STATE OF MICHIGAN

COURT OF APPEALS

WAYNE W. WEBBER, JOAN & WAYNE WEBBER, L.L.C., and WEBBER RESEARCH FOUNDATION, Plaintiffs-Appellants,	UNPUBLISHED February 23, 2010
v	No. 289113 Presque Isle Circuit Court
MUY GRANDE RANCH, INC., GLEN A. CATT, JEANNE M. CATT, PERRY HELESKI, PAULETTE HELESKI, DANIEL A. PEYERK, and GREENSTONE FARM CREDIT SERVICES, Defendants-Appellees.	LC No. 06-002752-CK

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right the court's orders dismissing their claims for breach of contract, specific performance, fraud, and misrepresentation on defendants' motions for summary disposition and also the court's order canceling their notice of lis pendens. We affirm.

I. Background

This case arises out of plaintiffs' attempt to seek specific performance and breach of contract on their purchase agreement with defendants, Muy Grande Ranch, Inc., and Glen and Jeanne Catt (hereinafter "sellers"). The purchase agreement provided for plaintiffs' purchase of a 1,500 acre commercial deer hunting ranch along with assets and inventory in Presque Isle County for $4,750,000. The agreement required an initial deposit of $150,000, which plaintiffs tendered on September 1, 2006, and contained relevant termination provisions. Specifically, Paragraph 5 provided plaintiffs a unilateral right to terminate the agreement within the first 15 days of the due diligence period[1] for a full refund of the initial deposit. If plaintiffs failed to

[1] The due diligence period extended for 30 days following the date of the agreement's execution. The purchase agreement required sellers to provide plaintiffs with books and records "with respect to each and every part of the Property and Business" to enable plaintiffs to perform their (continued…)

terminate within the first 15 days, a second deposit of $150,000 was required under Paragraph 2(a). Paragraph 10 provided that in the event of sellers' material breach and failure to cure by the closing date, plaintiffs were entitled to terminate the agreement, pursue all remedies at law or equity, and receive a full refund of the deposit.

On September 13, 2006, defendant Glen Catt acknowledged in an email to plaintiffs' attorney plaintiffs' request for information concerning the breeding facility and deer population. Catt specifically noted that as he was in Montana, he did not have that information with him and that his ranch hand, Tom Selke, also did not have that information. Plaintiffs' lawyer responded with an email requesting Catt to answer specific questions concerning the deer population on the ranch. The next day, September 14, 2006, Catt replied that other than the annual inventory report filed with the Michigan Department of Natural Resources (which was attached to the purchase agreement), all information was "kept in [his] head," Dr. Kroll had no information,[2] and he had answered plaintiffs' questions to the best of his ability.

On September 15, 2006 – the fifteenth day of the due diligence period – plaintiffs requested from sellers the return of their initial deposit on the grounds that the purchase agreement provided them a unilateral right for return of their initial deposit within the 15-day due diligence period. Additionally, plaintiffs noted their dissatisfaction with the sellers' representations of deer inventory and health report as well as the sellers' maintenance of the ranch. While plaintiffs indicated their "hope[]" that sellers would takes steps to ensure plaintiffs' timely acquisition of the ranch, plaintiffs expressly indicated that sellers should contact them "if [they] desire[d] to proceed."

Notably, before receiving this notice, sellers had entered into a "secondary purchase agreement" on September 13, 2006, with defendants, Perry and Paul Heleski, ostensibly to sell the property to the Heleskis for $5,250,000 in the event that the original agreement with plaintiffs fell through.[3] On October 12, 2006, the Heleskis and sellers closed on the ranch and a warranty deed was conveyed to the Heleskis.

On the same date as closing, plaintiffs initiated suit seeking declaratory relief, specific performance and damages for breach of contract. A notice of lis pendens was also filed. Defendants answered and filed motions for summary disposition. Sellers also filed a counterclaim for slander of title.[4]

The court initially granted the summary disposition motions and dismissed plaintiffs' breach of contract and specific performance claims, but on reconsideration, granted a hearing to determine whether the sellers breached the disclosure requirements of the purchase agreement in

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(…continued)

due diligence.

[2] Dr. Kroll is an expert in white-tailed deer management who had worked on the ranch deer herd from 1995 through 2004.

[3] Defendant Peyerk provided financing for the Heleskis. For ease of reference, we will collectively refer to those defendants as the "Heleskis."

[4] That claim was later dismissed.

order to prompt plaintiffs' termination. Following the hearing, the court again dismissed the breach of contract claim, holding that plaintiffs' had proceeded under the unilateral termination provision of Paragraph 5 and had additionally made no demand for a cure of the alleged breaches and left the option to proceed wholly within the sellers' discretion. In rendering this ruling, the court rejected plaintiffs' claim that Paragraph 10 entitled them to pursue of all remedies in law or equity.[5]

On June 6, 2007, the Heleskis filed their motion to cancel the lis pendens. On July 25, 2007, the court entered an order granting this motion because as potential purchasers, the Heleskis had no legal duty to contact other prospective purchasers (i.e., plaintiffs) before entering into a purchase agreement and their ability to develop the ranch outweighed any possibility that plaintiffs could prevail on their specific performance claim.

Plaintiffs subsequently filed a second amended complaint alleging conspiracy to commit fraud, and intentional and negligent misrepresentation against the sellers and also moved for reinstatement of the breach of contract and specific performance claims based on records allegedly withheld from plaintiffs during the due diligence period. Sellers replied to the reinstatement motion and also filed a counter motion for summary disposition of the fraud and misrepresentation claims.

On July 28, 2008, the court conducted a hearing on plaintiffs' motion to reinstate and sellers' counter motion for summary disposition. Regarding reinstatement, the court dismissed plaintiffs' motion because the records were not material to their claims. Regarding plaintiffs' remaining claims, the court found that defendant's failure to provide inventory records sought by plaintiffs did not constitute a cause for breach of contract or fraud where the records contained no information that would have yielded a different result, i.e., plaintiffs would have still terminated the purchase agreement. Additionally, the court determined that sellers' alleged misrepresentation regarding Dr. Kroll failed to establish that but for the misrepresentation, plaintiffs would have consulted Dr. Kroll on September 13, 2006, or that Dr. Kroll could have provided the information plaintiffs sought before their termination on September 15, 2006. Thus the court concluded that while plaintiffs could have requested additional information and then (depending on that information) have terminated the agreement and received a full refund, plaintiffs' exercise of their unilateral right to terminate rendered them "with no viable cause of action upon which to continue this litigation." Accordingly, the court entered a final order dismissing plaintiffs' fraud, conspiracy and misrepresentation claims. The instant appeal ensued.

II. Analysis

A. Breach of contract and specific performance

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[5] Plaintiffs' application for leave to appeal that decision to this Court was denied. *Webber v Muy Grande Ranch, Inc*, unpublished order of the Court of Appeals, entered December 11, 2007 (Docket No. 277979).

Plaintiffs first argue that genuine issues of material fact precluded summary disposition of their breach of contract and specific performance claims. We review de novo an appeal from an order granting summary disposition pursuant to MCR 2.116(C)(10). *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 the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *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). We also review issues of contract interpretation de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

As a starting point, plaintiffs maintain that the trial court's order of January 19, 2007, prematurely dismissed their claims because discovery was not completed. Absent a scheduling order, a motion under MCR 2.116(C)(10) may be raised at any time. MCR 2.116(D)(4). "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

While plaintiffs' initial challenge to sellers' summary disposition motion raises the issue of incomplete discovery on grounds that issues of fact existed concerning whether the Heleskis were bona fide purchasers, plaintiffs failed to support this claim – at that time – with independent evidence. Rather, plaintiffs merely cited defendants' brief and attached their attorney's deposition and the purchase agreement – none of which was sufficient to create a genuine issue of material fact.

In any event, the court entertained plaintiffs' subsequent motion to reinstate their breach of contract and specific performance claims after plaintiffs had conducted "extensive discovery." The court denied that motion on the ground that plaintiffs failed to establish how the additional discovery was material to their claim. Regardless, we note that plaintiffs admit that the evidence underlying their breach of contract and specific performance claims was the same as the evidence underlying their misrepresentation and fraud claims. Notably, in dismissing plaintiffs' misrepresentation and fraud claims, the court examined the additional discovery and also determined that no genuine issue of material fact existed supporting plaintiffs' breach of contract claim.

Even more importantly, plaintiffs make no argument on appeal that additional discovery is necessary or that the court's failure to reinstate their breach of contract and specific performance claims was erroneous due to incomplete discovery. Instead, plaintiffs argue that the court ignored the evidence from their "extensive discovery" and made improper findings of fact in dismissing their claims. In view of this, plaintiffs' reliance on the availability of evidence obtained in discovery is unfounded. *VanVorous v Burmeister*, 262 Mich App 467, 476-477; 687 NW2d 132 (2004) (summary disposition may be appropriate "if further discovery does not stand a fair chance of finding factual support for the nonmoving party.").

This brings us to plaintiffs' argument that the court improperly made findings of fact that were unsupported by the additional discovery. The additional discovery included electronic records regarding the ranch and deer inventory compiled from 15,000 pages of notes pertaining to sellers' deer breeding facility[6] as well as Dr. Kroll's affidavit and the parties' depositions.

Initially, we note that the court's alleged factual findings related specifically to plaintiffs' misrepresentation and fraud claims, and not the breach of contract claim. Furthermore, it was within the context of plaintiffs' motion to reinstate their breach of contract claim that the court found that the additional discovery was not material to plaintiffs' claim. Important for purposes of this appeal, plaintiffs have failed to challenge the order denying their motion to reinstate those claims and do not include any such argument in the statement of questions presented. Thus, to the extent plaintiffs' challenge rests on that ground, it is waived. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). However, regardless of whether the trial court erred in failing to find genuine issues of material fact concerning the location, control, disclosure, and relevance of these records,[7] the court correctly dismissed plaintiffs' breach of contract claim.

"In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) (citations omitted).

As previously set forth in this opinion, Paragraph 5 provided plaintiffs a unilateral right to terminate the agreement within the first 15 days of the due diligence period for a full refund of the initial deposit. Paragraph 10 provided that in the event of sellers' material breach and failure to cure by the closing date, plaintiffs were entitled to terminate the agreement, pursue all remedies at law or equity, and receive a full refund of the $300,000 deposit.[8]

The meaning of Paragraphs 5 and 10 are not in dispute in this case. Rather, at issue is their applicability. Specifically, plaintiffs submit that the trial court erred and made an impermissible factual finding that their letter of September 15, 2006, invoked Paragraph 5, when in fact, the intent of their letter was ambiguous. This argument is not sustainable in view of the straightforward language of plaintiffs' letter.

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[6] According to Selke, these records contained information relating to both the deer inventory on the ranch as well as deer health.

[7] Regarding the breeding inventory records, while it is undisputed that Catt directed Selke to provide plaintiffs' attorney with all records located at the ranch, it appears there was a genuine issue of material fact regarding whether these notes were in fact located at the ranch. Similarly, while the court found that Dr. Kroll's data were out of date, Kroll in fact testified that data in his possession would have been relevant to deer on the ranch in September 2006.

[8] If the purchaser did not invoke the unilateral right to terminate under paragraph 5, then an additional $150,000 was to be deposited by the purchaser. Plaintiffs never made the subsequent deposit.

That letter expressly requests a return of the initial deposit because "[t]he Purchase Agreement provides that the Purchaser has a unilateral right for the return of the Initial Deposit within the 15 day period." The letter also cites plaintiffs' dissatisfaction with the deer inventory report, the inadequacy of the deer health report and the sellers' failure to maintain the ranch (as required by Paragraph 8(a) of the purchase agreement) as reasons for requesting a refund. Notably, while the purchase agreement does require sellers to provide plaintiffs with all records as needed to conduct due diligence, the only provision in the purchase agreement providing plaintiffs a "unilateral right" to terminate the contract within the first 15 days is Paragraph 5. And that section provides no additional remedy other than a refund of the initial deposit with interest.

Plaintiffs correctly point out that a contract must be read as a whole to ascertain the parties' intent, but wrongly conclude that the terms of their letter invoked Paragraph 10, or were at least ambiguous. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Indeed, even assuming that plaintiffs' additional reasons for requesting the return of their deposit (i.e., the deer inventory, health reports, and maintenance of the ranch) outlined a potential material breach, plaintiffs' letter made no reference whatsoever to Paragraph 10, let alone to the provisions of that section. This is key because Paragraph 10 expressly provides that the purchaser is entitled to immediate return of the deposit "*[i]f this Agreement is terminated by Purchaser pursuant to this paragraph*." (Emphasis supplied.) While it is true that plaintiffs reference neither Paragraph 5 nor 10 by name, plaintiffs clearly indicate that their request for return of the deposit within the 15-day due diligence period was based upon the "terms of the Purchase Agreement," and those terms are found *exclusively* in Paragraph 5. Importantly, this is the *only* section of the purchase agreement plaintiffs cite in support of their request. And as Paragraph 5 – unlike Paragraph 10 – provides no additional remedy other than the return of the deposit, the purchase agreement provides plaintiffs no further recourse in this case.

Plaintiffs maintain that because the letter invited the seller "to take steps, quickly, that would allow the Purchaser to proceed with the acquisition on a timely basis" and because plaintiffs reiterated this ""hope[]" to the sellers by email as late as September 18, 2006, such invitations could not have evidenced their intent to terminate the purchase agreement, but instead invoked the "cure" provision of Paragraph 10. Both Paragraphs 5 and 10, however, condition a return of the deposit on plaintiffs' terminating the purchase agreement. Thus, by expressly invoking their "unilateral right for return of the return of the Initial Deposit within the 15 day period," plaintiffs necessarily invoked their right to terminate or put an end to the contract.[9] Consequently, plaintiffs' invitations to sellers to fix any perceived problems cannot create a genuine issue of material fact regarding the intent of the letter where each alleged problem was cited in reference to plaintiffs' requesting a refund of their initial deposit.[10]

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[9] Black's Law Dictionary (7th ed) defines "terminate" as "[t]o put and end to; to bring to an end" or "[t]o end; to conclude."

[10] Our reference to the cure provision of Paragraph 10 has no bearing on its use as an affirmative defense, but rather is relevant to determining the intent of plaintiffs' letter.

In any event, plaintiffs' invitation at the end of their letter to contact plaintiffs' attorney "[I]f [sellers] desire to proceed[,]" belies any argument that plaintiffs sought further action on behalf of sellers in accordance with the purchase agreement. Such language is clear and unequivocal and can hardly be construed as a polite demand that sellers honor the contract, as plaintiffs now argue. We therefore conclude that the trial court did not engage in impermissible fact finding with respect to plaintiffs' letter of September 15, 2006, and simply applied the unambiguous contractual language to the plain language of that letter.

Ultimately, to quote a popular phrase, plaintiffs want to have their cake and eat it too. Had plaintiffs intended to continue with the transaction as they now argue, they could have made a request to cure, made the second deposit as required by the agreement, and then still have terminated under Paragraph 10 in the event sellers' failed to cure any alleged material breach and sought legal remedies in accordance with that section in addition to receiving a full refund.[11] Instead, by exercising their right to a refund under the provisions of Paragraph 5, plaintiffs terminated the purchase agreement and have no further recourse. We will not countenance plaintiffs' request at this stage to apply in retrospect the section of the purchase agreement plaintiffs would now prefer to have invoked.[12]

B. Due process violation

Plaintiffs next contend that because they lacked notice that the court was considering summary disposition with respect to their claims of fraud and misrepresentation, they were denied due process. Whether a party was given sufficient notice to satisfy due process is a legal question ordinarily reviewed de novo. *In re Duane V Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007), result only aff'd 480 Mich 915 (2007). However, since plaintiffs failed

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[11] By failing to tender their second deposit as required by the agreement, plaintiffs failed to render full performance and cannot maintain a claim for specific performance. *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982).

[12] Additionally, sellers' entering into the secondary purchase agreement with the Heleskis did not violate Paragraph 4(v) of the purchase agreement (representing that seller had not entered into another agreement to sell the ranch) since the secondary purchase agreement was executed *after* sellers executed the purchase agreement with plaintiffs. Similarly, the doctrine of anticipatory breach provides no refuge for plaintiffs since at no point did sellers unequivocally declare their intent not to perform. *Brauer v Hobbs*, 151 Mich App 769, 776; 391 NW2d 482 (1986) ("Under the doctrine of anticipatory breach, if a party to a contract, prior to the time of performance, unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance.") Rather, Glen Catt expressly testified that he had informed Selke that no information was to be kept from plaintiffs prior to plaintiffs' attorney's inspection of the ranch on September 14, 2006. That Catt may have been mistaken regarding the location, relevance and amount of other information available in his emails to plaintiffs' attorney hardly demonstrates an unequivocal intent to the contrary. Similarly, that he may have had a motive or desire to close on the ranch with the Heleskis does not, *ipso facto*, show the required unequivocal intent.

to raise this due process issue below, our review is for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

"Generally, due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) (quotation marks and citation omitted). In the context of summary disposition, this means a party must be given adequate notice and a chance to respond. See *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 88-90; 492 NW2d 460 (1992) (Corrigan, J., concurring) and *Lawrence v Dep't of Corrections*, 81 Mich App 234, 237-239; 265 NW2d 104 (1978).

Plaintiffs have no grounds to claim a due process violation. Although the sellers' brief in support of the motion contains no law on fraud or misrepresentation, the sellers expressly argued in their response to plaintiffs' reinstatement motion and counter motion for summary disposition that "discovery has established as undisputed fact that there was no breach of contract by Catt, no fraud or material misrepresentation, either intentional or negligently by Catt, and that Catt provided the Plaintiffs with the appropriate and necessary information concerning the deer herd inventory and appropriate testing of the herd prior to September 13, 2006." Sellers then went on to explain why no genuine issue of material fact exists on these issues. At the motion hearing, plaintiffs' counsel admitted that all of their claims "derive[d] from the same evidence" and argued why that evidence created genuine issues of material fact. Additionally, at the conclusion of his argument, he indicated that plaintiffs "should be allowed to fully present [their] evidence to a jury on the fraud and the breach of contract claims and to this court as to the equitable claims."

Furthermore, it should be noted that after denying plaintiffs' motion to reinstate the breach of contract and specific performance claims, the court indicated on the record that an opinion would be issued shortly regarding sellers' summary disposition motion. Plaintiffs maintain that they believed this statement referenced sellers' original motion for summary disposition with respect to their breach of contract and specific performance claims. However, this understanding is belied by the fact that the court had already dismissed these claims and had confirmed that ruling in denying plaintiffs' motion to reinstate them. The court cannot dismiss claims that have not been reinstated. As such, the only claims on the table for summary disposition were plaintiffs' fraud and misrepresentation claims. In view of the foregoing, it cannot be argued that plaintiffs lacked sufficient notice or an opportunity to respond to sellers' counter motion for summary disposition. We find no plain error let alone a violation of substantial rights.

C. Cancellation of the notice of lis pendens

This brings us to plaintiffs' final argument: that the court erred in canceling their notice of lis pendens. Plaintiffs frame this issue as pertaining to summary disposition. However, while the court indicated in its initial summary disposition order of January 19, 2007, that the notice of lis pendens would remain in effect until 21 days following the final order denying reconsideration or through the pendency of an appeal, a trial court's decision to cancel a notice of lis pendens on equitable principles is a discretionary one. *Altman v City of Lansing*, 115 Mich App 495, 507; 321 NW2d 707 (1982); see also, MCL 600.2731(3). Indeed, the court entered a separate order canceling the notice of lis pendens only after the Heleskis filed the relevant

motion. Thus, our review is for an abuse of discretion. A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCL 600.2731(3) permits a court to cancel a notice of lis pendens made in a pending action for specific performance of a contract to convey real property. The decision to cancel a notice of lis pendens is proper if the judge determines that "the benefits of the notice are far outweighed by the damage it causes." *Altman*, 115 Mich App at 507. In making its ruling, the court determined that the Heleskis' ability to develop the ranch outweighed the possibility that plaintiffs could prevail on their specific performance claim. Additionally, the court noted that the Heleskis had no duty to determine directly from plaintiffs whether plaintiffs had an interest and reiterated that plaintiffs had terminated the contract in their letter of September 15, 2006.

In challenging the court's ruling, plaintiffs maintain – without citation to the record – that cancellation of the lis pendens was improper because the Heleskis recorded their deed the day after the notice of lis pendens was filed and made no inquiry of plaintiffs regarding plaintiffs' interest in the ranch. This argument is without merit. For starters, it appears the Heleskis acquired their interest in the ranch before plaintiffs filed their notice of lis pendens. On this point, Heleski testified that closing on the ranch occurred between 9:00 and 10:00 a.m. on October 12, 2006. The time stamp on the notice of lis pendens, however, was not until 10:26 a.m. that same day. In any event, plaintiffs' argument ignores that before canceling the notice of lis pendens, the trial court had already ruled that plaintiffs had terminated the purchase agreement on September 15, 2006, by invoking Paragraph 5. This ruling was correct. Therefore, the question of whether the Heleskis checked with plaintiffs before recording their interest is moot. *Eller v Metro Contracting*, 261 Mich App 569, 571; 683 NW2d 242 (2004) ("An issue is moot and should not be reached if a court can no longer fashion a remedy."). There was no abuse of discretion.

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray