

STATE OF MICHIGAN
COURT OF APPEALS

BARRICK ENTERPRISES, INC.,

Plaintiff-Appellee,

v

2257 WATERMAN OPERATING COMPANY,
L.L.C., and MARSHALL STILLMAN, and
ROCHELLE STILLMAN,

Defendants-Appellants.

UNPUBLISHED

March 4, 2008

No. 275038

Oakland Circuit Court

LC No. 05-069822 CZ

Before: Whitbeck, C.J., and White and Zahra, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree that the circuit court correctly granted summary disposition on the issue of defendants' liability for gas delivered and not paid for, that the court's analysis of the liquidated damages issue was also correct, and that the court properly determined that the deed was given as security for the debt. I conclude, however, that the court erred in entering the final judgment because there were genuine issues of material fact regarding the amount of damages.

In addition to the checks identified by the majority, I would also remand with respect to payments Marina Barisha claimed to have made. While the circuit court may have found the proofs unsatisfactory, Barisha's testimony created a genuine issue of material fact nevertheless.

Regarding the property, I would remand for a determination regarding when plaintiff took control of the collateral, and whether plaintiff properly maintained it after that point or permitted waste. If plaintiff dealt with the property in a commercially reasonable manner and the decrease in value was due solely to market forces and not waste or undue delay, I would value the property at the time of sale. If plaintiff did not act in a commercially reasonable manner, I would value the property at the time plaintiff took control of it. I would grant the parties a hearing on this matter.

Lastly, I would order that the court allow defendants a credit for the volume of gas purchased by Zaban since the final judgment was entered.

/s/ Helene N. White