STATE OF MICHIGAN

COURT OF APPEALS

IVAN GADJEV,

Plaintiff-Appellant,

v

MARCUS ANDERSON, SOFT TOUCH PAINTING, INC., JESSICA TOOMER, and CENTURY 21 TODAY, a Michigan corporation, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
June 29, 2004

No. 244307
Wayne Circuit Court
LC No. 00-040475-CZ

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

In this action arising from a failed real estate transaction, plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendants. We affirm. This case is being decided without oral argument, pursuant to MCR 7.214(E).

I

For over twenty years, plaintiff, Ivan Gadjev, and his wife, Florence Gadjev, owned and operated the Northland Veterinary Clinic on Eight Mile Road in Detroit. The property immediately adjacent to the Gadjevs' veterinary clinic was owned by defendant, Marcus Anderson, and operated as a commercial painting company, defendant Soft Touch Painting, Inc. (STP). Plaintiff Gadjev and defendant Anderson were acquainted with each other due to the proximity of their respective properties. In April 2000, defendant Anderson called plaintiff to inquire if he was interested in selling his building. Plaintiff told Anderson to make an offer. In May 2000, Anderson, through defendant Century 21 Today (Century 21) and its real estate broker, defendant Jessica Toomer, drafted a purchase agreement. A deal, however, could not be brought to fruition, and the purchase agreement was never signed by either plaintiff or Anderson because plaintiff was not willing to pay Toomer/Century 21 a four percent commission.

Discussions and verbal negotiations continued for months, and, ultimately, such negotiations culminated in the signing of a written purchase agreement, executed by plaintiff and his wife, as sellers, and defendant Anderson as the purchaser. The agreement, dated September 14, 2000, provided that Anderson would purchase plaintiff's property for the sum of $215,000, and stated in pertinent part that:

R. Ivan Gadjev & Florence Rose Gadjev as Seller, and Soft Touch Painting, Inc. . . . as Buyer, hereby agree that the Seller shall sell and the Buyer shall buy the following described property UPON THE TERMS AND CONDITIONS HEREINAFTER SET FORTH. . . . This offer is subject to:

1. City of Detroit Approval For Building Use

2. Inspections

3. Environmental Testing

4. and Appraisal

Additional Conditions:

1. Seller shall remove all veterinary equipment – examining tables, X-ray machine, drugs, syringes and cages throughout the buildings before occupancy.

Paragraph 4 of the purchase agreement further provided that "Seller warrants that there shall be no violations of building or zoning codes at the time of closing." The agreement further provided that it was "contingent upon the purchaser being able to secure a conventional mortgage in the amount of $215,000.00 for a term of 20 years . . . ." The purchase agreement did not specify a closing date.

Plaintiff thereafter closed his veterinary clinic and removed from the building the entire veterinary practice, as well as the kennel that he had operated and maintained at the location for over twenty years. However, approximately two weeks after the purchase agreement was executed, on October 3, 2000, defendant Anderson informed plaintiff by letter that he was terminating the agreement.[1] The basis for Anderson's decision not to consummate the sale was the property's noncompliance with city codes. At his deposition, Anderson testified that he contacted the city of Detroit prior to the scheduled closing and was informed that the subject property did not have sufficient parking for the size of the building. Thus, defendant STP could not have utilized the building without obtaining a zoning variance.

Following notification by Anderson that the real estate transaction would not be closed, plaintiff filed suit in Wayne Circuit Court against defendants, alleging breach of contract, tortious interference with contractual and advantageous business relations, and silent fraud.

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[1] The letter from defendant Anderson to plaintiff stated in pertinent part:

> We would like to inform you that we are unable to purchase the building, due to the City of Detroit contacting us explaining that the building square footage is to [sic] large for the parking space available. We would have to tare [sic] down one building to accommodate the parking. The City of Detroit explained that you currently have 20 ft of space, and you need at least 30 ft.

Following lengthy discovery, all defendants sought summary disposition, and, after separate hearings, the trial court granted defendants' motions as to all claims pursuant to MCR 2.116(C)(8) and (10). Plaintiff now appeals.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id*. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) may be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Id*.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 119-120. The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* The moving party is entitled to judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. *Id*.; MCR 2.116(C)(10), (G)(4). In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363.

With regard to defendants Anderson and STP, plaintiff first argues on appeal that summary disposition was inappropriate because genuine issues of material fact exist concerning the intent or state of mind of the parties to the contract. Plaintiff argues that, as reflected in the parties' numerous letters and correspondence sent in May 2000, defendants knew and understood that they had an agreement, and that it was the clear intent of the parties that defendants would purchase plaintiff's building. Plaintiff further contends that there are ambiguities in the purchase agreement which preclude summary disposition; although the basis of defendant Anderson's refusal to close was that the size of the building required more parking spaces than were available, the purchase agreement dated September 14, 2000, does not expressly address the need for approval of parking spaces by the city of Detroit. Finally, plaintiff maintains that even if the purchase agreement can be read to require city of Detroit approval of adequate parking space, such approval is dependent on defendants' actions in obtaining such approval. Here, defendants purportedly never filed such a request with the city and never received a letter of denial or refusal.

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). Courts must determine the intent of the parties from the words used in the document itself and courts may not "make a different contract for the parties or . . . look to extrinsic testimony to

determine their intent when the words used by them are clear and unambiguous and have a definite meaning." *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). In *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997), this Court set forth the following rules of contract construction:

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. . . . If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. . . . If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. . . . The language of a contract should be given its ordinary and plain meaning. . . . Parol evidence is not admissible to vary a contract that is clear and unambiguous, . . . but may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract. [Citations omitted.]

Initially, we conclude that the record belies plaintiff's contention that, as of May 2000, all of the constituent elements necessary to comprise a contract for the purchase of property existed. See *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602, 606; 423 NW2d 284 (1988). The letters exchanged between the parties indicate that plaintiff and defendant Anderson negotiated the price for the sale of the property over a four-month period, but never reached agreement as to the precise terms and conditions of the sale until the purchase agreement was ultimately signed on September 14, 2000. As evidenced by their correspondence, plaintiff and Anderson remained far apart on the price for the property through August 2000. Thus, the record is clear that there was no viable agreement on the specific terms of the proposed real estate purchase until the purchase agreement dated September 14, 2000, was signed by the parties. *Marina Bay*, *supra*.

Our review of the plain language of the purchase agreement reveals that plaintiff and defendants agreed to a number of conditions precedent, which, if not satisfied, excused either party from performing the agreement.[2] As previously noted, the purchase agreement was

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[2] In *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953), our Supreme Court explained that:

> A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. . . . Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract. [Citations omitted.]

See also *Reed v Citizens Ins Co*, 198 Mich App 443, 447; 499 NW2d 22 (1993).

specifically made contingent on defendants' satisfaction with the "City of Detroit Approval For Building Use," as well as "[i]nspections . . . [e]nvironmental testing . . . and [a]ppraisal." The trial court concluded, and we agree, that the contingencies were not ambiguous and that, with particular regard to the "City of Detroit Approval For Building Use" contingency,

> [C]ity of Detroit approval for building use means those requirements that are legally imposed by building and safety engineering.
>
> Regardless of everything else in this case, there is no evidence that this building, as it stood, could be approved for building use, for the building use intended.
>
> * * *
>
> There's nothing in this Record that indicates that the defendant . . . did not present the appropriate materials to those persons within building and safety engineering and was not apprised that it was not possible to close and get the city of Detroit approval for building use.
>
> That being the case, even if all the other conditions precedent were met there was no obligation to close.

Plaintiff now claims that disputed issues of fact exist regarding the parties' intentions as to the conditions and consummation of the purchase agreement. However, based on our review of the proofs submitted by the parties in conjunction with defendants' motion for summary disposition, we conclude that the parties plainly expressed their intent in the September 14, 2000, written agreement, made contingent on the terms set forth above. In particular, it is undisputed that defendants intended to include the condition necessitating city of Detroit approval, and that this contingency was clearly and unambiguously stated within the four corners of the purchase agreement. Defendant Anderson's unrefuted deposition testimony indicates that he twice contacted representatives of the city of Detroit prior to the scheduled closing and was advised that the subject building did not have sufficient parking for the size of the building:

> [I was told] [t]hat I did not have enough parking space. They told me that based on the property, that the owner that's there now, by him being there so long that it didn't affect him. But a new buyer it would affect and the parking space was not enough for me if I purchased the building.

In a letter to Anderson dated October 3, 2000, attached as an exhibit to defendants' summary disposition motion, STP's engineer opined that the building was not up to code, and the parking was inadequate, and stated that "The building department recommended that you apply to the Zoning Board of Appeals for a variance in order to be able to continue parking cars next to the building as is currently being done." The engineer further noted that

> In addition to having to address the barrier free toilet rooms and other possible problems presented by buildings of the age and condition of those, you also will have a parking shortage for them. The parking requirements will be 1 space for every 400 sq ft of building. The buildings are 4,320 sq ft and will

> require 11 parking spaces. We feel the most you could accommodate on the site by removing fences and gates would be 7 parking spaces. . . . You would have to apply for a zoning variance for this building also. If a variance were not granted, then the only option would be to demolish some of the building in order to make parking spaces. Until you find out if the city will grant the variance for your current building, it would seem risky to assume it could be granted for this one.

After learning of the inadequate parking situation, defendant Anderson notified plaintiff the next day, and the transaction was terminated.

It is clear from these proofs that defendants could not have utilized the property at all without obtaining a zoning variance, and, as the trial court correctly noted, the purchase agreement contains no term that imposes any affirmative contractual obligation on defendants to seek a variance. Consequently, defendants' decision not to close the real estate transaction did not constitute a breach of any term of the purchase agreement. Defendants acted within their contractual rights when they terminated the agreement after it was determined that the buildings could not be approved by the city for the intended use. In sum, the undisputed evidence shows that defendants lawfully terminated the purchase agreement pursuant to its clear and unambiguous terms and conditions. The trial court therefore did not err in granting summary disposition in favor of defendants Anderson and STP on plaintiff's breach of contract claim.

With regard to plaintiff's allegation of silent fraud, plaintiff alleged in his complaint that "[d]efendants and each of them knew that Defendants Anderson and Soft Touch would not purchase the said subject property . . . and did commit a fraud on the Plaintiff to cause him to diminish the value that he had in the building by requiring him to vacate the subject property and to effectively close down his business." Plaintiff alleges that defendants knew of the alleged parking problem at least two weeks prior to executing the purchase agreement and did nothing about it, watching while plaintiff vacated the property in reliance on the agreement to purchase the building.

Under a silent fraud theory, a defendant has a duty to disclose subsequently acquired information which he recognizes as rendering untrue, or misleading, previous representations which, when made, were true or believed to be true. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000); *M & D, Inc v McConkey*, 231 Mich App 22, 30-31; 585 NW2d 33 (1998). Here, plaintiff has failed to set forth any specific allegations which provide a basis for the previous representations and the subsequently acquired information necessary to establish such a silent fraud claim. The record is otherwise devoid of any evidence of fraud or misrepresentation on the part of defendants Anderson and STP. See generally *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-458; 559 NW2d 379 (1996); *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996). Moreover, this issue and plaintiff's remaining appellate issues are not properly preserved for our review because this Court hears only those issues that are contained in the appellant's statement of questions presented, *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Further, plaintiff's briefing is lacking in specifics and citations. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

III

With regard to defendants Toomer and Century 21, plaintiff maintains that summary disposition was improperly granted on his claims of tortious interference with contractual and advantageous business relations.

The elements of tortious interference with a contractual or business relationship are the existence of a valid contract or business relationship, knowledge of the contract, relationship or expectancy on the part of the defendant, the defendant's intentional interference causing a breach or termination of the relationship, and resultant damage to the plaintiff. *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). "One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI International, Inc v Intermet International Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002).

Plaintiff's claim of tortious interference centers on the fact that on May 9, 2000, the day after plaintiff indicated in a letter to defendant Anderson that he would not pay defendant Toomer's real estate commission as set forth in the initial proposed purchase agreement, Toomer wrote a note and faxed it to Anderson informing him how to write a letter to plaintiff to "re-adjust" the purchase price for the reason that the commission would now not have to be paid. On May 10, 2000, Anderson did in fact write to plaintiff, advising him that "the price that was set as $250,000 has to be re-adjusted and the procedures for securing the mortgage and getting the property appraised shall take place thereafter." Plaintiff now contends that where, as here, questions regarding defendant Toomer's intent and state of mind when writing the letter are purportedly crucial, summary disposition is inappropriate. See *Vanguard Insurance Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994). Plaintiff maintains that the letter and advice that Toomer gave to Anderson put in motion a stream of events that culminated in Anderson's non-compliance with his obligations to purchase the property and caused plaintiff to close his veterinary practice.

However, the undisputed evidence of record indicates that defendant Toomer was involved in this matter for a total of eight days, from May 2 to May 9, 2000. Toomer drafted the initial purchase agreement for her client, defendant Anderson, on May 2, 2000, and, on May 5, conversed with the parties on the telephone. Between May 5 and May 9, 2000, at the direction of her client, defendant Toomer prepared a draft letter to send to plaintiff, parts of which were used in Anderson's May 10th letter to plaintiff regarding "re-adjustment" of the purchase price. Plaintiff has presented no evidence that defendant Toomer was in any way involved in the transaction after May 9, 2000. Even plaintiff admitted in his deposition that after his one and only telephone conversation with defendant Toomer on May 5, 2000, he never had any dealings with her again.

As we have previously concluded, during the brief period of defendant Toomer's involvement in May 2000, no viable contract or agreement to purchase the property yet existed

between plaintiff and defendant Anderson. Moreover, plaintiff presents only speculation, not concrete evidence, that defendant Toomer somehow intentionally interfered with the negotiations and caused Anderson to terminate the contract five months later, on October 3, 2000. "[I]n order to raise a genuine issue and therefore escape summary disposition, a plaintiff must sufficiently demonstrate specific, corroborative acts . . . ." *CMI International, supra* at 132. Plaintiff has failed to come forth with the requisite proofs to survive summary disposition on this claim.

Moreover, we note that tortious interference with a contractual or business relationship requires the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another. *Id.* at 131. The substance of plaintiff's claim in the instant case was that if plaintiff refused to accept the purchase agreement, the terms of which required payment of a commission for real estate services, defendant Toomer was going to recommend to her principal, defendant Anderson, that he seek a lower price for the property. This alleged "threat," however, does not constitute wrongful conduct, as it would only be logical to advise a client to re-adjust the price which was based on the payment of a commission, when no commission was going to be paid. As the trial court aptly noted, defendant Toomer, in her capacity as a real estate broker for defendant Anderson, was entirely appropriately "servicing the need of her client" in order to get the best deal on the real estate. When a defendant is motivated by a legitimate business reason, this Court has declined to find that the action was per se wrongful. *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988). There is no evidence here that the alleged interference was improper or unjustified.

Because plaintiff has failed to show the requisite elements of a tortious interference claim, whether of a contract or business expectancy, we conclude that the trial court properly granted summary disposition in favor of defendants Toomer and Century 21.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen