STATE OF MICHIGAN

COURT OF APPEALS

FRENCHTOWN DEVELOPMENT, L.L.C.,

Plaintiff-Appellant,

v

OERTHER BROTHERS, MORLEY E. OERTHER, CHARLES G. OERTHER and WILLIAM R. ROBBINS,

Defendants-Appellees.

UNPUBLISHED
December 6, 2005

No. 256656
Monroe Circuit Court
LC No. 02-015039-CK

Before: Owens, PJ, and Fitzgerald and Schuette, JJ

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants[1] and dismissing plaintiff's cause of action. This action arises out of a dispute between plaintiff and defendants relating to performance of obligations under three separate real estate purchase agreements for properties located in Frenchtown Township and referred to as the Stewart Road property, the Hurd Road property and the Monroe Street property. We affirm.

We review de novo a trial court's decision to grant or deny a motion for summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Our review is limited to the evidence before the trial court at the time the motion was determined. *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for the claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Id*. Summary disposition is appropriate when there is no genuine issue regarding any material fact, and judgment as a matter of law should be granted to the moving party. "A genuine issue of material fact exists when the record, giving the benefit of

[1] Throughout this opinion, we refer to Oerther Brothers, Morley E. Oerther and Charles G. Oerther collectively as "Oerther defendants" and Oerther defendants and William R. Robbins collectively as "defendants."

reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Moreover, the proper interpretation of a contract and whether the contract is ambiguous are matters of law that are reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Plaintiff first argues that the trial court erred in failing to determine whether the language of the three purchase agreements was ambiguous before entering summary disposition in favor of defendants. We disagree.

The trial court ruled that the agreements in question were properly terminated because plaintiff failed to cure its default within fifteen days of notice of the default. Implicit in the trial court's finding that plaintiff had the duty to submit preliminary site plans and make certain payments was a determination that the terms of the agreements were unambiguous regarding these obligations. As plaintiff admits in its reply brief, a determination of whether there was a breach of contract necessarily involves a review of the contractual terms. A reviewing court may grant summary disposition on a breach of contract claim only if it finds that "the terms of the contract are not subject to two or more reasonable interpretations." *BPS Clinical Laboratories v Blue Cross & Blue Shield*, 217 Mich App 687, 700; 552 NW2d 919 (1996), citing *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360 363; 480 NW2d 275 (1991). Because the trial court engaged in interpretation of the agreements, we conclude that the trial court did not fail to address the ambiguity issue.

Next, plaintiff claims that the trial court erred in ruling that all three contracts were terminated on the grounds that plaintiff defaulted on the three purchase agreements and failed to cure the breaches after receiving notice of the default. We disagree.

With regard to this issue, plaintiff initially argues that the termination of the Stewart Road property agreement was erroneous because the letter giving notice of the alleged default did not mention this property. This argument was not raised before the trial court. Generally, this Court need not address issues that have not been raised in the pleadings nor argued before the trial court. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). Because defendants sought summary disposition with respect to all three purchase agreements and plaintiff did not raise this argument, we decline to consider it. *Id*.

Plaintiff also argues the trial court erred in finding that plaintiff defaulted on the terms of the agreements by its failure to file a site plan within the six-month inspection periods and to pay extension fees and taxes. "An unambiguous contract must be enforced according to its terms." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004), citing *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). Subsection 6.1 of the Stewart Road and Monroe Street purchase agreements[2] provided in relevant part:

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[2] The Hurd Road property purchase agreement contained substantially the same language but provided that the six month period began after all MDEQ issues were resolved.

> Purchaser shall have until the period ending six (6) months after the Effective Date ("Inspection Period") to investigate all circumstances which in Purchaser's sole judgment are material to Purchaser's determination that the Property is suitable for Purchaser's intended use.

The plain language of the agreements provided for a six-month inspection period for each property. The parties executed the purchase agreement for the Stewart Road property on January 22, 2001, and the inspection period was initially set to expire on July 22, 2001. However, the parties amended the agreement to extend the inspection period until October 22, 2001. The parties executed the purchase agreement for the Hurd Road property on February 22, 2001, and the inspection period was set to expire six months after all Michigan Department of Environmental Quality (MDEQ) issues were resolved. The MDEQ sent notice that the issues were resolved in a letter dated August 3, 2001. Therefore, the inspection period for the Hurd Road property was set to expire on February 3, 2002. The parties executed the purchase agreement for the Monroe Street property on October 17, 2001, and the inspection period was set to expire on April 17, 2002. Hence, the last inspection period expired on April 17, 2002. Further, the purchase agreements provided for an extension of the inspection periods. The agreement for the Stewart Road property[3] provided, in relevant part:

> 6.2 Extended Inspection Period. In the event Purchaser *has submitted its preliminary site-plan and is proceeding with due diligence to obtain approval for its planned unit development* ("PUD"), the Inspection Period will be automatically extended for such additional time as is necessary for Purchaser to obtain preliminary site-plan approval. Once Purchaser obtains preliminary site-plan approval, Purchaser may continue to extend the Inspection Period by providing Seller with a monthly payment of Three Thousand ($3,000.00) Dollars. . . . In addition, Purchaser shall also pay the prorata portion of the real estate taxes and insurance on the Property during the Extended Inspection Period. Such amounts shall be paid in arrears on a monthly basis and shall be refunded to the Purchaser in the event of a Seller default. . . . Any reference to the Inspection Period in this Agreement shall include reference to the extended inspection periods.

There is evidence that plaintiff never submitted a preliminary site plan or applied for a PUD on any of the three properties within the requisite six-month periods. Rodney Shacket, plaintiff's representative who signed the purchase agreements, admitted that he sought rezoning of the properties instead.[4] Despite plaintiff's contention that the inspection periods were to be

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[3] The agreement for the Hurd Road property contains a provision with the same language, except that the purchaser is required to provide the seller with a monthly payment of $2,000 in order to continue to extend the inspection period. The agreement for the Monroe Street property also contains a provision with the same language. Both the amended agreement for the Stewart Road property and the agreement for the Monroe Street property required that "the preliminary site-plan approval must allow Purchaser to connect to the existing sewer system."

[4] With respect to the Hurd Road and Monroe Street properties, the rezoning applications were (continued…)

left open-ended, the plain language of the agreements indicates that the periods were to end after six months, unless plaintiff fulfilled certain obligations that triggered an automatic extension. When the language of a contract is clear and unambiguous, the contract must be interpreted according to the actual words used. *Burkhardt, supra*, p 656. Because plaintiff failed to apply for a preliminary site plan for a PUD for any of the properties, the inspection period was not automatically extended. All three agreements also contained a provision for closing, which provided, in relevant part:

> 10.0 Time of Closing. Unless this Agreement has been earlier terminated in accordance with its terms, Purchaser and Seller shall complete the purchase and sale of the Property on a business date mutually acceptable to the parties which is between thirty (30) and sixty (60) days following the later of (i) the completion of the Inspection Period or (ii) Purchaser's receipt of final approval for its P.U.D. and site plan . . . . TIME SHALL BE OF THE ESSENCE IN THE PERFORMANCE OF THIS AGREEMENT.

The agreements further contained a provision for default, which allowed the seller to terminate upon the purchaser's failure to cure within fifteen days of written notice of default. Plaintiff claims defendants' breaches of the agreements prevented it from performing its duties, [5] and the trial court erred in holding that the breaches were immaterial. We disagree.

Plaintiff argues that Oerther defendants materially breached the purchase agreements by failing to provide title work for the properties within the time specified in the agreements. Although a party who first breaches a contract generally may not maintain a claim against the other party who subsequently fails to perform, the initial breach must be substantial before the rule will apply. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). "One consideration in determining whether a breach is material is whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990). Pursuant to section 4.1 of the three purchase agreements, Oerther defendants were required to provide a title insurance commitment and other documents of title within fourteen days after the effective date of each agreement.

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not even submitted within the six-month inspection periods.

[5] "A 'condition precedent' is a condition that must be met by one party before the other party is obligated to perform." *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 411; 646 NW2d 170 (2002). We note there was nothing in the agreements that made plaintiff's performance contingent on receipt of the title commitments. Unless the language of a contract requires, courts will not construe provisions as conditions precedent. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999). Therefore, we decline to find that defendants were required to provide the title commitments before plaintiff was required to perform. In fact, plaintiff had the option under section 11.2 of the agreements to rescind or enforce the agreements after providing defendants with notice of default or, pursuant to section 9.0, to waive defendants' performance under section 4.1 with respect to the title commitments. There is no indication in the trial court record that plaintiff ever sent notice to defendants that they were in default. By not notifying defendants that they were in default, plaintiff denied defendants the opportunity to cure any defect or default with respect to a duty plaintiff had expressly reserved the right to waive.

There was evidence that Oerther defendants did not provide title work for the properties within the requisite fourteen-day periods. In his deposition, Shacket testified that this failure to provide the title work for the properties resulted in the delayed filing of rezoning applications because the proper boundaries of the properties could not be determined until receipt of the title work. However, Shacket also testified that he filed the applications for rezoning despite not having the title work by using estimated figures. Because there was evidence that the title work was not necessary to file the preliminary applications and that plaintiff filed these applications without the title work, we conclude that the late provision of the title work for the properties was not a material breach of the agreements.

Second, plaintiff argues that Oerther defendants materially breached the purchase agreements by causing defects in title to the properties. Pursuant to section 7.5 of all three purchase agreements, "Seller shall refrain from creating on the Property any easements, liens, mortgages, encumberances and other interests that would affect the Property, or Seller's ability to comply with the terms of this Agreement at closing." Under section 3.0 of the purchase agreements, Oerther defendants were required to execute warranty deeds for the properties at each of their respective closings. Oerther defendants admitted that they allowed thousands of dollars in tax liens to be placed on the three parcels at issue and that there were foreclosures on both the Stewart Road property and the Hurd Road property. However, there was evidence that neither party had knowledge of the tax liens and foreclosures until the bank actually foreclosed on the properties in June 2002. Because the last inspection period terminated on April 17, 2002, we conclude that any title defects occurred subsequent to plaintiff's own breaches. In sum, we hold that the trial court did not err in finding that Oerther defendants' breaches were either subsequent to plaintiff's default or immaterial to the relevant terms of the agreements.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette