STATE OF MICHIGAN

COURT OF APPEALS

LINDA SMITH, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 13, 2008
V	No. 280004 Muskegon Circuit Court
SCOTT L. FLASKA and JOANN M. FLASKA, Defendants-Appellees/Cross-Appellants.	LC No. 00-039893-CH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

This action arises out of a complaint filed in 2000 by plaintiff against defendants for damages for breach of contract and fraudulent misrepresentation in the amount of $12,100, plus costs and attorney fees. Judgment was entered in favor of plaintiff for $3,449.89. It is from this damage award that plaintiff appeals as of right and defendant cross appeals. For the reasons set forth in this opinion, we vacate the original judgment and remand for reentry of a revised judgment. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In August 1999, defendant[1] conducted an auction sale of various parcels of real property, including the two improved parcels at issue in this matter. Both parcels are located in Muskegon County. One parcel is located on Amity Avenue (Amity) and the other parcel is located on Orchard Street (Orchard). Plaintiff attended the auction where she became interested in acquiring defendants' interests in the parcels; however, she did not bid on them during the auction. After the auction, plaintiff approached defendant directly about purchasing his interests in the parcels.

Plaintiff maintains she was interested in these parcels because they currently had land contracts attached to them. Also, according to her complaint, defendant told plaintiff he was the fee title owner of the Orchard and Amity parcels and that both parcels were the subjects of land

[1] Although Joann Flaska is also named in this action, she should have been dismissed by the trial court as will be discussed *infra*. References to "defendant" in the singular throughout this opinion are to Scott L. Flaska.

contracts under which he was the vendor. Defendant, however, denies telling plaintiff that both of the parcels were subjects of existing land contracts. Defendant stated he told plaintiff that only the Orchard parcel was subject to a land contract and that it had an outstanding balance of $7,500. Defendant also testified that he informed plaintiff that the Amity parcel was in need of immediate roof repairs.

The minimum bid price at the auction for the Orchard parcel was listed at $7,000. The minimum bid on the Amity parcel was not stated on the bid sheet. The parties negotiated an agreement deal wherein plaintiff would purchase defendants' interests in both parcels for a total price of $11,000, in addition to a $1,100 buyer's fee payment. Defendant stated that he reduced the price of the Amity parcel to $4,000 because there was no land contract and because it was vacant. Plaintiff admitted that defendant "told me prior to receiving my check that they had moved out. He didn't tell me there had never been a land contract on it."

Plaintiff further testified that defendant assured her that both parcels included "nice houses," in good physical condition and that they both had land contract buyers who were "good payers" and that there was a combined total of $16,000 outstanding on both land contracts. Plaintiff stated that it was based on the information provided by defendant that she agreed to pay a total of $11,000 for both parcels. Plaintiff reiterated that she did not want to purchase only one parcel.

At the time plaintiff purchased the parcels at the auction, she received a "land purchase certificate" stating "All Properties Are Sold As Is." The land purchase certificate also provided a "Disclosure" reading "All properties are sold as is with all faults, whether known or discovered later. Purchaser has done his own study as to the suitability for which the property is being purchased and accepts as is."

Shortly after the auction, in exchange for plaintiff's payment, defendants, as grantors, issued quit claim deeds to plaintiff, as grantee, on both parcels. The deed to the Orchard parcel listed consideration at $7,000 and the deed to the Amity parcel listed consideration at $4,000. Also, at that time, defendants executed an assignment of land contract to plaintiff in connection with the Orchard parcel.

After the purchase, plaintiff discovered that the Amity parcel was not the subject of a land contract and that defendant had no vendor's interest to transfer to plaintiff. Furthermore, plaintiff received no land contract payments from the Orchard parcel vendee nor could she locate that vendee. Ultimately, plaintiff never received payment on either property.

Plaintiff also stated that upon acquiring the Amity parcel she received notices from the City of Muskegon that the property was to be condemned but also admitted that she did not attempt to make any repairs. Robert Grabinski, a building inspector for the City of Muskegon, testified that the Amity parcel was unoccupied from April 5, 1999 to September 1, 2000 and that it was demolished on April 10, 2001.

Plaintiff filed her complaint for breach of contract, for fraud and misrepresentation regarding the condition of the parcels and the existence of land contracts, on or around January 26, 2000. A bench trial was held on October 21, 2003. The trial court issued a written opinion on December 18, 2006. The trial court found that there was no misrepresentation claim

regarding the Orchard parcel but "plaintiff submits that this was a 'package deal' and seeks rescission and/or damage for the combined sale under theories of breach of contract and misrepresentation." The trial court dismissed the breach of contract claim, stating that "contracts for the sale of land must be in writing . . . Therefore, plaintiff's reliance on breach of those oral contract provisions is not viable."

Regarding the misrepresentation claim, the trial court noted that defendant advised plaintiff of the need for roof repairs on the Amity parcel and further found that:

> Given the diametrically opposed testimony, the court, mindful of the Plaintiff's burden of proof, looks for corroboration. As to the condition of the houses, plaintiff offers no corroboration for her testimony. Defendant's position is supported by Exhibit 3[2] which is signed by the Plaintiff and indicates that the property is sold 'as is.' The Plaintiff has failed to sustain her burden of proof regarding the alleged misrepresentation of the condition.

The trial court then found that "the existence of a land contract is a different matter." The trial court noted that "plaintiff has corroborated her position that Mr. Flaska represented that there were land contracts associated with each parcel." The trial court referenced the auction bid book, which was furnished to auction participants representing that each of the parcels at issue was the subject of an existing land contract and was occupied. Therefore, the trial court found that regarding the Amity parcel, plaintiff proved that defendant misrepresented the existence of a land contract and that plaintiff relied on those misrepresentations to her detriment.

The trial court noted that because the Amity parcel had been demolished, rescission was not an option. The court further stated:

> However, Plaintiff has suffered damages. She is entitled to the difference between what she was promised and what she received. She was promised the property plus a land contract vendor's interest that would pay her $8,800 no later than March, 2002 with 11% interest. She received a property whose market value, apparently, was $4,400,[3] which is what she paid for it. Therefore, Plaintiff is entitled to an award of damages equal to the difference between $6,712,[4] what she was promised, and $4,400, of what she received plus taxable costs.

As for the Orchard property, the trial court determined:

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[2] Exhibit 3 was the "land purchase certificate," which stated that "all properties are sold as is."

[3] The parties concede that plaintiff paid $4,000 for the parcel and that the trial court's reference to $4,400 was simply a typographical error.

[4] The $6,712 represents the $8,800 due in March 2002, discounted at 11% to the present value as of August 1999.

> Plaintiff received what she bargained for. The fact that the land contract vendor may have defaulted after Plaintiff assumed the vendor position is not attributable to defendants. Nor is the court persuaded that this was a 'package deal.' Each parcel was the subject of a separate deed and a separate price as reflected in Exhibits 5 and 10.[5]

Judgment in the amount of $3,449.89, calculated pursuant to the foregoing, was entered on July 25, 2007.

On appeal from a bench trial, this Court reviews a trial court's findings of fact for clear error and its legal conclusions de novo. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). "An appellate court will give deference to 'the trial court's superior ability to judge the credibility of the witnesses who appeared before it.'" *Id.*, quoting *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989).

First, plaintiff argues that the trial court erred in dismissing the breach of contract claim on the basis that the alleged oral agreements did not constitute contracts between the parties.

The statute of frauds is applicable to the sale of land as well as the sale of a land contract interest in land. *Brooks v Gillow*, 352 Mich 189, 192-195; 89 NW2d 457 (1958). To satisfy a challenge under the statute of frauds, a contract for the sale of an interest in land must: "(1) be in writing and (2) be signed by the seller or someone lawfully authorized by the seller in writing." *Zurcher v Herveat*, 238 Mich App 267, 277; 605 NW2d 329 (1999). Here, the statute of frauds was satisfied by way of the land purchase certificate. However, plaintiff's complaint alleges that the parties' contract provided the following oral "covenants" by defendant, which plaintiff alleges were breached:

> A. That the improvements thereon were in good and habitable condition;
>
> B. That the dwellings thereon were occupied;
>
> C. That both parcels were the subjects of executory land contracts with defendants as vendors in their individual capacities. [Complaint, 4.]

The land purchase agreement executed by the parties specifically stated that "All Properties Are Sold As Is." It further provided: "All properties are sold as is with all faults, whether now known or discovered later. Purchaser has done his own study as to the suitability for which the property is being purchased and accepts as is."

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[5] Exhibits 5 and 10 were the deeds to each parcel, respectively.

A contract for the sale of an interest in land, which under the statute of frauds is required to be in writing, may not be modified by parol evidence. *Herpel v Herpel*, 162 Mich 606, 127 NW 763 (1910); *McEwan v Ortman*, 34 Mich 325, 1876 WL 7159 (1876). Because a purchase agreement for real property is required to be in writing under the statute of frauds, any modification or surrender of the purchase agreement also has to be in writing or supported by consideration in order to be enforceable. *Zurcher*, *supra* at 299-300. Moreover, an oral stipulation inconsistent with the terms of an agreement for the sale of lands may not be imported into it. *Herpel*, *supra* at 606; *McEwan*, *supra* at 325.

Here, the alleged oral covenants modified and were inconsistent with the written "as is" clause and disclaimer in the land purchase agreement. As such, these modifications needed to have been in writing. The trial court reviewed all documents identified by plaintiff and found no evidence of the alleged promises as to the Amity property.

Finally, plaintiff suggests that her performance of the contracts remove the requirement that the alleged oral covenants be in writing. While the statute of frauds applies only to executory contracts and not to those that have been executed and performed completely on both sides, *Korby v Sosnowski*, 339 Mich 705, 711; 64 NW2d 683 (1954) (quoting 37 CJS, *Statute of Frauds*, § 235, p 738), the parties' obligations under the contracts had not been satisfied at the time the contracts were executed. Thus, based on all of the foregoing, the trial court properly dismissed the breach of contract claim.

Next, plaintiff argues that she purchased both parcels as a "package deal" and that the trial court erred by considering the subject transaction as, in effect, two transactions and by not affording plaintiff relief in connection with the Orchard parcel in addition to damages it awarded in connection with the Amity parcel.

The evidence supports the trial court's finding that the parcels were sold individually, as separate transactions. Specifically, the auction documents listed the parcels separately and separate deeds were issued. The deeds listed separate consideration values for each parcel. In addition, the trial court was not persuaded by witness testimony that this was a "package deal." Accordingly, as there was sufficient evidence to support the trial court's finding that the parcels were sold individually as distinct transactions, the trial court did not clearly err in finding that the Orchard parcel transaction was separate from the Amity parcel transaction.

Finally, plaintiff asserts that the trial court's judgment of $3,449.89 in her favor was unsupported by the evidence at trial. The award was calculated as follows:

However, Plaintiff has suffered damages. She is entitled to the difference between what she was promised and what she received. She was promised the property plus a land contract vendor's interest that would pay her $8,800 no later than March, 2002 with 11% interest. She received a property whose market value, apparently, was $4,000, which is what she paid for it. Therefore, Plaintiff is entitled to an award of damages equal to the difference between $6,712, what she was promised, and $4,000, of what she received plus taxable costs.

Specifically, plaintiff claims the trial court did not consider the fact that she paid defendant $4,000, which he retained. On this basis, plaintiff asserts that the trial court's ruling is erroneous. However, the record reflects that the trial court explicitly considered the amount

plaintiff paid for the property (although referencing $4,400 instead of the correct figure of $4,000), stating that "$4,400 is what she paid for it." The trial court, upon review of the records, exhibits and testimony, determined this to be the value of the parcel. The damage award was in the range of the evidence presented and it is evident that the trial court was aware of the issues in the case. Ultimately, plaintiff bargained for and received title to the Amity parcel, which was worth at least $4,000 and the trial court did not apply faulty legal analysis in fashioning the award.

Plaintiff also argues that the trial court's damages award is incorrect because the Amity parcel "had no value." However, the trial court expressly considered the fact that the house on the Amity parcel was subsequently demolished by the government. There is also testimony that plaintiff took no action to sell or repair the home to prevent condemnation. Again, there is nothing on the record to refute the trial court's determination of the $4,000 value of the Amity parcel, showing that is clearly erred.

Finally, plaintiff argues that the interest of a vendor in a land contract is personal property and subject to equitable conversion and, therefore, plaintiff is entitled to the entire land contract receivables of $8,800. This particular argument was not raised below. "Issues raised for the first time on appeal are not ordinarily subject to review." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007). Nevertheless, we note that plaintiff has misinterpreted *Brooks v Gillow*, 352 Mich 189; 89 NW 457 (1958), which plaintiff used in support of this allegation. Contrary to plaintiff's suggestion, the *Brooks* Court actually held that a vendor's interest in a land contract is not personal property. *Id.* at 192-195.

Here, there is no legal or factual basis to reverse the trial court's computation of damages aside from the $400 added to the value of the Amity parcel in the trial court's opinion, presumably the result of a typographical error. Accordingly, the trial court's analysis was not clearly erroneous; however, the judgment should be revised to award plaintiff $3,849.89 to account for the $400 the trial court added to the value of the parcel as a result of a typographical error.

On cross appeal, defendant argues that the trial court erred in entering judgment against Joann Flaska as there is no suggestion, let alone evidence, that Joann Flaska made any representations to plaintiff. Since the breach of contract claim was dismissed and only damages for defendant Scott Flaska's misrepresentations were awarded, Joann Flaska should not be held liable for those damages. The inclusion of Joann's name of the judgment was likely the result of oversight by the trial court and should be revised.

Vacated and remanded for reentry of a revised judgment awarding plaintiff $3,849.89 and to dismiss Joann Flaska from the lawsuit. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis