STATE OF MICHIGAN

COURT OF APPEALS

SHELBY TOWN CENTER I, L.L.C., Plaintiff-Appellant,	UNPUBLISHED March 6, 2008
v	No. 273689 Macomb Circuit Court
GORMAN'S LAKESIDE, L.L.C., and GORMAN'S FURNITURE, L.L.C., Defendants-Appellees	LC No. 2004-001323-CZ

Before: Bandstra, P.J., and Donofrio and Murray, JJ.

PER CURIAM.

Plaintiff Shelby Town Center I, L.L.C., appeals as of right the circuit court judgment, following a bench trial, in favor of defendants Gorman's Lakeside, L.L.C. and Gorman's Furniture, L.L.C. (hereafter, referred to singularly as "defendant"), in this dispute over the operative terms of defendant's lease for commercial space in plaintiff's shopping center. Plaintiff also appeals the trial court's award to defendant of case evaluation sanctions under MCR 2.403(O). We affirm.

Plaintiff acquired the shopping center from Shelby Town Center Phase I Limited Partnership ("STC") in November 2002. Within a matter of months, a dispute arose over the proper amount of defendant's monthly rent, resulting in the filing of the instant action. The parties stipulated to participate in case evaluation before Philip Anderson, who was to act "as a single person case evaluator for evaluation of this matter in accordance with MCR 2.403." Defendant accepted the case evaluation award; plaintiff rejected it. The matter proceeded to a bench trial, after which the trial court determined that plaintiff had no cause of action and awarded defendant case evaluation sanctions pursuant to MCR 2.403(O).

Plaintiff raises several challenges to the judgment against it. First, plaintiff asserts that the trial court erred by concluding that the February 28, 2002 Modification of Percentage Rental Option (the "February 2002 modification") was a valid and enforceable part of defendant's lease. Next, plaintiff challenges the trial court's conclusion that defendant's reliance on that lease was not estopped by statements made in a November 15, 2002 estoppel certificate (the "November certificate"). Finally, plaintiff objects to the trial court's imposition of case evaluation sanctions.

I. The February 2002 Modification

Plaintiff challenges the trial court's determination that the February 2002 modification is a valid amendment to defendant's lease on two separate bases: (1) the modification is barred by the statute of frauds, MCL 566.108, because Stephen Shea lacked written authority to enter into the modification at the time that he signed it on behalf of STC, that STC did not thereafter ratify the modification in writing, and that STC did not accept the benefits of the modification with full knowledge of all material facts; and (2) the modification violated the terms of plaintiff's purchase agreement with STC, which was signed in December 2001, and which prohibited STC from modifying defendant's lease.

This Court reviews the trial court's findings of fact following a bench trial for clear error, recognizing the trial court's unique opportunity to observe the witnesses appearing before it, and giving due deference to the trial court's superior ability to judge their credibility. MCR 2.613(C); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004); *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003); *Gumma v D&T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). To be clearly erroneous, a trial court's finding must be more than maybe or even probably wrong. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Ambs*, *supra* at 652. This Court reviews de novo questions concerning the interpretation and application of the statute of frauds. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

Defendant and STC entered into a lease agreement on July 7, 1999, which was altered by an amendment executed within a few days thereafter (the "July 1999 amendment"). The July 1999 amendment was later modified by the February 2002 modification. It is undisputed that Shea executed both the July 1999 amendment and the February 2002 modification on STC's behalf.[1] It is also undisputed that, while Shea was authorized to act on STC's behalf regarding leasing matters, he lacked written authorization to do so.

The Michigan statute of frauds, MCL 556.108 provides, in relevant part that "[e]very contract for the leasing [of lands] for a longer period than 1 year, . . . shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease . . . is to be made, or by some person thereunto by him lawfully authorized in writing . . ." Because the instant lease was required to be in writing, any modification of the lease also had to be in writing to be enforceable. *Zurcher v Herveat*, 238 Mich App 267, 299-300; 605 NW2d 329 (1999). Shea admittedly did not have written authorization to modify defendant's lease. However, as our Supreme Court explained in *Forge v Smith*, 458 Mich 198, 208-209; 580 NW2d

[1] Shea also testified that he signed the lease itself on STC's behalf.

876 (1998), "[c]ontracts conveying an interest in land made by an agent having no written authority are invalid under the statute of frauds *unless ratified* by the principal['s]" affirmative or "distinct act of ratification." Thus, the February 2002 modification is nonetheless valid if it was ratified by STC.[2]

The trial court concluded that STC's principal, R. Gordon Mathews, acting for STC, ratified the modification by "his actions and testimony." There was substantial testimony at trial that STC ratified the February 2002 modification by, among other things, accepting rent from defendant consistent with the terms of the modification, continually representing to plaintiff that the modification was valid, offering defendant a lump-sum payment to rescind the modification, and negotiating for the purchase price for the shopping center to be reduced in part to compensate plaintiff for the lost value resulting from that modification.

Plaintiff does not dispute that STC ratified the contract by its conduct, but instead asserts that STC's ratification was required to be in writing, and that mere conduct was not sufficient. Plaintiff cites *Fine Arts Corp v Kuchins Furniture Mfg Co*, 269 Mich 277; 257 NW 822 (1934) for this proposition. However, plaintiff's reading of *Fine Arts* is overbroad. In *Fine Arts*, the question presented was whether two letters sent by the landlord adopting the lease and the signature of the property's manager as his agent ratified the lease, signed by the manager without written authority. In that context, our Supreme Court held that "[i]f, finally, the contract is adopted or the authority of the agent confirmed, in writing, the statutory requirements are observed, and ratification amounts to no more than completing execution of the contract which before had not been fully executed." *Id.* at 282. The Court neither addressed the question of ratification by conduct, nor held that ratification must be by writing. It merely determined that the writings presented were sufficient to constitute ratification.[3]

More recently, in *Forge*, *supra* at 208-209, our Supreme Court spoke of affirmative or "distinct *acts* of ratification"; it gave no indication that ratification was required to be written. The evidence presented at trial established a number of affirmative and "distinct acts of ratification" by STC. Therefore, the trial court did not err by concluding that STC ratified the February 2002 modification.

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[2] Defendant additionally asserts, and plaintiff denies, that MCL 566.1 indicates that no writing is needed to validate an oral modification of the lease where there is consideration for that modification. Defendant's interpretation of MCL 566.1 is consistent with case law although it seems contrary to the language of the statute itself. However, given the clear evidence that STC ratified the modification, this Court need not decide whether additional consideration will exempt a modification from the requirements of MCL 566.108.

[3] Even were this Court to conclude that STC's ratification was required to be in writing, the May 24, 2002, September 12, 2002, September 23, 2002, and October 29, 2002 letters from STC's counsel to plaintiff, its principal or its counsel, in which STC plainly indicated that the February 2002 modification constituted the operative lease agreement between it and defendant, would likely meet such a requirement.

Plaintiff asserts that STC's acts of ratification were ineffective because it did not have knowledge of all material facts regarding the modification; that is, because Mathews did not agree with Shea that the phrase "entire lease term" included in the modification was intended to include the optional renewal terms provided to defendant by the original lease agreement, STC could not have ratified the modification. Plaintiff offers no authority for the proposition that a difference in interpretation of the modification language between Mathews, Shea and others, would vitiate Mathews' clear ratification of the modification on behalf of STC. Mathews did not challenge the language used in the February 2002 modification, or deny that he agreed to it, but rather asserted that he understood the language in a particular way. Whether Mathews' interpretation of the language was correct presented a question of contract interpretation for the trial court. It did not change the fact, supported by substantial testimonial and documentary evidence presented at trial, that STC ratified the February 2002 modification.[4]

It is clear, from the evidence presented at trial, that at all times prior to its sale of the shopping center to plaintiff, STC considered the February 2002 modification to be valid, that it represented that the February 2002 modification was valid to plaintiff, that it accepted performance from defendant under the lease in the form of reduced rent to its detriment, and that it accepted a lower purchase price for the shopping center based in part on the validity of the February lease modification and its impact on the value of the lease to plaintiff, also to its detriment. Plaintiff stands in STC's shoes regarding this lease; it succeeded only to the agreement STC made with defendant, not to the agreement it wished STC to have made. Therefore, the trial court did not err by concluding that the February 2002 modification was valid and enforceable under the statute of frauds.[5]

Plaintiff next argues that the February 2002 modification was barred by the purchase agreement between plaintiff and STC, to which defendant was not a party. However, "[i]t goes without saying that a contract cannot bind a nonparty." *EEOC v Waffle House, Inc*, 534 US 279, 294; 122 SCt 754, 764; 151 LEd2d 755 (2002). See also, *Borg-Warner Acceptance Corp v Michigan Dept of State*, 433 Mich 16, 21-22; 444 NW2d 786 (1989); *Phinisee v Rogers*, 229 Mich App 547, 553; 582 NW2d 852 (1998). To the extent that the February 2002 modification

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[4] Plaintiff does not directly challenge on appeal the trial court's conclusion that the phrase "entire lease term" includes the renewal terms, as a matter of contract interpretation. Further, reading the lease and the February 2002 modification together, we find no basis for any such challenge.

[5] Plaintiff also argues that the trial court erred by applying the law of mistake to excuse the February 2002 modification from application of the statue of frauds. The trial court did conclude that, because the February 2002 modification was a mere correction of a mistake in the July 1999 amendment, and not itself a modification of the lease, it was not required to be in writing. However, because we conclude that the trial court was correct that STC ratified the February 2002 modification, plaintiff's argument in this regard is of no import to resolution of this issue.

violated the terms of the purchase agreement between plaintiff and STC, plaintiff's claim for breach of that agreement was against STC, not defendant. Plaintiff pursued and settled that claim in its prior lawsuit against STC, Mathews, Shea and others; it has no claim against defendant arising out of the purchase agreement.[6]

II. The November Certificate

Plaintiff first argues that the trial court erred in summarily disposing of its promissory estoppel claim on the basis that it was "not available" because plaintiff's claims against defendant arise "out of a written contract" – the lease. This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The applicability of a legal doctrine, such as promissory estoppel, presents a question of law also subject to de novo review. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001). However, the trial court's factual findings underlying its determinations are reviewed for clear error. MCR 2.613(C); *Gumma, supra* at 221.

Plaintiff asserts that it was entitled to present its breach of contract and promissory estoppel claims in the alternative, and therefore, the trial court should have allowed both claims to proceed to trial. As explained in *Gore v Flagstar Bank, FSB*, 474 Mich 1075, 1078; 711 NW2d 330 (2006) (Kelly, J., dissenting),

> In presenting a case to a jury, a party need not choose between promissory estoppel and a contract claim. The party can state as many claims as he or she has, even if the claims are inconsistent. MCR 2.111(A)(2)(b). Michigan courts have applied this rule of law expressly to cases involving both contract and promissory estoppel claims. [Citing *H J Trucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573-574; 595 NW2d 176 (1999).]

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[6] Plaintiff's reliance on this Court's unpublished decision in *King Dining, Inc v Trizec New Center Development*, unpublished opinion per curiam of the Court of Appeals, issued May 3, 2002 (Docket No. 230584), to support enforcement of the terms of the purchase agreement against defendant is misplaced. *King Dining* involved an attempt to pursue previously adjudicated claims by improper execution of a sublease between related parties; it did not involve enforcement of an agreement against an unrelated nonparty thereto. Plaintiff, having previously settled and released any claim it may have had against STC arising out of the purchase agreement, including that the February 2002 modification violated that agreement, now seeks to enforce that agreement against defendant who was not a party to it. There is no basis in law or equity for allowing it to do so. *EEOC, supra* at 294. As the trial court noted in denying plaintiff's motion for a new trial, the purchase agreement was expressly limited in its rights and the ability to enforce it, to STC and plaintiff, and plaintiff sued STC and received a reduction in the purchase price for the property based in part on the modification and reduction of rent.

Further, contrary to the trial court's characterization, plaintiff's promissory estoppel claim is premised on defendant's representations in the November certificate and not on any performance by either party under the lease. Thus, the trial court's grant of summary disposition on plaintiff's promissory estoppel claim was erroneous. However, because plaintiff was able to present all of the testimony and evidence pertaining to its promissory estoppel claim at trial, and because the trial court actually ruled on that claim at the close of trial, determining that plaintiff did not reasonably rely on defendant's representations in the November certificate, this Court is presented with a sufficient record to evaluate the merits of plaintiff's claim, and we need not remand this claim for further consideration by the trial court.

The elements of a claim of promissory estoppel are: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Booker v City of Detroit*, 251 Mich App 167, 174; 650 NW2d 680 (2002) rev'd in part on other grounds, 469 Mich 892 (2003); *Marrera v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). The promise must be definite and clear and the reliance on it must be reasonable. *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134, 139; 506 NW2d 556 (1993). Courts should cautiously evaluate an estoppel claim and apply the doctrine only if "the facts are unquestionable and the wrong to be prevented undoubted." *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999).

To establish a claim of promissory estoppel in this case, then, plaintiff must establish that it reasonably relied on a "clear and definite promise" made by defendant in the November certificate, which defendant should have expected to induce action by plaintiff in reliance thereon, such that defendant's statements therein must be enforced to avoid injustice. *Booker, supra* at 174; *Ypsilanti Twp, supra* at 134; *Novak, supra* at 687.

The trial court concluded that plaintiff did not reasonably rely on the November certificate. We conclude that this finding is not clearly erroneous. Evidence presented at trial established that STC persisted in its position that the February 2002 modification was the operative agreement between it and defendant and never conceded otherwise; that plaintiff knew that defendant and STC asserted that the February 2002 modification represented the actual lease agreement between them; that plaintiff knew that STC and defendant acted in accordance with the February 2002 modification, with defendant paying and STC accepting, rent consistent therewith; and that the purchase price was adjusted to account for the financial impact to plaintiff of the February 2002 modification. Certainly, there was testimony from plaintiff's principal that would have permitted the trial court to conclude that plaintiff believed that STC had settled the modification issue with defendant, such that plaintiff actually relied on the November certificate in closing on the property and that it did so reasonably. However, this testimony was in direct conflict to that offered by Mathews that plaintiff received a reduction in the purchase price in part because of the modification to defendant's lease. Therefore, giving appropriate deference to the trial court's unique ability to assess the credibility of the witnesses appearing before it, *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976); *Glen Lake-Crystal River*

Watershed Riperians, *supra* at 531; MCR 2.613(C), this Court is not left with a firm and definite conviction that the trial court's finding was mistaken. *Ambs, supra* at 652.[7]

III. Case Evaluation Sanctions

Plaintiff argues that "[t]he [trial] court erred in awarding fees under MCR 2.403 for the simple reason that the case evaluation/facilitation process overseen by Mr. Anderson was not a case evaluation giving rise to the sanctions which may be imposed under MCR 2.403(O)." In support of this assertion, plaintiff characterizes the evaluation undertaken by Anderson as "far more comparable to the mediation process now described in MCR 2.411, than to the case evaluation process addressed in MCR 2.403." According to plaintiff, "[t]he fact that Mr. Anderson acted alone demonstrates that, whatever role he may have been playing in this process, it was not case evaluation as governed by MCR 2.403." Plaintiff also asserts that "the parties were not advised" that the evaluation award issued by Anderson, if rejected, could result in the imposition of sanctions under MCR 2.403(O). We disagree.

This Court reviews de novo a trial court's decision to grant case evaluation sanctions under MCR 2.403. *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006); *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000).

The parties stipulated to case evaluation before Anderson "as a single person case evaluator *for evaluation of this matter in accordance with MCR 2.403*." Plainly, this stipulation placed the parties on notice that the provisions of the court rule, including the availability of sanctions, would apply to Anderson's case evaluation. Further, a "party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Therefore, having entered into a stipulated order for Anderson to act as a single person evaluator to evaluate the case "in accordance with MCR 2.403," plaintiff cannot now assert that MCR 2.403 does not apply to the evaluation process overseen by Anderson.

Plaintiff also asserts that it "is not altogether clear" that Anderson's case evaluation award is a monetary award as required by MCR 2.403, and that it cannot be determined whether

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[7] Plaintiff also asserts that the trial court erred by reading the November certificate together with the prior certificates and other documents and by refusing to hold defendant to the statements in the November certificate because those statements were a "mistake." However, as noted by the trial court in denying plaintiff's motion for a new trial, the determinations that the November certificate was a mistake and that it was to be considered with the prior certificates and documents were made in the context of the conclusion that defendant's conduct was not fraudulent. Thus, this reasoning is not at issue regarding the trial court's conclusion that plaintiff did not reasonably rely on statements in the November certification.

the verdict is more favorable to defendant than the case evaluation award, given the contingent percentage rent. However, because plaintiff did not present these arguments to the trial court, and, consequently, they were not addressed by the trial court, these assertions are not preserved for appellate review. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000); *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Thus, we need not address them, unless, in our discretion, we find that consideration of them is necessary to a proper determination of the case. *McCue v Detroit United Rwy*, 210 Mich 554, 557; 178 NW 68 (1920); *Shulick v Richards*, 273 Mich App 320, 327 n 1; 729 NW2d 533 (2006); *Pena v Ingham Co Road Comm'n*, 255 Mich App 299, 315-316; 660 NW2d 351 (2003); *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987). Having reviewed the record, we do not find error in the trial court's determination, and therefore, do not find consideration of plaintiff's unpreserved assertions to be warranted.[8]

We affirm.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Christopher M. Murray

[8] Contrary to plaintiff's assertion otherwise, the case evaluation award was a monetary award to which MCR 2.403 may be applied. As the rejecting party, plaintiff is required to pay sanctions unless it can establish that it improved its position by more than ten percent at trial. MCR 2.403(O). Thus, contrary to plaintiff's assertion, as the accepting party, defendant is not required to establish that it improved its position at trial to obtain sanctions. The burden is entirely on plaintiff to establish that the verdict was more favorable to it, within the meaning of MCR 2.403(O), than the case evaluation award to avoid paying sanctions. Considering that plaintiff lost this case, and considering the level of defendant's annual sales revenue, plaintiff has not met this burden. Therefore, consideration of plaintiff's unpreserved challenges to the case evaluation award is not necessary to a proper outcome in this case. *McCue, supra* at 557; *Shulick, supra*, at 327, n 2; *Pena, supra* at 315-316; *Providence Hosp, supra* at 194-195.