STATE OF MICHIGAN

COURT OF APPEALS

GUMBA PROPERTIES, INC.,

Plaintiff-Appellant,

v

MAREK KOLYNICZ and DAUNTA[1] KOLYNICZ,

Defendants-Appellees.

UNPUBLISHED
December 15, 2009

No. 287589
Wayne Circuit Court
LC No. 07-713219-CH

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

On May 16, 2007, plaintiff filed a complaint alleging that defendants defaulted in the terms of the land contract executed between the parties. The land contract was executed on May 23, 2003, between plaintiff, a Michigan corporation, and defendants, a husband and wife. Under the terms of the land contract, defendants made a down payment of $20,000 with a balance of $155,000. Defendants were required to make monthly payments of not less than $2400 with the first payment due by June 1, 2003. The entire unpaid principal and accrued interest was due and payable on May 23, 2007. According to the terms of the land contract, plaintiff had a duty to convey, upon payment of all sums owing, "a good and sufficient warranty deed conveying title to the land . . . but free from all other encumbrances, except such as may be herein set forth or shall have accrued or attached since the date hereof through the acts or omissions of persons other than Sellers or assigns." With regard to defendants' responsibilities, the land contract provided that defendants were "[t]o pay all taxes and special assessments hereafter levied on said land before any penalty for nonpayment attaches thereto …."

[1] The spelling of this defendant's first name is inconsistent in the lower court record. This defendant is also referred to as "Danuta" as set forth in the land contract. We will utilize "Daunta" because it is referenced on the final order closing the case.

Plaintiff alleged that defendants breached the land contract by failing to make the September 2006 payment and all payments through May 2007, at which time the complaint was filed. Plaintiff requested damages in the amount of $117,246.64 for the amount due and owing on the land contract. Further, plaintiff sought, in lieu of a return of the subject property, that the property be sold and that the net proceeds be paid to plaintiff in satisfaction of or in partial satisfaction of the total indebtedness due and owing. Defendants filed an answer to the complaint, asserting that the land contract was void and returned through election of a forfeiture action filed in district court and that plaintiff first breached the contract by failing to pay taxes that were due and owing on the property prior to the execution of the land contract with defendants. On December 7, 2007, plaintiff filed an amended complaint to include a count for waste and to allege that defendants owed $7,691.41 for back taxes on the property for the 2000-2002 years "per the terms of the land contract."

On June 17, 2008, plaintiff filed its motion for summary disposition pursuant to MCR 2.116(C)(10). Therein, plaintiff alleged that defendants admitted breaching the contract by failing to make payments from September 2006 to May 2007. Because the breach continued for more than 45 days, defendants were in default and plaintiff was entitled to foreclose upon the land contract. In support of the motion, plaintiff submitted an affidavit from Stanley B. Dickson, the president of plaintiff, attesting that defendants had not made payments on the land contract since September 2006. Additionally, Dickson asserted that "[p]ursuant to the Land Contract and a previous lease, Defendants were responsible for all property taxes associated with the Property."[2]

On July 10, 2008, defendants filed a response in opposition to plaintiff's dispositive motion and a counter-motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants alleged that plaintiff first committed a material breach of the contract by violating its obligation to pay for delinquent water and tax liens placed on the property before the execution of the land contract. Defendants alleged that they managed a retail grocery business specializing in products from Poland or products utilized by Polish-Americans. The property at issue was used solely as a warehouse for temporary storage of non-perishable goods and seasonal items. No employees worked at the subject premises, and defendants never turned the water on at the warehouse. Defendants were current in their monthly payments and payment of taxes through September 2006. In September 2006, defendants learned that there was an outstanding tax delinquency and outstanding water bills that had accrued prior to the execution of the May 2003 land contract. Consequently, defendants sought assurances that the property would not be lost in a foreclosure sale. Instead of providing assurances, plaintiff repudiated all liability for the delinquent tax bills. It was asserted that this material breach of the contract by plaintiff entitled defendants to summary disposition. In support of the counter-motion for summary disposition,

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[2] The land contract involved in the dispute was attached to the complaint. Despite the amendment to the complaint asserting that a prior lease indicated that defendants were responsible for back taxes, this prior lease was not attached to the amended complaint or to the motion for summary disposition. The other documentary evidence submitted with the motion included plaintiff's answers to defendants' request for admissions and a copy of the land contract.

defendants submitted an affidavit, delinquent tax bills, letters and emails exchanged between the parties regarding the delinquency, documents from the court cases, and answers to requests for admissions.

On July 18, 2008, the trial court heard oral argument regarding the motions and questioned the parties' failure to produce the lease. Plaintiff could not recall if the lease was oral or written. Defendants asserted that there was no written lease. The trial court held that a factual issue precluded summary disposition, concluding:

> Plaintiff initially breached the Agreement or Land Contract when Mr. Dickson indicated on December 4, 2006 that his interpretation of the Land Contract was that Plaintiff had no responsibility for taxes. Clearly Mr. Dickson was wrong. Under the Land Contract, . . . there's no provision to indicate that he was not responsible for taxes that accrued prior to the Land Contract. And in fact, the Land Contract indicates that the Defendants are only responsible for taxes that accrued after the date of the Land Contract. Under MCL 211.78g(1) a forfeiture had occurred. If Defendants continued to make Land Contract payments, Plaintiff could not provide a title without any encumbrances. This was a substantial breach.
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> In addition, Mr. Dickson's affidavit indicates that Defendants were responsible for taxes under a previous lease. Upon questioning of Plaintiff's counsel, I wanted to know whether there was a written lease or not. And he couldn't tell me. [Defense counsel] says there was no lease, no written lease. It was an oral lease. If there's a written lease, obviously Mr. Dickson cannot present parol evidence in an affidavit indicating what the terms of the lease are because that would violate the best evidence rule. MRE 1002. If there's an oral lease, there's a disputed issue of fact.
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> And consequently, I must deny the motion for summary disposition of both parties on that issue because there apparently is an oral lease and there's a dispute under the oral lease as to who is responsible for the taxes.

On July 28, 2008, defendants filed a motion for reconsideration, asserting that plaintiff had misled the trial court regarding the status of the lease. Defendants asserted that they were not parties to the oral lease. Rather, the prior oral lease was between Polish Market Co., d/b/a Euro Club, and Williamston Foods, Inc. The individual defendants were not parties. Furthermore, a merger clause in the land contract integrated any prior written or oral agreements. Therefore, the issue of tenant responsibility to pay taxes under the prior lease was immaterial and moot. Defendants presented documentary evidence to support the assertions contained in the motion for reconsideration. Plaintiff filed a response to the motion for reconsideration, alleging that defendants failed to demonstrate a palpable error.

On August 15, 2008, the trial court heard oral argument regarding the motion for reconsideration and ruled as follows:

> This Court granted Defendants' . . . motion for reconsideration from a denial of Defendants' motion for summary disposition on July 18, 2008. This

> Court ruled there was an issue of fact whether Defendants were responsible for tax payments based upon an oral lease that was entered into prior to the land contract. Defendants filed a motion for reconsideration raising two issues. First, that the parties to the oral lease were not the Plaintiff . . . or the Defendants. . . . Also attached to Defendants' motion for reconsideration were invoices showing that Euro Club paid the rent on the premises to Williamston Foods, Inc. The second issue raised by Defendants was that the merger clause in the land contract merged any prior agreements including the oral lease agreement.
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> In response, Plaintiff does not respond to the argument that the prior oral lease agreement involved other parties. Rather, Plaintiff raises new issues arguing that, in fact, Plaintiff paid the 2005 property taxes and he entered into an Escrow Agreement on August 8, 2008 to place $25,000 in escrow for payment toward past due property taxes and water bills.
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> Plaintiffs further argue that Defendants should be estopped from denying the validity of the land contract and did not properly rescind the land contract.
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> The new issues raised by Plaintiff will not be considered. They should have been raised in the original motion and no reconsideration has been granted on those issues. Rehearing was granted with respect to the two issues discussed above [and] raised by Defendants. The undisputed evidence establishes that the oral lease agreement did not involve the Plaintiff and the Defendants to this – to the instant litigation. Consequently, the Defendants could not be responsible for property taxes or water bills. Defendants are in [sic] entitled to summary disposition under MCR 2.116(C)(10) dismissing Plaintiff's claim.
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> There is no merit to Defendants' contention that the merger clause in the land contract precluded Plaintiff from claiming an oral lease. The merger clause only applies to contracts between the parties. It did not apply to the oral lease which involved other parties. However, this issue is moot because this Court determined that there's no issue of fact that Defendants did not agree in an oral lease to pay property taxes and water bills.

Plaintiff appeals as of right from this ruling.

Plaintiff first alleges that it did not repudiate any obligation owed to defendants pursuant to the land contract. Further, plaintiff asserts that an anticipatory repudiation must be an unequivocal declaration of the intention not to perform, and there was no such repudiation in the correspondence sent by plaintiff's representative. This issue is not preserved for appellate review. An issue is not preserved for appellate review unless it is raised, addressed, and decided by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Review of the lower court's ruling reveals that the trial court did not rule on the basis of anticipatory repudiation, but rather held that plaintiff committed the first substantial breach of the contract. Therefore, plaintiff's challenge on this basis is without merit.

Next, plaintiff contends that the trial court erred in concluding that a substantial breach of contract occurred because defendants were entitled to continue to use the property as intended

under the land contract for the entire term; therefore, they obtained their expected benefit. Rather, at the end of the contract term, plaintiff "could have tendered" good title by paying any unpaid taxes upon verifying the existence of the same. We disagree. The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If the contract language is clear and unambiguous, its meaning presents a question of law for the court. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

The general rule in Michigan is that the first party to breach a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform. *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). To apply the "first breach" rule, the initial breach must be substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994); see also *Able Demolition, Inc v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007). "To determine whether a substantial breach occurred, a trial court considers 'whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive.'" *Able Demolition, supra* quoting *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990). Rulings addressing a "substantial breach" are subject to close scrutiny. *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1967). "Such scrutiny discloses that the application of such a rule can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as causing of a complete failure of consideration or the prevention of further performance by the other party." *Id.* (Internal citations omitted).

In *Able Demolition, supra*, the plaintiff contracted with the defendant to tear down abandoned homes. However, the terms of the parties' agreement required that the plaintiff obtain a pre-demolition authorization known as the letter to proceed from the law director prior to performance. *Id*. at 578-579. After demolishing numerous buildings for which the defendant failed to pay, the plaintiff filed suit, alleging breach of contract, promissory estoppel, unjust enrichment, and quantum meruit. The defendant alleged that the material terms of the contract were not satisfied when the plaintiff failed to obtain the letters to proceed before it demolished the homes, and thereby, forfeited its right to payment. The trial court agreed and granted summary disposition in favor of the defendant. *Id*. at 580-581.

On appeal, the plaintiff asserted that it demolished buildings in accordance with the central purpose of the agreement and therefore, its failure to obtain and submit the preapproval letters did not excuse the defendant's obligation to pay for its services. *Id*. at 585. This Court disagreed, holding:

> We disagree with Able's assertion for several reasons. Though the contract contemplated that Able would perform demolition services for the city, the contract here is more than a mere services contract. Rather, the contract is a "legal protocol," and, as such, the critical aspect of the agreement is that any demolition be accomplished in strict compliance with the procedures designated by Pontiac's legal department to minimize the risk of legal liability and the

> serious violation of citizens' property rights. A demolition company must ask the city for a letter on the day of each demolition because, in some cases, a property owner may obtain a last-minute temporary restraining order to prevent destruction of a building. Clearly, the city insists on the clause to avoid liability for demolitions that should not, legally, go forward. This intent is clear because the contract language makes the letter to proceed mandatory on the date the demolition is performed, and this preapproval letter must be issued by the city's director of law. Because this step is in the contract to protect property rights and to protect the city from exposure to liability, the letter-to-proceed provision is an essential term of the contract and not a mere technicality. Indeed, the term goes to the heart of the agreement and reflects that the parties understood that the underlying action – the demolition of property – carries with it serious legal implications for all parties. If the parties were not bound by this term, the legal safeguards set forth in the agreement would be rendered meaningless. Thus, we hold that Able's breach was substantial and that Able may not maintain an action for damages against Pontiac as a matter of law. [*Id*. at 585-586.]

In the present case, plaintiff contends that a substantial breach did not occur because defendants were able to use and enjoy the property as intended for the entire term of the land contract, and it did "in no way interfere[] with that use and enjoyment." Plaintiff also alleges that it did not have any duty to convey title until payment of all sums due and owing.

However, we note that plaintiff fails to address that aspect of the trial court's ruling wherein it relied on the statutes addressing forfeiture to conclude that a substantial breach occurred. Plaintiff does not address the trial court's ruling with any citation to authority. When an appellant fails to challenge the basis of the ruling by the trial court, we need not even consider granting the party the relief requested. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).[3]

Moreover, contrary to plaintiff's assertion, defendants did not obtain the benefit of the land contract agreement. Irrespective of the use and enjoyment of the premises, defendants were

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[3] Although plaintiff fails to brief and address this aspect of the trial court's ruling, MCL 211.78g(1) provides that the property "is forfeited to the county treasurer" when there was a failure to pay property taxes in the preceding 12 months. A land contract vendee is vested with the equitable title in the land with the legal title remaining in the vendor. *Darr v First Federal Savings & Loan Ass'n*, 426 Mich 11, 19-20; 393 NW2d 152 (1986). A land contract vendee is entitled to possession of the land and retains an equitable lien upon the land against subsequent encumbrances and purchases. *Id*. In the present case, defendants were provided documentation indicating that plaintiff did not have valid legal title at the time that it entered into the land contract according to the law regarding forfeiture. However, plaintiff fails to address this authority. We note also that for the first time on appeal, plaintiff contends that the taxes were paid and presents a receipt. However, that argument and document was not submitted in the trial court. Our review is limited to the record established in the trial court, and it is inappropriate for a party to expand the record on appeal. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

making payments on the land contract, not as rent, but rather with the intention of owning the property at the conclusion of the contractual period. However, defendants were unable to protect the interest in the land contract because they were unable to record their land contract and the superior liens were subject to foreclosure at anytime. In light of plaintiff's failure to address the trial court's ruling and the failure of consideration, the trial court properly granted summary disposition in favor of defendants.[4]

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

[4] We note that plaintiff "contests" the assertion that defendants were not parties to the prior lease when they were listed as officers of the corporation. However, plaintiff, once again, fails to cite legal authority discussing the distinction between corporate and individual liability. Therefore, this contention is without merit.