STATE OF MICHIGAN

COURT OF APPEALS

J R DEVELOPMENT COMPANY,

Plaintiff-Appellant,

v

SAM HAMAME,

Defendant-Appellee.

UNPUBLISHED
May 20, 2004

No. 246598
Oakland Circuit Court
LC No. 2001-035190-CK

Before: Markey, PJ, and Wilder and Meter, JJ.

PER CURIAM.

Plaintiff sued defendant alleging breach of a contract to sell real property after defendant sold the property to another buyer. Defendant claimed plaintiff waived any right to seek additional damages by accepting a refund of its earnest money deposit. After the close of plaintiff's proofs at a jury trial, the trial court agreed with defendant and granted his motion for directed verdict. Plaintiff appeals by right. This appeal was submitted for decision without oral argument pursuant to MCR 7.214(E). We affirm.

We review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003) Likewise, the interpretation of a contract is also a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). An unambiguous contract must be enforced according to its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

On July 23, 2001, defendant and plaintiff, through its principal, John Hamood, entered a contract in which plaintiff agreed to buy for $440,000 and defendant agreed to sell 5.6 acres of undeveloped real estate situated in Canton Township, Oakland County. Real estate agent Sam Beydoun, not defendant's listing agent, brought the property to plaintiff's attention. On the day the contract was entered, plaintiff tendered an earnest money deposit of $20,000 to Beydoun. The parties do not dispute that the contract provided a due diligence period commencing on July 23, 2001, and ending thirty days thereafter. At trial, the parties disputed that a closing date was ever established: defendant contended the closing was scheduled for August 25, 2001, but plaintiff contended no firm closing date had been set. The parties agree that they met on August 23, 2001, and that plaintiff requested a seven-day extension of the due diligence period.

Hamood testified that defendant granted the seven-day extension; defendant testified that he denied the requested extension and required that closing occur on August 25, 2001. In a letter to plaintiff on August 23, 2001, defendant's attorney confirmed: "My client does not desire to grant said request."[1] The letter also declared the purchase agreement was null and void and instructed Baydoun, who received a copy of the letter, to return to plaintiff its earnest money deposit. Baydoun testified he subsequently delivered a $20,000 check to plaintiff. Hamood acknowledged at trial that he deposited the $20,000 check into a bank account.

At the close of plaintiff's proofs at trial, defendant moved for a directed verdict. Defendant argued that plaintiff had failed to prove any damages from the alleged breach of contract. Further, defendant argued that by accepting and depositing the check returning the earnest money, plaintiff had elected the return of the deposit as its sole remedy for the alleged breach of contract pursuant to paragraph seven of the parties' contract. That provision apparently[2] provides, in pertinent part:

> 7. DEFAULT BY PURCHASER OR SELLER: . . . In the event of legally inexcusable failure to perform by the Seller, the Purchaser may, at his/her option, elect to enforce the terms hereof or demand and seek a refund of his entire deposit in full termination of this agreement. Broker shall hold deposit until dispute is resolved by: written mutual consent, arbitration, or court of law.

The trial court agreed that plaintiff had failed to establish any damages from the alleged breach of contract. Then the trial court ruled as follows:

> But paragraph seven is pretty dispositive, and frankly should have been raised as [a] motion for summary disposition.
>
> Mr. Hamood knew on the afternoon of the 23rd that Mr. Hamame was not willing to complete the transaction, and was advising Mr. Baydoun to refund the deposit. Mr. Baydoun was Mr. Hamood's agent. He could have at that time called him and said I don't want the deposit back. I want to go forward. And pursuant to paragraph seven, the broker shall hold the deposit until the dispute is resolved by written mutual consent, arbitration, or court of law. Instead when the check came a week later, he put it in the bank. He wants to argue with me he didn't cash it. It's the same thing. Putting it in your bank account or cashing it is the same thing. By accepting that check, he accepted that as termination of [the] agreement pursuant to paragraph seven.

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[1] Plaintiff has failed to provide this Court with any of the exhibits admitted at trial. See MCR 7.210(A) (1), (C). The source of the quotation is plaintiff's brief on appeal, page 4, discussing the letter admitted at trial as exhibit 11.

[2] The pertinent part of paragraph seven was found in plaintiff's brief on appeal, page 6, and defendant's brief on appeal, page 12. See n 1.

So, I will grant the motion for directed verdict.

We agree with the trial court. A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic v Simplematic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). Likewise, the pertinent contract provision here is clear and unambiguous because paragraph seven is not subject to more than one reasonable construction. *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). The trial court correctly determined that paragraph seven provided for an election of remedies in the event of a breach of contract. Plaintiff could either receive its earnest money deposit back or could leave it with the escrow agent and resolve the disputed breach by negotiation, arbitration, or litigation. An unambiguous contract must be enforced according to its terms. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

Both plaintiff and defendant viewed paragraph seven as creating an election of remedies. Plaintiff's principal, John Hamood testified at trial as follows:

> *Q*. What does that sentence [from paragraph seven] mean to you?
>
> *A*. It means that if there's a default by the seller, the purchaser has an option to demand his money back.
>
> *Q*. What is the other option?
>
> *A*. Or enforce the terms of the contract. Full refund of his deposit.

In essence, plaintiff does not contest that paragraph seven provides for an election of remedies in the event of a breach of contract by defendant, but argues that by depositing the $20,000 check it did not select the deposit refund remedy. The cases on which plaintiff relies to support its argument are all factually distinguished because none involve a term in a written contract providing that the aggrieved party must either accept the return of an escrowed deposit or leave the deposit in escrow and pursue breach of contract remedies. Thus, *Fritz v Marantette*, 404 Mich 329; 273 NW2d 425 (1978), *Gitre v Kessler Products Co, Inc*, 387 Mich 619; 198 NW2d 405 (1972), and *Urben v Public Bank*, 365 Mich 279; 112 NW2d 444 (1961) all addressed the question of whether the parties had reached an accord and satisfaction *after* a dispute arose. See *Faith Reformed Church v Thompson*, 248 Mich App 487, 497, n 2; 639 NW2d 831 (2001). In the instant case, the parties agreed *before* the dispute arose that the buyer must elect a remedy if the seller defaulted.

The case on which plaintiff relies that is closest factually to the case at bar is similarly distinguished. In *Obremski v Dworzanin*, 322 Mich 285, 287; 33 NW2d 796 (1948), a real property purchase agreement contained a liquidated damages clause providing:

> In the event that the sellers or buyers will decline to close the deal, the refusing party have [sic] to pay the other party $1,500 as liquidated damages.

On the seller's failure to close, the buyer instituted suit to enforce the liquidated damages clause. In the midst of the litigation the seller returned the buyer's earnest money deposit, which also

was in the amount of $1,500. *Id*. at 287-288. The Court rejected the seller's argument that returning the buyer's deposit was an accord and satisfaction. *Id*. at 288. The Court reasoned that there was nothing in writing to support the contention that settlement of the liquidated damage claim was intended and that "nothing occurred except the performance of that which was a clear duty on the part of the respective parties." *Id.* at 289. Thus, like the other cases on which plaintiff relies, *Obremski* addressed whether an accord and satisfaction was reached after a dispute arose. Further, in *Obremski* the buyer was entitled to the return of his earnest money deposit even while litigation was pending. *Id*. But here, the purchase agreement clearly and unambiguously required the buyer's earnest money deposit be held in escrow pending resolution of any litigation or alternative dispute resolution.

By choosing to retain and negotiate the tendered $20,000 as a return of its earnest money deposit with knowledge of the election of remedy provision the parties had agreed to before any dispute existed, plaintiff's actions speak louder than words. See, e.g., *DMI Design & Manufacturing, Inc v ADAC Plastics, Inc*, 165 Mich App 205, 210; 418 NW2d 386 (1987). Although *DMI* is an accord and satisfaction case, the same principle of election applies. Simply put, given paragraph seven of the parties' contract, plaintiff cannot prevail.

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter