STATE OF MICHIGAN

COURT OF APPEALS

DAVID CACIOPPO,

Plaintiff-Appellee,

v

SANTA TUCCI,

Defendant-Appellant,

and

ARCHANGELO TUCCI,

Defendant.

UNPUBLISHED
April 29, 2004

No. 244573
Wayne Circuit Court
LC No. 96-691365-CZ

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Following a bench trial after a remand by this Court (*Cacioppo v Tucci*, unpublished opinion per curiam of the Court of Appeals [Docket No 218284, dec'd October 2, 2001]), the trial court found that defendant Santa Tucci (hereafter referred to as "defendant" in the singular) breached an agreement by executing a warranty deed when there were clouds on the title. The court held that under a liquidated damages clause in the agreement, plaintiff was entitled to $50,000 in liquidated damages plus attorney fees of $30,000 from defendant. From a judgment for $80,000, defendant appeals as of right. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff agreed to forbear foreclosure on a company sold to defendant's son in return for an agreement providing, among other things, that in satisfaction of her son's debt, she would execute a warranty deed transferring to plaintiff a certain parcel of property. Defendant executed the warranty deed on the same day that she signed the agreement, knowing that the property still had certain liens and encumbrances. In the first appeal, this Court stated that defendant had "not provided any persuasive authority to support her suggestion that as a matter of law the typical warranties accompanying a warranty deed were nullified in this case by the contemporaneous execution of the 1993 agreement and the warranty deed." *Cacioppo v Tucci*, *supra* at 2. This Court held that the trial court had erroneously found that the agreement required only that she execute the deed, not that she warrant the property, and that it had erred in directing a verdict in her favor. *Id*.

On remand, the trial court found that defendant breached the agreement by warranting that there were no clouds on the title at the time of transfer given the outstanding real estate taxes, totaling $5,632.44, and an approximate $2000 lien, both of which plaintiff ultimately paid. The court further held that defendant was subject to the following liquidated damages clause:

> In the event that Purchaser and/or Guarantor default in any of the terms of this Agreement including but not limited to the discharge of all liens, removal of tanks and filing an appropriate MUSTFA claim,[1] and providing all labor and materials pursuant to the time table set forth by Seller which shall be no later than February 15, 1994, then in the even [sic] of such default, Seller shall be entitled to the sum of Fifty Thousand ($50,000.00) Dollars immediately from Purchaser and/or Guarantor plus costs and reasonable attorney fees.

We note that the trial court made several factual errors when interpreting this clause. It said "the purchaser and/or the guarantor, meaning Mrs. Tucci," when Mrs. Tucci (defendant) was the grantor. It also said that the agreement states that the seller would be entitled to liquidated damages "from the purchaser and/or purchasers**"** when the agreement says "from Purchaser and/or Guarantor." Finally, the court stated that there was testimony that the parties' intent was that the liquidated damages clause would cover defendant. However, while plaintiff referred to all the Tuccis as "they" and indicated that they sometimes spoke collectively when negotiating the terms of the contract, there was no testimony about the intent of the parties with respect to the liquidated damages clause.

Regardless of the parties' actual intent, we conclude that the language of the liquidated damages clause unambiguously binds only the Purchaser and the Guarantor to pay liquidated damages. Courts must discern the parties' intent from the words used in the contract and must enforce an unambiguous contract according to its plain terms. *Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003). There was some basis for finding the first part of this liquidated damages clause ambiguous. Although it indicates that it applies only to defaults by the purchaser and guarantor, it lists one potential default as being the failure to file the MUSTFA claim. Under the agreement, only defendant, the grantor, had a duty to file such a claim. Thus, the only party that could have defaulted by failing to file this claim was defendant.

However, even if there was ambiguity about whether a default by defendant would give rise to liquidated damages, there is no ambiguity in the remainder of this clause, which deals with who must pay liquidated damages in the event of a default. The clause provides that in the event of a default,

> Seller shall be entitled to the sum of Fifty Thousand ($50,000.00) Dollars immediately from Purchaser and/or Guarantor plus costs and attorney fees.

---

[1] MUSTFA refers to the Michigan Underground Storage Tank Financial Assurance Act, MCL 324.21501 *et seq*.

The words of this contract indicate that the parties' intent was to subject only the purchaser and guarantor to these liquidated damages. Thus, the trial court erred in holding that defendant, the grantor, was liable for liquidated damages.

The trial court found that defendant breached the contract by warranting that there were no outstanding real estate taxes or liens, when plaintiff was forced to pay $5,632.44 in real estate taxes and approximately $2,000 to discharge a lien. We conclude that defendant is liable only for this amount.

Reversed and remanded for entry of a judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski