

STATE OF MICHIGAN
COURT OF APPEALS

FRANK RICHARD JACOBSON,

Plaintiff-Appellant,

v

NORFOLK DEVELOPMENT CORPORATION,

Defendant-Appellee.

UNPUBLISHED

January 22, 2008

No. 273708

Washtenaw Circuit Court

LC No. 06-000289-CH

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition of plaintiff's contract and misrepresentation claims. We affirm. This case arose after plaintiff repeatedly refused to close on a real estate transaction and, after defendant suspected credit problems, failed to provide assurance of adequate credit. Rather than sue for damages, defendant returned plaintiff's deposit and rescinded the purchase agreement. Plaintiff did not accept the rescission, however, and filed suit for breach of contract and misrepresentation, requesting the remedy of specific performance. He also encumbered the property with a notice of lis pendens.

Defendant moved for summary disposition, arguing that the contract expressly permitted it to rescind the contract if it did not, in its sole discretion, receive adequate proof that plaintiff could obtain financing. According to defendant, its agents grew suspicious that plaintiff's fastidious nitpicking and repeated postponements of the closing over minor matters was actually a ruse to stall until plaintiff could secure financing. Defendant investigated and confirmed that plaintiff had a blemished credit history, so it sent plaintiff a letter requesting assurance that he could finance the transaction. When plaintiff failed to provide assurances, defendant notified him that it would rescind the agreement within ten days if he did not provide the evidence it required. Plaintiff never responded with any demonstration of his creditworthiness.

According to paragraph seven of the contract's general provisions, "Purchaser's credit is subject to approval . . . by Builder. In the event that . . . Builder determines that Purchaser does not meet credit requirements for participation in this Project, then Builder may, at its option, return to Purchaser all of the sums paid hereunder, and . . . this Agreement shall be deemed null and void . . ."

Plaintiff does not dispute that he never responded to defendant's demands for evidence of creditworthiness or that defendant never determined that he failed to meet the credit requirements for participation in the project. Instead, plaintiff argues that defendant elected to terminate the contract, and the contract specifically prohibits the parties from terminating the contract more than forty days after it was made. We disagree. The interpretation of contractual language is an issue of law, which this Court reviews de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). "[W]e enforce the contract as written if it fairly allows but one interpretation." *Id.* Although the section cited by plaintiff allows the parties, within forty days, to terminate the agreement, it adds that when the period expires, the contract is binding and all other provisions of the contract "shall remain in full force and effect." This includes paragraph seven, which allowed defendant to return plaintiff's deposit and rescind the contract because it determined that plaintiff had deficient credit. Nothing in paragraph seven limits the time period permitted for reviewing plaintiff's credit, and nothing in the section regarding the forty-day period refers to paragraph seven. Therefore, the trial court did not err when it determined that these were two unrelated provisions that each provided separate occasions for terminating the contract.

Plaintiff argues that defendant's interpretation of the creditworthiness paragraph would improperly insert into the contract the provision that defendant could review plaintiff's credit at any time. However, adopting plaintiff's interpretation of the contract would indefinitely suspend other time limits, especially the time set for closing. The contract specifically provides that if plaintiff fails to close in a timely fashion, then defendant may terminate the contract or wait until closing and collect a set fee for every day of delay. Plaintiff's interpretation of the forty-day termination clause would limit those options to accepting an indefinite delay and charging a fee at closing, if it ever occurred. It would also undermine the forty-day period itself, requiring the parties to obtain necessary financing, build the home, acquire a certificate of occupancy, inspect the home, and close within the forty days that the agreement, by its terms, was not yet enforceable. In context, the forty-day period clearly allowed the parties an unreserved, but temporary, opportunity to withdraw from the agreement in addition to the rescission remedy available to defendant if it determined that plaintiff did not have sufficient credit to follow through with the transaction. Because the plain language of the statute allowed defendant to rescind the contract, the trial court did not err by granting summary disposition of plaintiff's contract claims.

We also reject plaintiff's argument that defendant never provided "express written agreement" terminating the contract, so it remains valid. The "express written agreement" language appears in a separate, tangentially related, section that requires plaintiff to provide sufficient evidence of his pre-qualification for financing. The language only means that he would continue to be bound to the agreement unless defendant expressly released him in writing, it did not require his written agreement to the contract's rescission. In context, the lack of an "express written agreement" terminated all of defendant's duties under the contract and still allowed it to pursue all available remedies against plaintiff, including rescission.

Similarly, we reject plaintiff's argument that, because plaintiff defaulted by failing to close, the contract required defendant to retain liquidated damages and did not expressly permit rescission instead. However, the portion of the contract allowing rescission for lack of financial confidence does not refer to the issue as a default by plaintiff, and that provision specifically

allows defendant to terminate the contract unilaterally. Moreover, plaintiff clearly points out in his brief that the different remedies conflicted, leaving defendant, if it could prove default, to elect one or the other. The section dealing with default also recognized that defendant could bring suit for damages, await performance, or rescind the agreement, at its option. Plaintiff's arguments that his own default preserved his rights in the contract are unsupported, specious, and wholly unpersuasive.

Plaintiff next argues that the decision to rescind the agreement was not founded on an accurate perception of his credit situation, so defendant's rescission was improper. However, plaintiff failed to demonstrate that he actually provided any of the supporting documentation that defendant requested or otherwise evinced an ability to finance the transaction. Plaintiff's documentation in response to the motion did not contain any indication that plaintiff actually communicated his creditworthiness to defendant. Instead, his documentation merely reflected that he could obtain financing, which was not sufficient to demonstrate that the contract provision did not apply or that defendant rescinded the agreement in bad faith. Even if defendant was mistaken in determining that plaintiff's delays, unresponsiveness, and other suspicious events were owing to a credit crisis, the contract granted defendant the authority to make the determination, and plaintiff has not demonstrated that defendant's determination was a mere pretext for dissolving the contract. See *Ferrell v Tanny Int'l, Inc*, 137 Mich App 238, 243-244; 357 NW2d 669 (1984).

Because plaintiff's remaining misrepresentation claims were resolved by upholding defendant's decision to rescind the contract, and because plaintiff failed to present any evidence that would justify nullifying defendant's rescission of the contract, the trial court properly granted summary disposition of plaintiff's claims and dissolved the notice of lis pendens. We find no abuse of discretion in the trial court's decision to deny plaintiff's motion to amend the complaint to add more claims after defendant's nullification of the contract was deemed valid. The additional claims predominantly restated and extrapolated on matters at issue in the motion for summary disposition, such as the validity of defendant's rescission, so justice did not require the trial court to grant plaintiff leave to amend his complaint. MCR 2.118(A)(2).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell