STATE OF MICHIGAN

COURT OF APPEALS

REPUBLIC BANK,

Plaintiff/Counter-Defendant-Appellee,

v

EMBASSY PROPERTIES AND INVESTMENTS, LLC,

Defendant/Counter-Plaintiff-Appellant,

and

SILVERI COMPANY,

Defendant.

UNPUBLISHED
July 10, 2008

No. 278393
Kent Circuit Court
LC No. 06-010130-CK

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

In this contract dispute, defendant Embassy Properties and Investments, LLC ("Embassy Properties") appeals as of right the trial court order granting summary disposition in favor of plaintiff Republic Bank. We affirm.

I. Facts and Procedural History

In September 2004, Embassy Properties agreed to purchase a five-acre parcel of property in Kentwood, Michigan from the United States Postal Service. Embassy Properties subsequently hired Glenn Turek, a broker for defendant Silveri Company, to assist in developing, marketing, and selling the property.[1] In January 2005, Brian Mioduszewski, the Director of Facilities for

[1] The parties previously stipulated to the dismissal of Silveri Company.

Republic Bank, sent a letter to Turek expressing the bank's interest in purchasing a portion of the property.

In July 2005, following negotiations, the parties entered into a purchase agreement ("the Agreement") wherein Republic Bank agreed to purchase from Embassy Properties a parcel of property described as one and one-quarter (1.25) acres in the northeast corner of East Paris Avenue and Embassy Drive.[2] Attached to the Agreement was a site plan ("the Site Plan") showing a right-turn-exit-only drive from the property onto East Paris Avenue. Paragraph five of the Agreement stated that the property included "the land and easements for access to East Paris Avenue and Embassy Drive as shown on the Site Plan (subject to change but for the Property including possible re-location of egress on to East Paris if required by the City of Kentwood)."

Additionally, it is undisputed that paragraph four of the Agreement required several conditions precedent to closing, stating, in part:

> 4. CONDITIONS PRECEDENT TO CLOSING:
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> * * *
>
> B. Seller to obtain City of Kentwood split permit to create the Property as a separate parcel and site plan approvals and special land use permits for the 5,753 square foot drive thru banking facility shown on attached Site Plan, with ingress and egress to the Property per attached Site Plan, within ninety (90) days from the date of this Agreement. The ninety (90) days may be extended for thirty (30) days by written notice from Seller to Buyer if Seller has diligently pursued the approvals and permits and they are awaiting decision by the City of Kentwood; a second thirty (30) day extension may be made on the same conditions.
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> * * *
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> E. Seller to close its acquisition of the Property as part of a larger parcel by October 20, 2005.

Pursuant to the Agreement, the bank deposited $40,000 as earnest money with Silveri Company as Embassy Properties' escrow agent. The third paragraph of the Agreement provided that if "the Buyer shall default under this Agreement, the Seller shall have the right to terminate this [A]greement by written notice (subject to 15 days to cure) and retain the earnest money deposit as liquidated damages. If the Seller shall default under this Agreement, the Buyer may terminate this Agreement by written notice (subject to 15 days to cure) and receive the return of the earnest money deposit."

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[2] The Agreement was executed by Embassy Properties on July 21, 2005 and by Republic Bank on July 25, 2005.

On August 8, 2005, Embassy Properties sent Mioduszewski a City of Kentwood Planning Commission ("Planning Commission") staff report stating that the proposed drive onto East Paris Avenue "may not be desirable; not only because of its close proximity to the east-west drive but also because of the conflicting patterns of vehicular traffic movement it creates within the site." During a Planning Commission meeting the next day, the city commissioners expressed concern about the proposed drive and requested that Embassy Properties conduct a traffic study. Thereafter, Phillip Stenger, the owner of Embassy Properties, sent the Planning Commission a letter stating that, in order to accommodate the commissioners' concerns, Embassy Properties would remove the right-turn-exit-only drive onto East Paris Avenue from the Site Plan.

On September 27, 2005, the Planning Commission issued its "Findings of Fact" regarding the property. In its findings, the Planning Commission conditionally approved the parties' Site Plan. One of the conditions to obtaining approval was "elimination of the right-turn-exit-only drive on the East Paris Avenue frontage of the property."

On October 4, 2005, Stenger telephoned Mioduszewski and asked if the bank would consent to extend the date for closing. According to Stenger, Mioduszewski said that, "an extension would not be a problem." Two days later, Stenger sent Mioduszewski a proposed amendment to the Agreement that changed the date for closing ("the Proposed Amendment"). Attached to the Proposed Amendment was a new site plan ("the Proposed Amended Site Plan") that did not include the drive onto East Paris Avenue. Stenger indicated that, at that point, he believed Mioduszewski would approve the Proposed Amendment. But, according to Mioduszewski and Peter Lemmer, senior vice president and in-house counsel for Republic Bank, only the bank's board had the authority to approve modifications to the Agreement.

On October 18, 2005, Lemmer telephoned Stenger and Turek and advised them that Republic Bank would not approve the Proposed Amendment. According to Stenger, Lemmer said that, "the Bank had decided to go in a different direction," and that, "even if Embassy Properties fulfilled all the conditions of the contract, the Bank would still not close on the Property." Later that day, Stenger sent Lemmer a letter stating that he was "absolutely shocked to have learned today, for the first time, that Republic Bank has decided not to fulfill its obligations." The letter further stated that the "Bank's anticipatory breach constitutes a default under the Agreement, therefore, I am terminating the Agreement and retaining the $40,000 deposit." Lemmer sent a letter to Stenger the following day stating that the bank had "reconsidered its position on the purchase" and that, "as a result of [Embassy Properties'] anticipatory breach by requesting an extension, the Bank intends to reclaim its $40,000 and receive the return of the earnest money deposit."

Republic Bank filed suit against Embassy Properties in October 2006 seeking recovery of the deposit under a breach of contract theory. Thereafter, Embassy Properties counterclaimed arguing that it was entitled to retain the deposit. In February 2007, the bank moved for summary disposition under MCR 2.116(C)(10). In support of its motion for summary disposition, the bank asserted that the deposit should be returned because Embassy Properties failed to satisfy conditions precedent to closing, thereby defaulting on the Agreement.

In April 2007, the circuit court granted summary disposition in favor of Republic Bank. The court found that, pursuant to paragraph four of the Agreement, "Embassy Properties was required to: (1) obtain a lot split permit from the City of Kentwood; (2) obtain site plan approvals

and special land use permits from the City of Kentwood; and (3) close on the larger parcel" as conditions precedent to closing. The court further found that while there were factual disputes as to whether Embassy Properties could have obtained the lot split permit and closed on the larger parcel, there was no dispute that Embassy Properties could not obtain approval of the Site Plan attached to the Agreement. Because Embassy Properties was in default of the Agreement, Republic Bank was entitled to terminate the Agreement and have the earnest money deposit returned.

II. Analysis

Embassy Properties argues that the trial court erred in granting summary disposition in favor of Republic Bank. We disagree.

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record 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). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all of the evidence submitted by the parties in the light most favorable to the non-moving party. *Id*. at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120.

The construction and interpretation of a contract presents questions of law that we review de novo. *Saint Clair Medical, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the agreement. *Id*. "It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Id*., quoting *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). If reasonable minds could differ, however, a question of fact for the factfinder exists and summary disposition is inappropriate. *Id*.

The trial court found, and the parties agree, that the language in paragraph four of the Agreement that required Embassy Properties to obtain approval of the Site Plan from the City of Kentwood was a condition precedent. A condition precedent "is a fact or event that the parties intend must take place before there is a right to performance." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007). Although this Court is generally disinclined to construe stipulations of a contract as conditions precedent, we will do so where the clear language of the contract compels it. *Id*. at 132 n 2. In this case, paragraph four of the Agreement was titled, "CONDITIONS PRECEDENT TO CLOSING," and the parties agree that all of the stipulations listed in that paragraph were conditions precedent.

The trial court further found, and Embassy Properties disputes, that the condition precedent requiring approval of the Site Plan could not be completed in accordance with the Agreement. We agree with the trial court. Pursuant to paragraph four of the Agreement, Embassy Properties was required to obtain approval of the facility "shown on attached Site Plan, with ingress and egress to the Property per attached Site Plan" from the City of Kentwood, and it is undisputed that the city's Planning Commission did not approve the Site Plan. The Planning Commission had issued its Findings of Fact stating that it would not approve the facility without

"elimination of the right-turn-exit-only drive on the East Paris Avenue frontage of the property" as shown on the Site Plan.

Embassy Properties argues that it could have completed the condition precedent because the Planning Commission would have approved the Proposed Amended Site Plan. In so arguing, Embassy Properties relies on paragraph five of the Agreement. Paragraph five stated that the property included "the land and easements for access to East Paris Avenue and Embassy Drive as shown on the Site Plan (subject to change but for the Property including possible re-location of egress on to East Paris if required by the City of Kentwood)." Embassy Properties argues that, at the very least, this Court should find that the language in paragraph five was ambiguous and that a material question of fact existed as to its meaning. But, although the language in paragraph five provided some flexibility as to the location of the bank's egress onto East Paris Avenue, it did not allow for the elimination of the egress. The Agreement plainly stated that the egress could be *relocated*, not removed or eliminated, and this Court may not create ambiguity when the terms of a contract are clear. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

Contrary to Embassy Properties' argument on appeal, careful review of the original Site Plan and the Proposed Amended Site Plan reveals that the amended plan *eliminated* the bank's egress onto East Paris Avenue, as requested by the city's Planning Commission. The original Site Plan allowed for egress onto East Paris Avenue, as well as egress onto a shared driveway leading to East Paris Avenue and Embassy Drive. The Proposed Amended Site Plan only provided for egress onto the shared driveway and completely eliminated the bank's separate drive onto East Paris Avenue. As the trial court properly concluded, because "the East Paris Avenue access was not relocated as permitted under paragraph 5, but rather removed entirely, Embassy Properties could not have met the conditions precedent under the Agreement and, accordingly, was in default."

Alternatively, Embassy Properties argues that, even if it was impossible to obtain approval of the Site Plan in accordance with the Agreement, Republic Bank waived the performance of the condition by repudiating the Agreement for reasons unrelated to the condition. Embassy Properties asserts that the bank never objected to the Proposed Amended Site Plan; rather, when the bank refused to approve the Proposed Amendment, Lemmer said that, "the Bank had decided to go in a different direction," and that, "even if Embassy Properties fulfilled all the conditions of the contract, the Bank would still not close on the Property." But, we have found that before a court will find a waiver of a condition precedent, "a party must prevent the condition from occurring by either taking some affirmative action, or by refusing to take action required under the contract." *Harbor Park Market, supra* at 132. In this case, there is no evidence that Republic Bank prevented or otherwise interfered with the fulfillment of the condition.

Despite the argument that the alleged repudiation by Republic Bank occurred before the deadline had expired for Embassy Properties to potentially satisfy the condition precedent, the repudiation did not cause or contribute to the nonoccurrence of the condition precedent. Rather, the condition had already failed by the time of the claimed repudiation and was no longer capable of being fulfilled, given the undisputed determination by the Planning Commission nearly a month earlier that the approval of the site plan was subject to the elimination of the exit on East Paris Avenue. Therefore, the nonoccurrence of the condition precedent was not excused

and Republic Bank was discharged from any duty to perform under the contract. See *Comerica Inc v Zurich American Ins Co*, 498 F Supp 2d 1019, 1029 (ED Mich, 2007), quoting Williston on Contracts, § 39.41, pp 690-691 (general rule excusing the nonoccurrence of a condition precedent on repudiation of the contract by party whose performance is conditional is not applicable if other party would not or could not have performed the condition in any event regardless of repudiation; "'the repudiation must have caused or substantially contributed to the nonoccurrence of the condition"'). Furthermore, because the Proposed Amended Site Plan completely eliminated the bank's egress onto East Paris Avenue, rather than relocating it as permitted under paragraph five of the Agreement, the bank was under no obligation to accept the amended plan. Accordingly, Embassy Properties' argument that the bank waived the performance of the condition precedent must fail.

Embassy Properties could not satisfy all of the conditions precedent to closing and was, therefore, in default of the Agreement. Accordingly, pursuant to paragraph three of the Agreement, Republic Bank was entitled to terminate the Agreement in its October 19, 2005, letter and have the $40,000 earnest money deposit returned.

Affirmed.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering