STATE OF MICHIGAN

COURT OF APPEALS

TCL ENTERPRISES, INC., and J. MICHAEL SHEDD,

Plaintiffs-Appellees/Cross Appellants,

v

MALINO PROPERTIES, L.L.C.,

Defendant/Cross Defendant-Appellant-Cross Appellee,

and

TRANSNATION TITLE INSURANCE COMPANY,

Defendant/Cross-Plaintiff.

UNPUBLISHED
June 12, 2008

No. 277016
Wayne Circuit Court
LC No. 05-535541-CK

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

PER CURIAM.

In this contract dispute, defendant Malino Properties, L.L.C., appeals as of right the trial court's order granting summary disposition in favor of plaintiffs TCL Enterprises, Inc. and Michael J. Shedd.[1] Plaintiffs cross appeal the trial court's determination of the amount of damages. We reverse the trial court's grant of summary disposition and remand for further proceedings.

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[1] Defendant Transnation Title Insurance Company is not a party to this appeal. The trial court entered an order dismissing all claims by and against Transnation. According to the original complaint, TCL was dissolved in July 2004 and Shedd is TCL's successor in interest. For the sake of clarity, although the term plaintiffs is used throughout, Shedd is not otherwise referenced individually or separately from TCL.

On April 20, 1999, TCL entered into a land contract under which Eileen Bluestone, as trustee of the Eileen R. Bluestone Revocable Living Trust Agreement, and Bruno and Mildred Manni agreed to sell, and TCL agreed to purchase, a parcel of land in Metroplex Industrial Park in Romulus, Michigan, for $52,000 ("the Bluestone Land Contract"). In September 2002, TCL and Michael Leipsitz, "on behalf of an entity to be formed," (Malino),[2] entered into an agreement of sale under which TCL agreed to sell and Malino agreed to purchase:

> Parcel 1: Lot 4 and the north 20 ft. of Lot 3 of Metroplex. Ind. Park Subdivision 1 . . .
>
> Parcel 2: Lots 5 & 6, & the South 25 ft. of Lot 7 of Metroplex. Ind. Park Subdivision 1 . . .
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> being known as: 7010 Metro Plex Street, together with all improvements and appurtenances, ____ if any, now on the premises, and to pay therefor the sum of $750,000* Dollars, subject to the existing building and use restrictions, easements and zoning ordinances, if any, upon the following conditions: * See item 12 Addendum

The addendum provided that TCL would assign its interest in the Bluestone Land Contract to Malino and Malino would assume the existing land contract balance. Malino's monthly payment of $1,352 to "vendor"[3] was to be in lieu of land contract payments to TCL until the balance on the Bluestone Land Contract was paid in full. The addendum also provided that TCL would assign its rights, interest, and rents in an existing lease agreement for parcel 2 to Malino at closing. In turn, Malino agreed to the assignment of $5,648 per month of the lease payments to TCL's lender, and agreed that each lease payment assigned to TCL's lender would be in lieu of a land contract payment to TCL. Together, the assigned $5,648 lease payment and the $1,352 payment under the Bluestone Land Contract equaled a $7,000 monthly obligation.

On November 1, 2002, TCL and Malino executed a land contract ("2002 Land Contract") under which TCL agreed to sell and Malino agreed to purchase:

> Parcel 2:
>
> Lots 5, 6 and the South 25 feet of Lot 7, Metroplex Industrial Park Subdivision No. 1 . . .
>
> More commonly known as: 7010 Metroplex

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[2] Both the agreement of sale and the addendum list Leipsitz as the Purchaser, but he signed both documents on behalf of "an entity to be formed" and retained his right to assign the agreement "to an assignee of its choice." None of the parties dispute that Malino was the ultimate purchaser.

[3] The sellers under the Bluestone Land Contract.

The agreement provided that "the consideration for the sale of the above described premises" was $750,000, of which $75,000 had already been paid. The $675,000 balance, plus interest at a rate of 7.5 percent a year, was to be paid in monthly installments of $7,000 beginning December 1, 2002.

Also on November 1, 2002, TCL executed multiple documents, including: a warranty deed, by which it conveyed parcel 2 to Malino for $750,000; an assignment of the lease on parcel 2 to Malino; a quitclaim deed conveying parcel 1 to Malino for one dollar; and an assignment to Malino of its interest in the Bluestone Land Contract, showing a $43,441.69 balance remaining on the contract. On November 5, 2002, Malino, TCL, Brunno Manni, Mildred Manni, and Eileen Bluestone, as trustee for the Bluestone Trust, executed an amendment to the Bluestone Land Contract reflecting TCL's assignment of its right, title, and interest in the contract to Malino and providing that: the balance to be assumed by Malino was $43,441.69; the balance was to be paid in monthly installments of no less than $1,352, "which includes an annual interest rate of 7.5%"; and the principal balance was to be paid within 36 months from the date of assignment.

In December 2005, plaintiffs filed a complaint in the trial court alleging that Malino breached the 2002 Land Contract when it paid off the underlying mortgage on parcel 2 in December 2004 and "never made another payment under the Land Contract." Plaintiffs ultimately filed a motion for summary disposition, arguing that there was no genuine issue of material fact because, if Malino paid the approximately $583,000 balance remaining on TCL's mortgage on parcel 2 on November 1, 2002, Malino still owed TCL approximately $92,000. Plaintiffs claimed that the $750,000 purchase price set forth in the 2002 Land Contract was only for parcel 2, but, even if the court found that it also included parcel 1, they were still entitled to $49,000 in damages. The trial court granted the motion for summary disposition. On the record, the court found that the 2002 Land Contract concerned only parcel 2, but awarded plaintiffs only $49,000 in damages.[4]

Malino first argues that, in light of the absence of evidence of separate consideration to be given for parcel 1 and the express incorporation of the agreement of sale in the 2002 Land Contract, the trial court erred in concluding that the agreement of sale was not incorporated by reference into the 2002 Land Contract. We agree.

We review de novo questions of contract interpretation. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Id.* If additional terms are found in a document referenced by another instrument, we interpret the terms by reading the two writings together. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). However, because parties to a contract may modify its terms by later agreement, *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005), we

[4] $92,000 minus the approximately $43,000 Malino paid for parcel 1 under the Bluestone Land Contract.

must consider whether the 2002 Land Contract incorporates the agreement of sale, as Malino argues, or constitutes a contract modification, as plaintiffs argue.

The 2002 Land Contract states that "the consideration for the sale of the above described premises," which is only parcel 2, is $750,000. However, reading the agreement of sale, the addendum, the 2002 Land Contract, and the assignment of purchaser's interest in 2002 Land Contract together, the documents do not conflict. Rather, the purchase agreement and the assignment of purchaser's interest in 2002 Land Contract, both executed on November 1, 2002, are not only consistent with the terms of the earlier-executed agreement of sale and its addendum, they are part of the same agreement. The agreement of sale contemplates that, while parcel 2 would be conveyed to Malino by land contract, an assignment of TCL's interest in the Bluestone Land Contract might be used to convey TCL's interest in parcel 1:

> D. Payment of the sum of $75,000 Dollars in cash or certified check, and the execution of a Land Contract upon mutually acceptable form with terms not inconsistent here within, acknowledging payment of that sum and calling for the payment of the remainder of the purchase money within 3 years from the date of Contract in monthly $7,000.00 * dollars each, which includes interest payments at the rate of 7.5 per cent annum (sic), and which DO NOT include prepaid taxes and insurance. * See Item 12 Addendum
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> As to Parcel 1, if the Seller's title to said land is evidenced by an existing land contract with unperformed terms and conditions substantially as above set forth and the cash payment to be made by the undersigned on consummation hereof will pay out the equity, an assignment and conveyance of the vendee's interest in the land contract, with an agreement by the undersigned to assume the balance owing thereon, will be accepted in lieu of the contract.

Moreover, the 2002 Land Contract makes explicit reference to the agreement of sale, the addendum, and the assignment of the Bluestone Land Contract, as follows:

> Additional Clauses
>
> * * *
>
> (x) Both parties agree that the Seller's interest in a certain land contract between Eileen R. Bluestone, as trustee of the Eileen R. Bluestone Revocable Living Trust under Agreement dated August 20, 1993 and Bruno Manni and Mildred A. Manni, husband and wife, as seller and TCL Enterprises, Inc., as purchaser, is hereby being assigned to the buyer, Malino Properties, L.L.C.
>
> (y) Both parties agrees [sic] that the Agreement to Sale [sic] dated September 9, 2002, and it's [sic] addendum is hereto attached and made part of said land contract. *The Addendum of the Agreement of Sale shall be followed as to the payments of land contract and as to the assignment of the underlying land contract.* The monthly land contract payment will be applied to both principal and interest of said land contract.

> (z) The Seller has agreed to convey their [sic] purchaser's interest in a land contract to Malino Properties, L.L.C. for a parcel of land described as follows: Lot 4 and the North 20 feet of Lot 3, Metroplex Industrial Park Subdivision No. 1, ... [Emphasis added.]

These additional clauses are specifically referenced in the "terms of payment" section of the 2002 Land Contract, which states that the monthly payments are "7000.00* (SEE ADDITIONAL CLAUSES)."

The addendum makes clear that monthly payments of $1,352 on the Bluestone Land Contract, plus the assignment of $5,648 per month of the lease payments by Malino to TCL's lender, will be in lieu of the $7,000 monthly payments recited in the 2002 Land Contract:

> 1. Seller shall assign and convey his vendee's interest in the land contract to Purchaser at closing, subject to the terms and conditions hereof. Purchaser will assume and agrees to pay the existing Land Contract balance including payments in arrears. *Purchasers* [sic] *monthly payment of $1,352.00 to vendor monthly, shall be in lieu of Land contract payments to Seller until assumed Land Contract is paid in full*.
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> 2. Seller hereby agrees to assign his rights, interest and rents in lease agreement dated May 10, 2001 by Seller and USF Worldwide, Inc to Purchaser at closing.
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> 3. The Purchaser hereby consents to the assignment of $5648.00 per month of the lease payments to Seller's Lender. *Each lease payment assigned to the Seller's Lender will be in lieu of land contract payment to the Seller*. [Emphases added.]

The documents clearly reflect that the parties intended their agreements with respect to parcels 1 and 2 to be part of the same transaction, and the payments on the Bluestone Land Contract were to be credited toward the $7,000 monthly payment on the 2002 Land Contract. Therefore, the trial court erred in concluding, as a matter of law, that the agreement of sale was not incorporated by reference into the 2002 Land Contract and that the document concerned only parcel 2.

Having found that the 2002 Land Contract concerns both parcels and that the agreement of sale and its addendum are part of the parties' agreement, we agree with Malino that its payments on the Bluestone Land Contract were payments toward the $750,000 purchase price under the 2002 Land Contract. Accordingly, the trial court properly credited Malino with these payments.[5]

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[5] Although we agree with plaintiffs that the trial court's award of damages was inconsistent with its finding that the purchase price under the 2002 Land Contract pertained only to parcel 2, this inconsistency is irrelevant in light of our findings that the 2002 Land Contract pertained to both parcels and that the trial court erred in granting summary disposition to plaintiffs.

Malino next argues that the trial court erred in granting summary disposition for plaintiffs because there was a genuine issue of fact regarding whether the total amount Malino paid to TCL or its creditors was less than the $750,000 contract price. Because we find that plaintiffs failed to meet their initial burden of supporting their position with documentary evidence, we agree.

We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision made pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. Summary disposition is appropriate when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. "The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence." *ER Zeiler Excavating, Inc v Valenti Trobec Chandler, Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006). "The responding party must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial." *Id*.

We find that plaintiffs failed to meet their initial burden. They did not ground their claim that Malino failed to meet its payment obligations under the 2002 Land Contract in documentary evidence of Malino's actual payments. Instead, they essentially argued that the court should assume that Malino paid approximately $583,000, in addition to the $75,000 paid at closing, leaving $92,000 unpaid.[6] Malino, however, claims that the relevant amount to credit against the $675,000 due under the 2002 Land Contract is the amount Malino actually paid on TCL's mortgage and the Bluestone Land Contract.

Genuine issues of fact remain regarding the payments Malino made, how each payment was allocated to the principal and interest remaining on the 2002 Land Contract, and, ultimately, whether Malino met its payment obligations under the contract. The 2002 Land Contract provides that the $7,000 monthly payment would be applied to interest and then to principal. The record contains a spreadsheet tracking the payments made to TCL's lender on its mortgage on parcel 2, the balance remaining on the principal, and the interest due. It shows that between November 5, 2002 (the first entry after the parties' closing on November 1, 2002) and December 7, 2004, 26 payments of $4,465 to $5,648 were made,[7] and that the mortgage was paid off on December 24, 2004, with a payment of $552,453.50. The record does not contain a listing of payments made on the Bluestone Land Contract, but it does show that the balance was paid off on December 27, 2004, with a payment of $13,163.43.

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[6] $750,000-$75,000 (paid at closing)-$583,000 = $92,000.

[7] It is not clear whether these payments were made directly by Malino, or were lease payments rendered to TCL's Lender in lieu of 2002 Land Contract payments pursuant to the terms of addendum as incorporated by "Additional Clause" (y). Regardless of how the payments were made, however, Malino should receive credit for the payments.

Plaintiffs point out that the 2002 Land Contract specifically provides that: "It is mutually understood that the monthly installment payments specified in said contract are insufficient to fully pay the obligation owing within the term of said contract, and that there will be a lump-sum payment due Seller upon completion of said term." But Malino did not simply make payments of $7000 a month until the expiration of the term on December 1, 2005. Instead, Malino paid off the balance of the TCL mortgage on December 23, 2004, with a payment of $552,336.62, and paid off the balance of the Bluestone Land Contract on December 27, 2004, with a payment of $13,163.43. Although there are records of at least some of the payments Malino made on TCL's mortgage, there is nothing on the record to show how the payments on TCL's mortgage and on the Bluestone Land Contract affected the balance owed on the 2002 Land Contract itself, or how the payments were allocated to interest and principal. While plaintiffs may be able to demonstrate that Malino has not met its obligations under the contract, they failed to show it based on the evidence provided. Indeed, the statement on which plaintiffs rely appears to be nothing more than recognition by the parties that the 2002 Land Contract will result in a "balloon payment" of the unpaid principal at the end of the three-year term because $7,000 per month over 36 months would not pay off the loan balance. This interpretation is consistent with "Additional Clause" (v) which states:

> Seller is under no obligation to extend this contract beyond the agreed upon termination or to refinance the principal balance beyond said termination date.

Because plaintiffs failed to support their position with documentary evidence, the trial court erred in granting their motion for summary disposition.[8]

Finally, we find that Malino has abandoned its argument regarding credit of the Transnation settlement by including it in the questions presented but failing to address the issue within its brief or to provide any authority. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). We also note that plaintiffs' suggestion that Malino has "unclean hands" is inapposite because Malino is the defendant in this action and plaintiffs brought the motion for summary disposition. See *Richards v Tibaldi*, 272 Mich App 522, 537; 726 NW2d 770 (2006).

We reverse the trial court's grant of summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[8] As a result, we need not address Malino's appeal regarding the issue of damages.