

STATE OF MICHIGAN
COURT OF APPEALS

RAZZOOK'S PROPERTIES, L.L.C., COUSINS
SUPERMARKET, INC., and JAMAL ABRO,

UNPUBLISHED
June 16, 2009

Plaintiffs/Counter-Defendants-
Appellees,

v

NICK YONO,

No. 283520
Genesee Circuit Court
LC No. 03-077470-CZ

Defendant/Counter-Plaintiff-
Appellant.

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying his motion for specific performance and dismissing the case. We reverse and remand for further proceedings.

Plaintiffs initiated this equitable action when they filed a complaint requesting the trial court to enter a judgment concluding that defendant breached various agreements, that each agreement was therefore null and void, that defendant must cease and desist his operation of the store and surrender possession of the building, that defendant must pay plaintiffs' costs and attorney's fees related to this action, and that the trial court grant such further relief that it deemed just and in good conscience. On appeal, defendant argues that rescission is not a fair remedy in the absence of a breach. We agree.

This Court reviews "[a] trial court's dispositional ruling on equitable matters . . . de novo." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). "A court acting in equity 'looks at the whole situation and grants or withholds relief as good conscience dictates.'" *Michigan Nat'l Bank and Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992), quoting *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951).

This case involves three separate transactions: an agreement to purchase real estate, a lease, and a business purchase agreement. In June 2003, plaintiffs and defendant entered into an agreement for the sale of plaintiffs' business, inventory, fixtures, supplies, etc. (hereafter business purchase agreement) for a purchase price of \$70,001. According to the business purchase agreement, defendant was required to tender a \$10,000 earnest money deposit, and \$60,000 in 36 consecutive monthly payments at an interest rate of five percent (\$1,798.25).

Around the same time, plaintiffs and defendant also entered into an agreement wherein plaintiffs would convey the property known as 1401 W. Dayton, Flint, Michigan, together with all improvements and appurtenances, and defendant would tender a purchase price of \$195,000. Plaintiffs and defendant also entered into a lease agreement wherein plaintiffs leased the premises situated at 1401 W. Dayton for a term of ten years, and defendant was required to pay \$3,000 per month, real estate taxes, assessments, replacement value insurance and all maintenance expenses.

According to plaintiffs, defendant tendered a check for \$10,000, but the check was returned as "uncollected funds." However, plaintiffs subsequently acknowledged the receipt of approximately \$70,000 from defendant for inventory. Plaintiffs sought to evict defendant from the store alleging that defendant failed to pay debts to the state of Michigan, defendant failed to pay unemployment, income and workman's compensation taxes, and defendant was operating under plaintiffs' lottery and liquor licenses but failed to pay applicable fees. Defendant's delinquency could cause plaintiffs to lose such licenses, and therefore, plaintiffs would be irreparably harmed if the trial court did not grant its motion for a preliminary injunction. On October 9, 2003, on plaintiffs' motion for a temporary injunction, the trial court ordered defendant to cease and desist operating the store and vacate the building.

Defendant filed a motion and a brief in support of his motion to dissolve plaintiffs' preliminary injunction, arguing that defendant withheld \$10,000 of his consideration due to a dispute that arose over the value of the store's inventory. Defendant argued that he refused to remit lease payments to plaintiffs due to the same inventory dispute, and according to the purchase agreement, plaintiffs were not yet entitled to payment because the \$10,000 deposit was due at the time of closing. Even if plaintiffs were entitled to lease payments, Michigan landlord-tenant law required plaintiffs to submit a notice to quit and await defendant's response, before seeking injunctive relief. Defendant further argued that plaintiffs' assertion that defendant failed to pay lottery, sales, payroll, unemployment, and workman's compensation taxes was unsupported by evidence, and that the trial court's preliminary injunction failed to state why plaintiffs' alleged injury was irreparable, pursuant to MCR 3.310.

On November 6, 2003, the trial court granted plaintiffs' motion for a preliminary injunction, ordering defendant to cease and desist operating the store and vacate the building. Plaintiffs were ordered to take immediate possession of the store, sell such inventory contained therein, and deposit the proceeds with the Genesee County Clerk's Office. Furthermore, plaintiffs were required to deposit \$72,000, received from defendant, with the clerk's office. Defendant was ordered to have an inventory performed of all goods contained in the store.

Ultimately, the trial court issued an amended judgment concluding that the business purchase agreement shall be specifically enforced according to its terms, and leased equipment on the premises was not included in the business purchase agreement, and therefore, plaintiffs were not obligated to leave the equipment behind, and defendant was not required to accept the equipment. However, if defendant did accept such equipment, he would be responsible for all indebtedness remaining under the equipment lease. The trial court further concluded that defendant shall pay plaintiffs \$6,000 rent for use of the building in August and September 2003, that Quality Inventory Specialists shall perform another inventory at closing, and upon the issuance of the trial court's order, or the denial of a motion for reconsideration, plaintiffs were entitled to \$16,000 (\$10,000 toward the business purchase agreement and \$6,000 in full

satisfaction of rent owed) to be subtracted from the funds on deposit with the clerk. Upon closing under the business and real estate purchase agreements, plaintiffs could apply for a distribution of \$1,798.25 from the clerk until the funds held in escrow were exhausted or until all amounts owed under the agreement were paid. Defendant would remain responsible for the balance of the purchase price after the escrow funds were exhausted, and all remaining damage claims were denied by the trial court. Furthermore, the trial court retained jurisdiction and closed the case.

Subsequently, plaintiffs filed a motion to set aside the trial court's judgment, alleging that the court's judgment was not reflective of the court's order. After a hearing on plaintiffs' motion to set aside judgment, the trial court denied plaintiffs' motion. Defendant filed a claim of appeal with this Court from the trial court's amended judgment. In November of 2004, the store was damaged by fire. Defendant subsequently withdrew his appeal.

On March 18, 2005, plaintiffs filed a motion and brief in support of their motion to rescind the contracts on the basis of impossibility caused by the fire, and defendant's material breach caused by his failure to maintain casualty insurance on the premises, pursuant to the lease. Plaintiffs, although not obligated to do so, insured the property, but the proceeds were insufficient to rebuild the building. Plaintiffs argued that defendant's failure to maintain fire insurance on the property was a material breach because the terms of the lease "specifically contemplated" the risk of loss due to fire damage. Plaintiffs further argued that rescission was necessary to return the parties to their positions prior to entering into each agreement, which would require defendant to pay plaintiffs in full for the inventory and contents of the building that were destroyed by the fire.

On appeal, defendant argues that rescission was no longer warranted after the Supreme Court reversed, in part, this Court's opinion in *Razzook's Properties, LLC v Yono*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 263010). Ultimately, this Court rescinded all three agreements. The lease agreement was rescinded due to defendant's purported material breach. Moreover, this Court *extended* rescission to the business purchase agreement and the agreement to purchase real estate for two reasons: (1) because defendant breached the lease agreement, and (2) because the subject matter of the three agreements was so interrelated that rescission of the lease agreement would not restore the parties to status quo without the rescission of the business purchase agreement and the agreement to purchase real estate. *Id.*

However, the Supreme Court held that defendant was not obligated to insure the premises at the time the fire occurred. On November 6, 2003, the trial court granted plaintiffs' motion for a preliminary injunction to prevent defendant from operating a grocery store on the premises, and therefore, defendant was "deprived of all beneficial use of the property [W]hen defendant vacated the premises, any lease agreement then operating was terminated." See *Razzook's Properties, LLC v Yono*, 480 Mich 865; 737 NW2d 758 (2007).

Plaintiffs argue that this Court's equitable rescission of the business purchase agreement and the agreement to purchase real estate should remain operative regardless whether defendant breached the lease agreement. Plaintiffs' argument is without merit. In the unpublished opinion per curiam in *Razzook's Properties, supra*, this Court thoroughly explained its rationale for rescinding the "series of contracts," in this case, as follows:

“In order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract.” [Quoting *Omnicom v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997).]

* * *

Defendant breached the lease agreement by failing to maintain insurance coverage. This breach is material because the building that plaintiffs are required to lease to defendant no longer exists, and plaintiffs must now provide defendant with a newly constructed building to perform under the lease, at their own expense. As a result, plaintiffs are entitled to rescission of the lease *on the basis that defendant materially breached the lease agreement*. *Omnicom*, *supra* at 348. [Emphasis added.]

* * *

“[A] Court acting in equity looks at the whole situation and grants or withholds relief as good conscience dictates.” [Quoting *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002).] This fundamental legal principle evinces this Court’s ability to rescind an agreement or series of agreements based on the totality of the circumstances. It follows that a court acting in equity is *not limited to rescission of only the contract that a party has materially breached*, but any other contract necessary to “grant . . . relief as good conscience dictates.” *Id.*

* * *

Allowing defendant to receive the benefits under the other agreements *while his failure to secure fire insurance creates a greater burden on plaintiffs would be an inequitable result*. [Emphasis added.]

To grant rescission of an agreement or series of agreements “as good conscience dictates,” there must first be a material breach of the agreement. This Court’s decision to rescind additional agreements was dictated by defendant’s purported material breach of the lease agreement. The fact that the agreements remain interrelated is an insufficient basis for rescission in the absence of defendant’s material breach of the lease agreement.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray