STATE OF MICHIGAN

COURT OF APPEALS

MAIN STREET DINING, L.L.C., f/k/a J.P. PROPERTIES MANAGEMENT, L.L.C.,	UNPUBLISHED February 12, 2009
Plaintiff-Appellant,	
v	No. 282822 Oakland Circuit Court
CITIZENS FIRST SAVINGS BANK,	LC No. 2007-085120-CK
Defendant-Appellee.	

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this breach of contract case. We affirm.

I. Basic Facts

This case arises out of plaintiff's attempt to seek specific performance of a purchase agreement into which the parties entered on May 5, 2006, after defendant reneged on its promise to purchase real property in Farmington Hills for $850,000. Pursuant to the agreement, defendant placed a $10,000 deposit in escrow pending completion of conditions precedent prior to closing. The conditions precedent included a due diligence period during which defendant could inspect and assess the property to determine, in its sole discretion, whether to terminate the agreement.

In the event of default, the purchase agreement provided as follows:

> **ARTICLE VII**
>
> **DEFAULT**
>
> 7.1 Default by Purchaser. In the event of a default by Purchaser, and after expiration of the applicable Notice and Cure period, Seller shall be entitled to terminate this Agreement. *Seller further expressly acknowledges and agrees that termination of their Agreement and retention of the Deposit shall be its sole and exclusive remedy for default by Purchaser*.

> 7.2 Default by Seller. In the event of a default by Seller, and after expiration of the applicable Notice and Cure period, Purchaser may, at its option, rescind this Agreement or pursue any and all rights and remedies it may have under this Agreement and applicable law, including, without limitation, claims for damages and specific performance.
>
> 7.3 Notice and Cure. In the event of a default by either party, the non-defaulting party must provide written notice, in accordance with the terms of this Agreement. The defaulting party shall have thirty (30) days, or a longer period if reasonably required to cure the default by diligent effort, to cure the default to the reasonable satisfaction of the non-defaulting party.

The parties subsequently amended the purchase agreement twice. In the First Amendment, the parties extended the due diligence period due to delays in removing a title exemption and obtaining a survey. In the Second Amendment, the parties again extended the due diligence period in order for defendant to request rezoning approval from the Farmington Hills city council. Also in the Second Amendment, defendants waived all other conditions to close. Both amendments specified that except for the amendment, "all terms and conditions of the Purchase Agreement between the parties shall remain unchanged."

Although the city council approved rezoning on February 12, 2007, defendant notified plaintiff on February 20, 2007, that it was terminating its due diligence and the purchase agreement and that it was releasing its deposit to plaintiff. Defendant withdrew its rezoning approval request on February 26, 2007.

On August 14, 2007, plaintiff filed a complaint requesting specific performance of the purchase agreement and noted it had sustained nearly $60,000 in damages due in part to a probable drop in property value because of a soft real estate market. Defendant moved for summary disposition on the grounds that plaintiff's sole remedy was retention of the deposit. In granting defendant's motion for summary disposition, the trial court concluded that the contract language clearly and unambiguously provided that plaintiff's sole remedy was termination of the agreement and retention of the deposit and that this contractual provision was not waived by the Second Amendment, which left the terms and conditions of the purchase agreement unchanged with the exception of the amendment.

II. Analysis

Plaintiff argues that the trial court erred in interpreting the liquidated damages clause as permitting defendant to opt out of the purchase agreement. This Court reviews de novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681

NW2d 342 (2004). In addition, the Court reviews the proper effect of a contractual clause and the determination of whether an equitable remedy is appropriate de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

"[T]he primary goal of contract interpretation is to ascertain and effectuate the intent of the contracting parties. The law presumes that the contracting parties' intent is embodied in the actual words used in the contract itself." *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 218-219; 702 NW2d 106 (2005). In interpreting a contract, courts give contractual language its plain and ordinary meaning unless otherwise defined. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004). When the contractual language is plain and unambiguous, the contract must be enforced by its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

In this case, despite the purchase agreement's clear and unambiguous language providing that "termination of this Agreement and retention of the Deposit shall be [plaintiff's] *sole and exclusive remedy* for default by Purchaser[,]" (emphasis supplied) plaintiff claims that a proper reading of the purchase agreement's due diligence and Notice and Cure provisions precluded application of this remedial provision. We conclude that such a reading misconstrues the contractual language at issue and renders an incorrect interpretation of the contract.

Regarding the due diligence provision, plaintiff correctly observes that defendant waived all conditions to close in the Second Amendment (with the exception of the amendment) and that as the due diligence provision was a condition to close, defendant waived its right to terminate the contract under this provision. However, while the due diligence provision specifically refers to defendant's right to terminate the contract in its sole discretion if it is not satisfied with the results of its due diligence, that provision also provides that should defendant terminate the contract under that provision, neither party would have any further obligations under the agreement.[1] Given that defendant released its deposit to plaintiff upon informing plaintiff it would not purchase the property, it is clear defendant did not terminate the contract under this provision. Furthermore, plaintiff's argument ignores the remainder of the Second Amendment's language expressly providing that with the exception of the amendment, all terms and conditions of the purchase agreement remain unchanged. Consequently, the remedial provision designating termination of the agreement and retention of the deposit as plaintiff's "sole and exclusive remedy" was unaffected by the Second Amendment.

---

[1] The due diligence section, Article VI, provides in part:

> 6.2 Results of Due Diligence: In the event Purchaser, in its sole discretion, is not satisfied with the results of any studies, tests, or inspections conducted pursuant to paragraph 6.1 of this Agreement, Purchaser may, by written notice to Seller prior to expiration of the period set forth in paragraph 6.1, terminate this Agreement. In the event this Agreement is terminated pursuant to this paragraph, Seller and Purchaser shall have no further obligations to the other under this Agreement.

With respect to the Notice and Cure provision (section 7.3), plaintiff maintains that a fair reading of this section precludes summary disposition because 1) when read in tandem with the remedial provision (section 7.1), the requirement that defendant attempt to cure a default by diligent effort only triggers the remedial provision where defendant cannot timely complete the transaction despite its best efforts and 2) defendant's failure to use diligent effort precludes defendant from availing itself of the remedial provision because the diligent effort clause amounted to a constructive condition precedent. Both arguments fail.

First, although the Notice and Cure provision expressly allows a defaulting party 30 days or other reasonable period to cure a default by diligent effort to the satisfaction of the non-defaulting party, the applicability of the remedial provision is not contingent upon the defaulting party's diligent effort to cure. Rather, the remedial provision only indicates that plaintiff may not terminate the contract until the Notice and Cure period expires. Thus, that defendant failed to diligently cure its default (i.e., the failure to close) within a reasonable period did not preclude application of the remedial provision, but on the contrary, actually triggered it. In light of this, the Notice and Cure provision merely allows a defaulting party time within which to cure a default and does not preclude application of the remedial provision.

Second, assuming the diligent effort clause amounts to a constructive condition precedent to application of the remedial provision, it is the *failure* to exercise such timely diligent effort that would amount to a fulfillment of that condition rather than the positive exercise of diligent effort to cure a default. Indeed, a condition precedent must occur before there is a right to performance. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 N.2d 360 (1999). As noted above, the remedial provision here becomes applicable only after the Notice and Cure period expires. In other words, if the party fails to cure a default by diligent effort within 30 days or a reasonable time, plaintiff is entitled terminate the contract and retain the deposit. The failure to cure a default by diligent effort is exactly what happened in this case as defendant made no effort at all. Thus, even if defendant were affirmatively obligated to exercise diligent effort to cure a default, the failure to do so rendered the remedial provision applicable.

Plaintiff attempts to distinguish breach of contract from default, asserting that because defendant breached rather than defaulted on the contract, it may not avail itself of the remedial provision. Initially we note that while plaintiff is correct in asserting that a breaching party to a contractual agreement may not recover damages for a breach by the other party, *Verran v Blacklock*, 60 Mich App 763, 768; 231 NW2d 544 (1975), defendant alleges no breach by plaintiff and does not assert damages. On the contrary, defendant has complied with the remedial provision and has released its deposit to plaintiff. In any event, Black's Law Dictionary (8th ed) defines "breach of contract" as a "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance[,]" and "default" as "[t]o be neglectful,; esp., to fail to perform a contractual obligation." See *Morley v Automobile Club*, 458 Mich 459, 470; 581 NW2d 237 (1998) (courts may rely on dictionary definitions to find meanings of terms in contracts). The purchase agreement only references remedies in the event of default and does not mention breach. However, given that defendant failed to perform its promise to close on the property, plaintiff's contention concerning these terms is nothing more than a distinction without a difference.

Additionally, we note plaintiff's reliance on *Milner Hotels v Ehrman*, 307 Mich 347; 11 NW2d 914 (1943), and *Hendrick v Firke*, 169 Mich 549; 135 NW2d 319 (1912), in support of

the proposition that the purchase agreement did not entitle defendant to opt out of closing. Neither case, however, is instructive. In *Milner*, the Court found specific performance appropriate where the seller refused to close on the property and returned the deposit to the purchaser because the return of a deposit does not constitute the payment of damages. *Milner*, *supra* at 349-350, 357. In *Hendrick*, the Court found specific performance appropriate because the parties' contract did not give the purchaser the option to purchase the property or pay a stipulated sum. *Hendrick*, *supra* at 554.

The instant case is distinguishable for two reasons. First, unlike *Milner*, the deposit here is being forfeited rather than returned. Second, unlike both cases, the purchase agreement here provides for termination of the contract and retention of the deposit as plaintiff's "sole and exclusive remedy." In contrast, the purchase agreement's remedial provision for defendant in the event plaintiff were in default expressly delineates specific performance as a remedy. In light of this, the purchase agreement clearly did not contemplate specific performance as a remedy for plaintiff or contemplate defendant's forfeiture of the deposit as a mere penalty. Thus, despite plaintiff's expectation that defendant would follow through with its promise, we must enforce the clear and unambiguous language of this contract. *Burkhardt*, *supra* at 656. Indeed, "[t]he judiciary may not rewrite contracts on the basis of discerned 'reasonable expectations' of the parties . . . ." *Id*. at 656-657.

Finally, plaintiff argues that the remedial provision is void because its enforcement would be unreasonable or unconscionable given the actual damages plaintiff would suffer and given defendant's superior bargaining power. This argument fails. A liquidated damages provision fixes the amount of damages owed in the case of a breach of contract and is enforceable if the amount is reasonable in relation to the injury suffered and is not unreasonable or unconscionable. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998). A liquidated damages provision is appropriate "where actual damages are uncertain and difficult to ascertain or are of a purely speculative nature." *Saint Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006) (quotation and citation omitted). The validity of a liquidated damages clause depends on the conditions existing when the contract was signed rather than the time of the breach. *Solomon v Dep't of State Highways and Transportation*, 131 Mich App 479, 484; 345 NW2d 717 (1984).

In contesting plaintiff's argument, defendant calls attention to *Curran v Williams*, 352 Mich 278; 89 NW2d 602 (1958), which is directly on point. In *Curran*, the purchase agreement permitted the seller to retain the deposit of $1,000 as liquidated damages should the purchaser fail to complete the purchase of the property at issue. *Id*. at 279-280. The Court held that even though the seller claimed damages in excess of seven times the amount of the deposit, the liquidated damages provision was enforceable because

> at the time of the execution of this agreement it would have been difficult to ascertain the damages the respective parties might suffer in the event of breach of the agreement. It would certainly not be possible to assume at that time that in the event the purchaser failed to go through with his contract that the seller might find someone else to buy at approximately the same price. Other factors with reference to the damages might be equally difficult to arrive at. Therefore, it would appear that the facts in the instant case, at the time of the execution of the agreement, were such that the damages were difficult to ascertain, and that the

> honest attempt of the parties themselves to compute the best they could the just compensation from loss by breach of the contract justified the liquidated damage provision. The parties themselves being more intimately associated with the circumstances and therefore better able to compute the actual or probable damages than might a court or jury after breach. [*Id*. at 286-287.]

Here, plaintiff estimates damages to be nearly $60,000. However, as in *Curran*, it would have been difficult to ascertain the amount of damages the parties might suffer in the event of a breach. While plaintiff contends the amount lost in light of the amount of the deposit renders the remedial provision unconscionable and unreasonable, the amount claimed in damages is proportionally less than the amount the seller claimed in *Curran*. Moreover, plaintiff's claim that it lost the benefit of the bargain due to a fluctuating real estate market actually cuts against plaintiff's cause. Indeed, the effects of a fluctuating real estate market would be difficult to ascertain at the time the agreement was signed and the parties' awareness of this uncertainty put them in a better position than a court or jury to compute probable damages after a breach. Certainly plaintiff could have bargained for a higher deposit if that were in its best interests. However, that retention of the deposit seems unfair to plaintiff now is not a basis to interpret the contract contrary to its plain meaning.

Lastly, we reject plaintiff's contention that defendant had superior bargaining power thereby rendering the purchase agreement unconscionable. Indeed, plaintiff was represented by counsel while negotiating the purchase agreement and was under no obligation to enter into the agreement. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 144; 706 NW2d 471 (2005) (procedural unconscionability exists where the weaker party has no realistic alternative to the acceptance of a term and no freedom to accept or reject a term). Thus, we conclude that the trial court did not err in granting summary disposition.[2]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray

---

[2] While plaintiff argues that summary disposition is disfavored as a general rule, summary disposition is appropriate here where there is no genuine issue of material fact regarding whether the remedial provision provided plaintiff's sole and exclusive remedy in the event of default. *Maiden, supra* at 120. Despite plaintiff's assertion to the contrary, plaintiff has failed to cite any specific issue of fact, and it is not our responsibility to fashion and support plaintiff's argument on this score. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).