STATE OF MICHIGAN

COURT OF APPEALS

CLANCY REALTORS and CHARLES CLANCY, Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants, v MICHAEL RUBICK, Defendant/Cross-Plaintiff-Appellant/Cross-Appellee.	UNPUBLISHED November 20, 2008 No. 276309 Kalamazoo Circuit Court LC No. 04-000360-CK
J.B. MCKAY and GULLPRAIRIE FARM, L.L.C., Plaintiffs/Counter-Defendants-Appellees, v MICHAEL RUBICK, Defendant/Counter-Plaintiff-Appellant.	 No. 276310 Kalamazoo Circuit Court LC No. 04-00374-CK

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

In Docket No. 276309, defendant, Michael Rubick, appeals as of right the judgment awarding plaintiffs, Clancy Realtors and Charles Clancy (hereinafter "the Clancys"), their realtor commission. The Clancys cross-appeal the same judgment, in which the trial court denied them a commission despite having procured a buyer for a separate parcel of real property owned by defendant. In Docket No. 276310, defendant appeals as of right the judgment in favor of

plaintiffs, J.B. McKay and Gull Prairie Farm, L.L.C. (hereinafter "McKay"), granting specific performance of an agreement to convey real property.[1] We affirm.

Defendant owns 179 acres of property, consisting of four separate tax parcels. The front 99 acres consists of adjoining 80-acre and 19-acre parcels that border C Avenue to the south and McKay's property to the west. The front 80-acre parcel was used as farmland and is heavily wooded. An old farmhouse and rundown barn are on the 19-acre parcel. The back 80 acres consists of two 40-acre parcels that border McKay's property to the south and consists primarily of swampland. The back 80 acres and front 99 acres are not contiguous, with the back 80 acres lacking both an access road and utilities. Although defendant asserts that a two-track easement is available to access the back 80 acres, the record fails to support defendant's assertion of an easement over any neighbors' properties. Defendant's father obtained the subject properties in 1949 and defendant resided there as a child. Following his marriage, defendant and his wife, Sharon, resided on the property for three years until 1973. In 1980, defendant was added as a joint-owner of the property with his father. Defendant obtained sole ownership when his father passed away in 1986.

In March 2004, defendant contacted the Clancys to sell the parcels. The Clancys indicated that similar properties were worth $4,000 to $7,000 an acre. However, after reviewing tax records and maps, the Clancys revised their estimate and determined that defendant's property would be worth $5,000 to $5,500 an acre, assuming there was access to the back 80 acres.[2]

On March 29, 2004, defendant, representing that he had marketable title, signed a listing agreement with the Clancys to sell the 179 acres for $1,074,000, or $6,000 an acre. The listing agreement included a provision regarding the possibility of dual agency. Defendant also signed a disclosure form at that time. The Clancys sought to procure potential buyers by including the property on the multiple listing service (MLS) database and by contacting contiguous property owners, such as McKay.

By March 31, 2004, the Clancys received an offer from McKay, and a separate offer from Ric and Melanie Cooper. McKay offered $716,000 for defendant's entire property. The Coopers offered $594,000 for the front 99 acres. Because defendant was traveling for business, the Clancys were unable to physically present the offers to defendant but did convey the offers by telephone. Defendant rejected both offers and made no counteroffers.

On April 3, 2004, defendant and his daughter walked the property with the Clancys. Defendant told the Clancys that he wanted to clear $1 million from the sale of his property; however, they opined that defendant would not receive more than $800,000, because the back 80

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[1] This Court consolidated the appeals in *Clancy Realtors v Rubick*, unpublished order of the Michigan Court of Appeals, entered April 3, 2007 (Docket Nos. 276309 and 276310).

[2] A subsequent title search revealed that there were no recorded access or easement rights for the back parcel.

acres was not worth more than $3,500 an acre. The Clancys identified several factors that would affect the value of the back 80 acres, including: (1) the proportion of land that was swamp; (2) lack of a legal access to the back 80 acres; and (3) the preclusive cost of constructing a driveway and securing utilities to the back 80 acres. During the walk-through, the Clancys did not convey any confidential information regarding their dealings with McKay or the Coopers. However, they told defendant that there would be limited buyers for the back 80 acres due to the access problems, and suggested that defendant's best sale option would be a contiguous property owner.

On April 5, 2004, the Clancys met with McKay, and the meeting resulted in another offer for defendant's property. McKay offered $760,750 ($4,250 an acre) for defendant's entire property. The Clancys prepared a written offer, which McKay signed. That agreement was contingent on McKay obtaining a mortgage for $608,000. McKay indicated that he was most interested in the back 80 acres, and was only seeking to procure the front 99 acres to shield his current property from future development. McKay never expressed a maximum price that he would be willing to pay for the back 80 acres.

The Clancys submitted McKay's revised offer to defendant. Defendant rejected this offer, but a counteroffer, prepared by the Clancys, was presented to McKay. The counteroffer contained two options: (1) $874,000 for the entire property with the front 99 acres at $6,000 an acre and the back 80 acres at $3,500 an acre, or (2) $334,000 for the back 80 acres ($3,500 an acre) and a nine-acre buffer between McKay's property and the rest of defendant's "front" property (those nine acres were priced at $6,000 an acre). McKay accepted the second option of defendant's counteroffer and paid earnest money. A closing was scheduled for June 1, 2004.

The Clancys testified that a buyer-agency addendum was sent by facsimile with the counteroffer to defendant on April 6, 2004. The addendum provided in relevant part:

> Agency Disclosure: Buyer and Seller acknowledge that Broker and Broker's Salespeople are agents for both Buyer and Seller in this transaction. Broker has previously acted as an exclusive agent for each party and may have information that could affect the transaction between the parties. Broker and Broker's Salespeople shall not be required to disclose information to either party that was previously undisclosed, without approval from the parties whose information is being disclosed.

Defendant signed the addendum on April 7, 2004, and also signed the agency disclosure form, which McKay previously signed. The licensee disclosure section provided that the Clancys' status was that of disclosed dual agents.

Defendant and the Clancys subsequently entered into a new listing agreement for defendant's remaining property. The farmhouse and 19 acres were offered for $155,000, and the remaining 71 acres were offered for $390,000 ($5,500 an acre). Alternately, the entire remaining property was offered at $545,500. The Coopers remained interested and by May 20, 2004, signed an agreement offering to purchase the remaining 90 acres for defendant's asking price of $545,500.

In the interim, the relationship between defendant and the Clancys deteriorated. Defendant told his wife, Sharon, about the transactions and she threatened to leave him. On May

6, 2004, defendant left a voicemail message for the Clancys, indicating that the "front 90 acres" was no longer for sale, and that they never discussed the back 80 acres' mineral rights. The Clancys responded that they had a listing agreement for the remaining front 90 acres, and that mineral rights were addressed in both the listing agreement and the sales agreement. Later that day, the Clancys received two voicemail messages from Sharon indicating that the back 80 acres was off the market and that she would divorce defendant if he went through with the transaction. Before this communication, the Clancys had no contact or dealings with Sharon during these transactions. On May 24, 2004, the Clancys communicated with Sharon's legal counsel, who explained that his client had dower rights and did not want to sell. On May 28, 2004, defendant left another voicemail for the Clancys, indicating that he was canceling the sale of the back 80 acres. Defendant did not attend the June 1, 2004, closing, claiming that he was out-of-town on business. McKay indicated that he wanted to close, but was willing to reschedule and to accept the property subject to Sharon's dower interests.

On July 6, 2004, the Clancys filed an action for breach of contract against defendant for failing to pay commissions on the agreement for McKay to purchase part of defendant's property, and for the Coopers' offer to purchase the remaining parcel. The Clancys asserted that they were entitled to $26,720 in commission from the McKay transaction, and $43,640 from the Coopers' offer. Defendant filed a counterclaim against the Clancys, alleging fraud and misrepresentation, breach of contract and fiduciary duty, and for rescission. McKay filed an action for breach of contract, arguing that defendant breached the sales agreement and the option agreement. McKay requested specific performance to convey the property pursuant the sales agreement. Defendant filed a counterclaim for rescission, asserting that the sales agreement was induced by fraud. Following a bench trial, the trial court concluded that the Clancys were entitled to the commission based on McKay's offer to purchase 89 acres from defendant. However, the trial court ruled that they did not meet their burden of proof with respect to the commission for the Coopers' offer. The trial court also held that McKay was entitled to specific performance and rejected defendant's counterclaims.

On appeal, defendant asserts the trial court erred in awarding a commission to the Clancys based on their misconduct in failing to adequately advise defendant of their dual agency status. This Court reviews a trial court's factual findings for clear error and its conclusions of law de novo following a bench trial. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A finding of fact is clearly erroneous if this Court "is left with a definite and firm conviction that a mistake has been made." *Carrier Creek Drain Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005).

"The business of a real estate broker is generally to find a purchaser, and in the absence of express stipulation otherwise the generally recognized rule is that he has earned his commission when he finds and produces a party who is ready, able, and willing to take the property, and enter into a valid contract therefor upon the terms made by the principal." *Beatty v Goodrich*, 224 Mich 538, 545; 194 NW 985 (1923). Moreover, a real estate broker is entitled to his or her commission even if the transaction is not completed. *Beatty, supra* at 544-545. The law is well settled in Michigan "that a real estate broker who furnishes a buyer for property, ready, willing and able to complete the purchase on the owner's terms, is entitled to his agreed compensation if the owner wrongfully refuses to complete the sale," so long as there was nothing

in the sales agreement to the contrary. *Advance Realty Co v Spanos*, 348 Mich 464, 468-469; 83 NW2d 342 (1957).

Defendant contends that the Clancys are not entitled to a commission on the McKay transaction because they engaged in misconduct by failing to obtain informed consent from defendant regarding dual agency, thereby breaching their fiduciary duty to defendant. As a threshold matter, we must determine whether the "disclosure of agency relationship" statute, MCL 339.2517, applies to the instant case. In interpreting a statute, our first step is a review of the statute's language, and if that language is clear and unambiguous, it is assumed that the Legislature intended its plain meaning. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

The version of MCL 339.2517(1) in effect at the time of this litigation provided that a real estate broker "shall disclose to a potential buyer or seller in a real estate transaction all types of agency relationships available and the licensee's duties that each agency relationship creates before the disclosure by the potential buyer or seller to the licensee of any confidential information specific to that potential buyer or seller."[3] MCL 339.2517(9)(g) defined a "real estate transaction" as "the sale or lease of any legal or equitable interest in real estate where the interest in real estate consists of not less than 1 or not more than 4 residential dwelling units or consists of a building site for a residential unit on either a lot as defined in section 102 of the land division act, 1967 PA 288, MCL 560.102, or a condominium unit as defined in section 4 of the condominium act, 1978 PA 59, MCL 559.104." The statute fails to define the term "residential dwelling," but Random House Webster's College Dictionary (1997) provides the following relevant definitions: "residential" means "characterized by private residences," and "dwelling" means "a building or other place to live in."[4] MCL 560.102(m) defines "lot" as "a measured portion of a parcel or tract of land, which is described and fixed in a recorded plat."

It is undisputed that defendant sought to sell four separate tax parcels, and that only the 19-acre parcel contained any sort of residential dwelling – an uninhabited farmhouse which, according to the listing agreement, had no value. The parcels that McKay agreed to purchase did not contain any residential dwelling units and did not comprise a building site for a residential unit. During his initial contact with the Clancys, defendant described the front 99 acres as farmland and the back 80 acres as swamp. According to an appraiser, the front 80-acre parcel, included in the front 99 acres, was zoned "agriculture." The east 40-acre parcel of the back 80 acres was zoned "homestead," while the west 40-acre parcel was zoned "agriculture." Based on the clear and unambiguous language of the statute, we find that MCL 339.2517 is not applicable,

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[3] MCL 339.2517 was substantially modified by the Legislature, effective July 1, 2008. "Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001).

[4] Random House Webster's College Dictionary (1997) defines a "building" as "any relatively permanent enclosed structure on a plot of land having a roof and usu[ally] windows," and for "site" as "the area of or exact plot of ground on which anything is, has been, or is to be located."

because the land being sold to McKay did not constitute a "real estate transaction" as defined by MCL 339.2517(9)(g).

Further, even if this Court were to determine that MCL 339.2517 was applicable to this case, the Clancys complied with the informed consent requirement of the former MCL 339.2517(2), where they provided adequate disclosure to defendant in writing that the possibility of dual agency may arise during the course of the transaction. According to MCL 339.2517(2), "[a] real estate licensee can be the agent of both the seller and the buyer in a transaction, but only with the knowledge and informed consent, in writing, of both the seller and the buyer." Thus, the Clancys were not prohibited from acting as a dual agent, but could do so only with the knowledge and informed consent of the buyer and seller. It is sufficient under the statute for a real estate broker to satisfy the informed consent requirement by explaining that the possibility of dual agency may arise during the course of the transaction and providing a form that substantially complies with MCL 339.2517(2). By executing the form, the signor agrees to allow a dual agency.

The Clancys testified that a limited dual agency was explained to defendant, and that the agency disclosure statement was attached to the listing agreement and contained language that was substantially similar to the sample form contained in MCL 339.2517(2). That statement provided descriptions of seller's agents, buyer's agents, and transaction coordinator, as well as their related duties. The section titles of "seller's agent" and "disclosed dual agents" were circled on the statement. On March 29, 2004, defendant acknowledged the dual agency "[b]y signing below, the parties confirm that they have received and read the information in the agency disclosure statement and that this form was provided to them before disclosure of any confidential information specific to the potential Sellers or Buyers." On March 31, 2004, the Clancys obtained offers from McKay and the Coopers, both of which were conveyed to defendant by telephone. The Clancys asserted that they informed defendant that they were also representing the buyers, but did not disclose the identity of the buyers. In addition, although defendant initially indicated that he did not believe that he gave his informed consent regarding dual agency, after reviewing the listing agreement, he conceded that he probably consented to a dual agency. Defendant admitted that he knew the Clancys were disclosed dual agents when he signed the counteroffer. Consequently, defendant cannot sustain his assertion that the award of a commission constituted error by the trial court.

Defendant also asserts several actions or omissions by the Clancys resulting in a breach of their fiduciary duties to defendant. However, defendant provides only cursory treatment or conclusory assertions with little or no analysis to support these allegations. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

For his second issue, defendant asserts the trial court erred in granting specific performance because the purchase agreement lacked the signature of defendant's wife. "[C]ourts of equity exercise a sound discretion in granting or withholding remedy of specific performance, although . . . that the discretion is judicial and not arbitrary." *Continental & Vogue Health Studios, Inc v Abra Corp*, 369 Mich 561, 563; 120 NW2d 835 (1963).

A trial court should not arbitrarily refuse specific performance of a contract for the purchase of real estate; rather, it should order specific performance for the sale of real property

unless to do so would be inequitable. *Foshee v Krum*, 332 Mich 636, 643; 52 NW2d 358 (1952). While specific performance is not a matter of right, "the court is not justified in withholding a decree from the one clearly entitled thereto, merely because of the exigencies of the case." *Tiley v Chapman*, 320 Mich 173, 175; 30 NW2d 824 (1948). Moreover, "[t]he adequacy of a remedy at law is not a bar to specific performance where the contract involves realty." *Wilhelm v Denton*, 82 Mich App 453, 454; 266 NW2d 845 (1978).

Concurrently, "The law protects the right of dower." *In re Stroh Estate*, 151 Mich App 513, 516; 392 NW2d 192 (1986); MCL 558.1. "No contract of sale or conveyance made by a husband without his wife's signature will operate to deprive her of her dower." *Id*. A wife's conveyance or release of her dower must comply with the statute of frauds. *Wright v DeGroff*, 14 Mich 164, 165 (1866).

The trial court's grant of specific performance in favor of McKay is consistent with a prolonged history of case law. Since the mid-1800's, the Michigan Supreme Court has permitted an award of specific performance despite a wife's retention of her dower interest. In *Walker v Kelly*, 91 Mich 212, 217-218; 51 NW 934 (1892), the Court granted specific performance of a contract to convey land, but recognized an exception for property, which comprised a homestead. The Court ruled, in relevant part:

> There is no question but what the contract here was for a deed from both Kelly and wife, and, while the wife cannot be compelled to release her dower, there is no reason why complainant may not have a decree for specific performance so far as defendant Kelly is concerned, and for compensation as to the dower interest of his wife. [*Id*.]

(See also *Lamberts v Lemley*, 314 Mich 417, 424; 22 NW2d 759 (1946), in which the Court denied specific performance but permitted an award of damages regarding the sale of property which comprised a homestead.)

The Court has also recognized the distinction inherent between an ownership interest in land and an inchoate right to dower. *Jefferson Land Co v Kannowski*, 233 Mich 210, 213; 206 NW 351 (1925) (Wife "had but an inchoate right of dower, which was nothing she could sell apart from joining with her husband"). This is consistent with earlier rulings, which recognized that while a wife cannot be compelled to release her dower it does not preclude a requirement to convey [property], when the notes and mortgage were offered to him and a deed demanded; for he did not place his refusal on the ground that his wife was required to unite with him in the conveyance." *Richmond v Robinson*, 12 Mich 193, 200 (1864).

We note that, although the Michigan Supreme Court has refused under certain circumstances to grant specific performance, these exceptions are factually distinguishable from the case before this Court. Primarily, the Supreme Court has refused to order specific performance when the wife retained an ownership interest in the land rather than merely dower right. For example, in *Way v Root*, 174 Mich 418, 428; 140 NW 577 (1913), the Court recognized a purchaser's right to recover damages:

> We think that the husband's contract to sell realty held by himself and wife under a tenancy by entirety, though not susceptible of specific performance, nor valid to

> affect in any way either her or his title, has validity between him and the party to whom he contracts to sell as foundation for an action to recover damages for his breach of it.

In *Solomon v Shewitz*, 185 Mich 620, 631-632; 152 NW 196 (1915), the Court denied specific performance and limited the purchaser to an award of damages because the wife's failure to release her dower right "changes the contract between the parties, and . . . compels the vendee to accept an imperfect title which he had not in mind when he agreed to purchase." Notably, the concerns of the *Solomon* Court do not exist in this case given McKay's willingness to accept the title subject to the dower interest of defendant's wife.

We recognize that recent cases have refused to grant specific performance, but find these cases are also factually distinguishable. This Court, while upholding a denial of specific performance, reasserted "the rule of law that parties who sign an agreement to sell land protected by the homestead exemption are liable for damages if they breach that agreement." *Joyce v Vemulapalli*, 193 Mich App 225, 228; 483 NW2d 445 (1992). The Court indicated that "the nature of the property right of the defendant's wife," whether it comprised a tenancy by the entireties or a dower interest, "is not dispositive" of whether the conveyance is void pursuant to the statute of frauds, MCL 566.108. *Id.* However, the Court, in determining the availability of an award of damages, distinguished between cases in which the "signature requirement [of the wife] was a condition precedent pursuant to the terms of the agreement" from those in which "the statute of frauds was inapplicable because the wife was not a necessary party . . . because the husband had expressly or impliedly promised to convey marketable title." *Id*. at 230.

This Court also found an agreement for the purchase of real property was not enforceable under the statute of frauds due to the absence of the signature of the wife, who retained a dower interest in the property. *Berg-Powell Steel Co v The Hartman Group, Inc*, 89 Mich App 423, 427-428; 280 NW2d 557 (1979). However, in this instance the Court denied the seller the relief of specific performance finding the failure to secure his wife's signature resulted in an invalid contract because "there was no acceptance between the parties." We view the holding as consistent with that of *Solomon*, in which the Court determined that failure to release the wife's dower right resulted in a substantive change in the contract and the impropriety of compelling a purchaser to accept an imperfect or defective title, which had not been contemplated by the initial agreement.

More recently, in *Slater Management Corp v Nash*, 212 Mich App 30, 31-32; 436 NW2d 843 (1995), this Court affirmed the denial of specific performance because the absence of the wife's signature releasing her dower interest violated the statute of frauds. Citing for authority *Berg-Powell Steel Co*, the Court reasserted "that the statute of frauds requires both the seller and his wife with a dower interest to sign a purchase agreement in order to create a valid contract for the sale of land." *Id.* at 32. The Court determined that there was no significant distinction between the types or nature of the interest held by the seller's wife and found both *Fields*[5] and

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[5] We note that the Court's decision in *Fields v Korn*, 366 Mich 108, 109; 113 NW2d 860 (1962) is inapplicable to the circumstances of this case because it did not involve a suit for specific
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Berg-Powell controlling. However, as noted in *Berg-Powell* the Court refused to require a purchaser to complete a sale due to the defect in the title. In contrast, under the circumstances of this case, McKay is not being compelled to accept a substantively altered contract, but rather has indicated his willingness to accept title to the property subject to the dower rights of defendant's wife. Further, *Slater* is not contrary to the long history of case law, which has recognized a substantive difference between an ownership interest in land and an inchoate right to dower. Although *Slater* relies on *Fields* and deems it controlling, *Fields* did not involve either a request for specific performance or a dower right. *Slater* is also factually distinguishable because it involved the seller of the property seeking specific performance of the contract despite the inability to convey the title promised in the agreement. As noted by the Court:

> Even assuming, but not deciding, that Slater's signature in his corporate capacity was adequate to create a valid contract for the sale of property he held personally, his wife's signature was also required under the statute of frauds because she has a dower interest in the real estate. The absence of her signature made the purchase agreement plaintiff sought to enforce ineffective to convey marketable title. [*Id.* at 32-33.]

As a result, we find the trial court's grant of specific performance in favor of McKay consistent with prior case law and not an abuse of discretion.

Next, defendant argues that McKay's failure to obtain mortgage financing and to tender the purchase price constitute material breaches of the sales agreement allowing defendant to cancel the agreement and precludes an award of specific performance. Contractual interpretation is a question of law subject to de novo review. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). "[C]ourts of equity exercise a sound discretion in granting or withholding remedy of specific performance . . . that discretion is judicial and not arbitrary." *Continental & Vogue Health Studios, Inc*, *supra* at 563. Generally, a trial court will not grant specific performance unless the party seeking that remedy has tendered full performance. *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982).

On April 5, 2004, McKay presented his second offer to purchase defendant's entire property for $760,750, which was contingent on McKay obtaining a mortgage for $608,000. Defendant presented a counteroffer with two options to McKay, which served as a rejection of McKay's offer. *Zurcher v Herveat*, 238 Mich App 267, 296; 605 NW2d 329 (1999). Under the terms of the counteroffer, only the sales price was amended; the remaining provisions of McKay's offer were incorporated into defendant's counteroffer. That offer contained a provision regarding the procurement or waiving of mortgage financing. McKay did not apply for a mortgage. McKay testified that he would have obtained a mortgage if he were going to purchase the entire property, but when he accepted defendant's counteroffer to purchase only a portion of the property he decided to pay cash. It was undisputed that McKay had the financial capability to pay cash for the property.

(…continued)

performance and involved undivided interests in property rather than a right of dower.

Under the plain meaning of the mortgage contingency provision, the agreement was "contingent" or conditional on McKay's ability to obtain a loan in the amount of $608,000. The need for a $608,000 loan was clearly obviated when McKay accepted defendant's counteroffer for the reduced sale price of $334,000. It is reasonable to conclude that the $608,000 mortgage amount would not be required given the lower purchase price. Based on this record, the mortgage contingency provision does not comprise a condition precedent. See *Mikonczyk v Detroit Newspapers*, Inc, 238 Mich App 347, 350; 605 NW2d 360 (1999). The key phrase of the mortgage contingency provision is: "If Buyer fails to provide evidence of the loan approval or waive the mortgage contingency on or before _____ (Date), Seller may cancel this Agreement." "Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." *Mackie v State Farm Mut Auto Ins Co*, 13 Mich App 556, 560; 164 NW2d 777 (1968) (quotation omitted).

While the trial court found that the mortgage contingency provision was not relevant because McKay was able to pay cash, the agreement itself provided that McKay "may waive the mortgage contingency by written notice and pay cash." The use of the term "may" generally indicates a permissive provision. *Phinney v Perlmutter*, 222 Mich App 513, 561; 564 NW2d 532 (1997). No deadline was set for McKay to waive the contingency. Presumably, he could waive it in writing at the closing and tender cash. Defendant acknowledged that he did not tell anyone he was canceling the sales agreement because McKay did not apply for or receive mortgage financing, or because McKay did not waive the mortgage financing contingency in writing before a certain date. As such, the mortgage contingency provision was not a "deal breaker," where a fair and reasonable construction of the provision and the parties' conduct demonstrated that the failure to fulfill the mortgage contingency provision did not and was not intended to excuse performance. Under the circumstances, the failure of the financing contingency was not grounds to deny specific performance as a matter of law. See *Mackie*, *supra* at 560.

It is also undisputed that McKay did not tender the purchase price for the property. Generally, a trial court will not grant specific performance unless the party seeking that remedy has tendered full performance. *Derosia*, *supra* at 652. However, "a formal tender is not necessary where the defendant by his words or acts has shown that it would not be accepted." *Frakes v Eghigian*, 358 Mich 327, 333; 100 NW2d 297 (1960). The Clancys testified that defendant indicated that he was backing out of the McKay transaction on May 28, 2004. At trial, defendant acknowledged that he was not going to attend the closing with McKay. Moreover, defendant and his wife sent facsimiles to the title company, indicating that defendant would not attend the closing. Because defendant's conduct was "tantamount to a renunciation" of the sales agreement, McKay's failure to tender the purchase price does not preclude an award of specific performance. *Id.*

Defendant also asserts the trial court erred when it permitted the Clancys to amend their witness list to include an expert. This Court reviews a trial court's decision to allow a party to amend a witness list for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992).

MCR 2.401(I) provides, in relevant part:

> (1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:
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> > (a) the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
> >
> > (b) whether the witness is an expert, and the field of expertise.

"Before imposing a sanction, such as barring a witness, several factors should be considered, including whether the violation was wilful or accidental; the party's history of refusing to comply with discovery requests or disclosure of witnesses; the prejudice to the party; the actual notice to the opposite party of the witness; and the attempt to make a timely cure." *Colovos v Dep't of Transportation*, 205 Mich App 524, 528; 517 NW2d 803 (1994).

The trial court issued its scheduling order on November 18, 2004, and the Clancys timely filed their witness list on January 18, 2005. They did not expressly identify any expert witnesses, but indicated that they might call "[p]otential expert witnesses should the necessity for expert testimony become known during litigation." Defendant filed his witness list on February 17, 2005, which included four potential expert witnesses.

Defendant injected expert testimony into the proceedings after seeking leave to file amended affirmative defenses, which the trial court granted. In his amended affirmative defenses, defendant first asserted that the Clancys' claims were barred, because they "forfeited any right to commissions because of broker misconduct, broker did not act in good faith, broker failed to properly and fully disclose that it was acting in a dual agency capacity, and that broker failed to maintain a Chinese wall between Chuck Clancy and Bill Clancy." In addition, defendant's pleadings opposing plaintiffs' motions for summary disposition included an affidavit of a proposed expert who asserted that the Clancys engaged in various acts of misconduct in support of defendant's affirmative defenses. In response the Clancys filed an affidavit from Chuck Clancy providing his qualifications as an expert and his opinions on matters raised in defendant's affirmative defenses. The Clancys then filed an amended witness list, which included two potential expert witnesses. The Clancys subsequently sought to formally amend their witness list to include an expert witness to rebut issues raised by defendant's expert. The Clancys contended that the need for rebuttal testimony became apparent only after defendant filed his amended pleadings. The Clancys also argued that defendant cannot claim prejudice because he also added an expert witness in an untimely manner. At the February 21, 2006, hearing, the trial court permitted the Clancys to amend their witness list to include an expert based on having demonstrated good cause and the absence of prejudice to defendant. The trial court determined that the need for such expert testimony was not readily apparent until after defendant filed amended pleadings.

We find that the trial court did not abuse its discretion by permitting the Clancys to amend their witness list where the trial court found good cause, the amendment was made several months before trial and none of the factors delineated by this Court in *Colovos, supra* at 528, were present to preclude the amendment.

On cross-appeal, the Clancys contend the trial court erred in determining that the Coopers were not "ready, willing and able buyers" based on the failure to demonstrate that the Coopers would have elected to proceed with the closing subject to the inchoate dower rights of defendant's wife. This Court reviews for clear error the trial court's factual findings and reviews de novo its conclusions of law following a bench trial. *Ligon, supra* at 124.

The law is well settled in Michigan "that a real estate broker who furnishes a buyer for property, ready, willing and able to complete the purchase on the owner's terms, is entitled to his agreed compensation if the owner wrongfully refuses to complete the sale," so long as there was nothing in the sales agreement to the contrary. *Advance Realty Co, supra* at 468-469. Moreover, a real estate broker will be entitled to his or her commission upon producing a ready, willing, and able buyer, even where the seller's title has a defect. *Barber v Vernon,* 8 Mich App 116, 121; 153 NW2d 882 (1967). However, "where a broker, who at the time he makes his contract with the owner knows of defects in the employer's title, or who knows of facts sufficient to put a prudent person on inquiry, which, if followed with reasonable diligence, would have resulted in such knowledge, he is not entitled to recover where the sale failed because of such facts, unless it was the intention of the parties that the employer should subsequently perfect his title in order to be able to perform." *Cain v Masurette,* 196 Mich 7, 13-14; 162 NW 287 (1917).

It was clear that the Clancys were unaware that defendant's wife would oppose the sale of the property when they entered into a listing agreement with defendant to sell the remaining parcel. Although the Clancys only learned that defendant's wife was asserting her dower rights on May 24, 2004, defendant had told the Clancys that the remaining front 90 acres were off the market, and his wife had communicated that the back 80 acres were no longer for sale before the Coopers offered to purchase the property. Consequently, there were sufficient facts to put a prudent person on inquiry regarding the status of the property. A reasonable inquiry by the Clancys would have demonstrated that the dower interest of defendant's wife created a defect on defendant's title that could negatively impact the sale. As such, the Clancys are not entitled to a commission with respect to the Coopers' offer. *Cain, supra* at 13-14.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot