# STATE OF MICHIGAN

# COURT OF APPEALS

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| OAKWOOD OF CAMBRIDGE, L.L.C.,<br><br>Plaintiff-Appellee,<br><br>v<br><br>JAMES KAPSA and VERONICA KAPSA,<br><br>Defendants-Appellants. | UNPUBLISHED<br>May 20, 2010<br><br>No. 289590<br>Wayne Circuit Court<br>LC No. 07-702577-CK |

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's orders granting plaintiff's motion for summary disposition, awarding damages, and denying defendants' motion for new trial and entry of new judgment in this breach of contract action. We affirm insofar as the court found defendants liable under the purchase agreement, but reverse the court's orders awarding damages and case evaluation sanctions, and denying defendants' motion for a new trial and new entry of judgment, and remand for proceedings consistent with this opinion.

## I. BACKGROUND

The genesis of this case is the decision of defendants, James Kapsa and Veronica Kapsa, to move from their home in Trenton to Brownstown Township to live closer to their daughter. In February 2005, defendants entered into a building and purchase agreement with plaintiff to construct a 3,400 square foot Rosewood model home within a block of their daughter's house. The building and purchase agreement between the parties, entered into on February 1, 2005, called for a total purchase price of $357,990 in addition to mortgage and closing costs. Included in the total cost were five $5,000 installment payments due upon signing and at various stages of construction. Not included in the total cost were landscaping and flooring, which totaled $50,000 and were required for issuance of the certificate of occupancy. Pursuant to the agreement, closing was to occur within seven days of the issuance of that certificate.

Upon defendants' obtaining pre-approval for a $300,000 mortgage, construction on the home commenced. Undertaking such liability was of no grave concern to defendants at the time they obtained the pre-approval, however. Indeed, both defendants were gainfully employed, were receiving payments from their rental property ("Oakwood house") that they planned to later sell along with their current home in Trenton, and had $276,000 in "liquid assets" – $85,000 of

which was in savings and the remainder was in various 401(k) accounts.[1] Defendants even owned a classic corvette worth $15,000.

During the construction phase, defendants visited the house and met with plaintiff's president, Damiano Randazzo, numerous times. Over the course of these visits, defendants made 25 modifications to the original construction plan–all at additional expense. While Randazzo ensured all changes were made, he mistakenly indicated in the building permit that under construction was a 3,200 square foot Redwood model without air conditioning, and accidentally submitted an energy analysis report pertaining to an Aspen model home. Notwithstanding, construction continued in accordance with defendants' plans.

Although Randazzo had initially estimated that construction would be complete by Thanksgiving of 2005, the house was not finished until August 2006. It was also around that time that defendants' financial fortunes took a turn for the worst. In July of that year, defendants paid their daughter's $25,000 debt to the IRS when she lost her job. The following month, as a result of his former employer's bankruptcy, Mr. Kapsa's pension was reduced by $1,400 and his health benefits were eliminated. As a result, defendants took out a health insurance policy with a $1,925 monthly premium. Additionally, Mr. Kapsa's current employer reduced his working hours that same month, and defendants were unable to sell their Oakwood house, which their tenants had vacated, thus leaving defendants with a $1,000 monthly mortgage payment. Notwithstanding, on August 29, 2006, defendants' lender approved their loan for $300,000.

With the closing date of September 11, 2006, fast approaching, defendants participated in the final walk-through of the home and signed the final walk-through document dated August 23, 2006, indicating defendants "found no items of concern." The certificate of occupancy was issued in due course on September 8, 2006. Mrs. Kapsa, however, maintained that the final walk-through occurred "much earlier" than that date, which did not appear on the form when she signed it. Nevertheless, sometime after the walk-through, according to Mrs. Kapsa, defendants informed Randazzo that they were not prepared to close due to their financial situation and inquired about entering into a land contract with plaintiff. Mrs. Kapsa elaborated that Randazzo suggested in response that defendants take out another loan. Closing was rescheduled for November 13, 2006. Despite these alleged conversations with Randazzo, defendants participated in additional walk-throughs after September 11, 2006, and even requested additional changes to the house. In Randazzo's words, defendants appeared to be "waffling." Additionally, Randazzo testified that defendants did not inform him of their financial situation until all of defendant's additional minor changes were completed–a time he pegged as occurring sometime between September and November 2006.

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[1] Mrs. Kapsa earned between $40,000 and $50,000 annually from ABC Warehouse, and Mr. Kapsa earned an hourly wage at DTE Energy, in addition to his $3,500 monthly pension and health benefits from Great Lakes Steel. Rental payments from the Oakwood house totaled $1,000 per month.

By November 2006, defendants had discovered another house for sale in the subdivision neighboring their daughter's and entered into a purchase agreement for that home on November 3, 2006. Defendants applied for and received a $240,000 mortgage for that home and, after providing a $60,000 down payment, closed on December 31, 2006. However, it was not until Randazzo's brother-in-law observed Mr. Kapsa coming out of the garage of the newly purchased house, that Randazzo discovered defendants had purchased a different house. And although it is unclear from the record when this discovery occurred, Randazzo noted that defendants failed to attend the closing rescheduled at their request for November 13, 2006, and the second rescheduled closing for November 22, 2006.

On January 29, 2007, plaintiff filed suit seeking specific performance or damages for breach of contract.[2] Defendants filed an answer and affirmative defenses, claiming, *inter alia*, that the Rosewood house was not constructed in accordance with the purchase agreement, impossibility precluded their performance, and plaintiff had failed to mitigate damages. Following Randazzo's deposition in June 2007, plaintiff eventually listed the Rosewood house for resale in July 2007, seven months after filing the initial complaint. While the home was listed for $319,000, it was sold to another buyer for $295,000 on August 4, 2007.

On January 25, 2008, plaintiff filed for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense) and (10) (no genuine issue of material fact), arguing that it was entitled to damages where it had performed in compliance with the contract. Plaintiff additionally contended that impossibility was not a viable defense to defendants' failure to perform since the alleged financial hardship occurred after the contract was executed, defendants had already obtained a binding loan commitment, and the contract permitted defendants to finance their purchase should they not qualify for a mortgage.

Defendants responded that because plaintiff failed to complete construction in accordance with the contract, they were entitled to summary disposition under MCR 2.116(I)(2) (opposing party entitled to summary disposition). Alternatively, defendants argued that plaintiff built the house at its own risk since defendants failed to secure financing and the doctrine of impossibility excused defendants' performance.

At the summary disposition motion hearing of February 29, 2008, the parties contested the issue of whether plaintiff, in fact, constructed the home for which the parties contracted, and agreed that additional testimony was necessary to resolve this issue. Accordingly, the court adjourned the proceedings for a bench trial.

Following two days of testimony, the court ruled that plaintiff had constructed the home in accordance with the contract and that defendants' claim of impossibility was meritless. With respect to home construction, the court found that despite any typographical errors in the building permit application, the floor plan as well as defendants' inspections and walk-throughs showed that the correct house was built. Regarding impossibility, the court initially acknowledged the difficulty of economic downturns, but explained that defendants' situation was

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[2] Plaintiff dropped its claim for specific performance after it sold the house to a different buyer.

one of inconvenience rather than impossibility given that they had sufficient funds in their savings and retirement accounts, their income had not changed dramatically, and the purchase price of their new home was only $50,000 or $60,000 less than the original Rosewood price. Accordingly, the court granted plaintiff's motion for summary disposition.

Concerning damages, the parties disputed whether the purchase agreement limited damages to the amount plaintiff had collected under the contract, which amounted only to one $5,000 installment payment. The court found that after the certificate of occupancy was issued, defendants refused to participate in closing despite Randazzo's efforts, and interpreting the contract in light of *Schneider v Levy*, 256 Mich 184; 239 NW 326 (1931), the court ruled that since enforcement of the liquidated damages clause was enforceable at plaintiff's discretion, plaintiff was permitted to pursue actual damages. Thus, the court awarded plaintiff $85,215 for the difference between the contract price owed by defendants and the actual resale price and $10,688.21 for the modifications made to sell the home.[3]

Defendants subsequently filed a motion for a new trial to amend the findings and for entry of a new judgment on the grounds that the correct measure for damages was the difference between the contract price and the market value of the land at the time of breach. The court denied this motion on August 12, 2008, ruling that the actual resale price of the home was the proper benchmark for damages given that there was no evidence of market value for the date of the breach. The court also noted that defendants effectively forestalled breaching the contract and that plaintiff was forced to sell under deteriorating market conditions. In addition, the court awarded case evaluation sanctions to plaintiff in the amount of $13,520. An order was entered reflecting this ruling on December 15, 2008. The instant appeal ensued.

## II. ANALYSIS

### A. IMPOSSIBILITY AND BREACH OF CONTRACT

Defendants contend that the court erred in not finding that the change in their financial circumstances rendered their performance impossible as a matter of law and in finding that plaintiff did not breach the purchase agreement. At the outset, we note that the trial court ruled on these issues by way of granting plaintiff's motion for summary disposition following a bench trial. Regarding this procedural irregularity, MCR 2.116(I)(3) does permit an immediate trial to resolve any disputed issues of fact in a motion for summary disposition provided the grounds asserted in support of summary disposition are based on subrules (C)(1) through (7). The relevant bases of plaintiff's motion, however, were subrules (C)(9) and (10). Notwithstanding, *both* parties agreed to proceed with a bench trial at the conclusion of the summary disposition motion hearing, and importantly, the order granting summary disposition under subrule (C)(10) was entered only after the trial court made findings of fact integral to granting that order. Given

[3] The court, however, rejected plaintiff's request for additional damages (including utilities, maintenance fees, insurance, and interest) because it was not until defense counsel urged plaintiff to mitigate damages at his deposition several months after litigation commenced that plaintiff sought a new buyer for the home.

these circumstances, it is appropriate for this Court to review this case under the standard appropriate for a bench trial. *Beach v Lima Twp*, 283 Mich App 504, 524 n 7; 770 NW2d 386 (2009). Therefore, we review the trial court's findings of fact for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C).

1. IMPOSSIBILITY

The doctrine of impossibility may extinguish a party's liability under a contract if performance of the party's promise becomes objectively impossible. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73; 737 NW2d 332 (2007). Courts have classified impossibility into two categories: original and supervening. *Rogers, Plaza, Inc v SS Kresge Co*, 32 Mich App 724, 743; 189 NW2d 346 (1971). Original impossibility exists when performance is promised that was impossible at the time of the contract's inception, whereas supervening impossibility develops sometime after the parties entered into their contractual agreement. *Id*. In either event, "absolute impossibility is not required," however, "there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Roberts*, 275 Mich App at 74. In this case, defendants only raise the issue of supervening impossibility.

Contrary to defendants' argument, the facts of this case are legally insufficient to invoke the doctrine of supervening impossibility. Indeed, despite the fact that defendants faced a reduction in their monthly income and were unable to sell their Oakbrook home, it was undisputed that their "liquid assets" of $276,000 were sufficient to supplement their mortgage payments on the Rosewood home.[4] And while a supervening event's lack of foreseeability may produce an impossibility sufficient to extinguish liability, *Vergote v K Mart Corp* (*After Remand*), 158 Mich App 96, 110; 404 NW2d 711 (1987), under Michigan law "[s]ubsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve [a party of its contractual obligations.]" *Chase v Clinton Co*, 241 Mich 478, 484; 217 NW 565 (1928).

Consistent with *Chase*, comment b to § 261 of the Restatement 2d of Contracts[5] elaborates: "The continuation of existing market conditions and of the financial situation of the

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[4] Besides the approximate $85,000 difference in cost between the Rosewood house and the house defendants actually purchased, defendants were also liable to plaintiff for $50,000 in flooring and landscaping costs.

[5] Restatement Contracts, 2d § 261 states:

> Discharge of Supervening Impracticability
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> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this section." Thus, although a near-retirement age couple tapping into their savings or retirement account prematurely is certainly lamentable, it is not sufficient to relieve defendants of their contractual obligation to plaintiff under these circumstances. The court, after making factual findings supported in the record, did not err in ruling that there was no supervening impossibility as a matter of law.[6]

Defendants counter that they faced a "dramatic decrease in income" given that Mr. Kapsa not only lost his pension and faced a reduction in his work hours, but also because they were forced to purchase their own health insurance when his former employer went bankrupt. Despite these difficulties, however, we would be remiss if we did not highlight that defendants–during and after the onset of these problems–continued to request minor improvements to the Rosewood home, voluntarily undertook their daughter's $25,000 tax debt to the IRS, and purchased a new home with a purchase price that was approximately $85,000 less than the home plaintiff constructed. Given that defendants' liquid assets totaled $275,000–a sum more than sufficient to cover the difference in cost between the house they purchased and the Rosewood home with the additional improvements–defendants' claim of supervening impossibility is rendered entirely untenable as a matter of law. Impossibility does not extinguish liability in this case.

2. BREACH OF CONTRACT

Alternatively, defendants argue that plaintiff's action for breach of contract is unsustainable where plaintiff was the first party to breach the contract. See *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007) (a party who first breaches a contract may not maintain an action against the other contracting party for his subsequent breach provided the first breach was substantial).[7] Specifically, defendants invoke the "first breach rule" on two grounds: (1) the Township assessor measured the square footage of the home to be 3,088 square feet despite the parties' agreement that the home be 3,400 square feet, and (2) plaintiff obtained a certificate of occupancy whose validity rested upon plaintiff's filing an energy report pertaining to a different home. Defendants cannot prevail on either ground.

First, regarding the square footage of the home, plaintiff maintains that the area of the house as constructed was actually around 3,480 square feet (a number that included plaintiff's 25 modifications to the original building plan), and that the house, therefore, was built in conformity with the agreement. The reason for the incongruity between the assessor's measurement and the agreed upon size of the home, plaintiff argues, is that the assessor's measurement accounts only

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[6] Defendants incorrectly claim that one of the primary grounds for the court's ruling was that defendants had obtained a mortgage commitment for the Rosewood home. But while the court did observe that that mortgage commitment suggested that defendants' income had effectively remained stable, the crux of the court's ruling was that defendants' finding a better deal and refusal to withdraw from their savings and retirement accounts did not constitute an impossibility.

[7] Defendants concede on appeal that the trial court correctly ruled that plaintiff constructed a Rosewood model home as called for in the purchase agreement.

for the floor area of the home–an area that necessarily excludes such features as bay windows and interior walls. While the testimony in the record confirms that the assessor's measurement pertained only to floor area, plaintiff fails to cite–nor can we find–any evidence in the record supporting plaintiff's explanation of the incongruous measurements. This omission is in clear violation of MCR 7.212(C)(7), which requires that "[f]acts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." What is more, plaintiff may not place the onus on this Court to scour the record to factually support its claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

In any event, defendants participated in numerous walk-throughs of the Rosewood home, and while each minor problem they addressed was remedied, not once did defendants challenge the size of the home. Moreover, even though Mrs. Kapsa disputed the date that she signed the final walk-through document, defendants do not dispute their actual execution of that document, which plainly indicated that defendants "found no items of concern." In view of this, we conclude that defendants waived any argument based upon a discrepancy in the square footage of the home as constructed, and therefore defendants are without the refuge they seek at this juncture. *H J Tucker and Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999), quoting *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718-719; 179 NW2d 252 (1970) ("A waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance.").

Second, with respect to the energy report and certificate of occupancy, while it is true that Randazzo admitted to filing the wrong energy report when applying for the necessary building permits, the certificate of occupancy was issued only after Brownstown Township inspectors determined, after looking at every aspect of the Rosewood home's construction, that the construction complied with the state building codes. And defendants have failed to cite any evidence in the record in support of their contention that the home was found compliant based on the submission of the wrong energy report. Thus, reliance on the "first breach rule" is unfounded.

## B. DAMAGES

As their final assignment of error, defendants claim that the trial court incorrectly calculated damages as the difference between the contract price and the price at which the house eventually sold in August 2007. Defendants did not raise this issue on the grounds asserted on appeal until their motion for new trial to amend the findings and for entry of a new judgment.[8] We review a trial court's denial of a motion for new trial for an abuse of discretion, which occurs when the court's decision falls outside the range of reasonable and principled outcomes. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006). To the

[8] Defendants based their initial challenge to plaintiff's claim for damages on the so-called liquidated damages clause, which provided plaintiff the option to (1) retain the deposit for actual costs incurred and render the agreement null and void or (2) to extend financing.

extent the court's decision involved an issue of law or concerned its findings of fact, our review is de novo or for clear error, respectively. *Alan Custom Homes, Inc*, 256 Mich App at 513.

"[W]here a vendor seeks to recover damages from the vendee pursuant to a contract for the transfer of real property, the measure of damages is the difference between the contract price and the market value of the land." *In re Day Estate*, 70 Mich App 242, 246; 245 NW2d 582 (1976), citing Calamari and Perillo, Contracts, § 231, p 365. Market value means the market value as of the date of breach as opposed to the price the vendor later obtained on resale. *Id*. at 246-247. "Where there is some evidence of the market value of the property around the time of the breach, the fact finder should weigh all the evidence in an effort to make a reasonable determination of market value and, hence, damages." *McNeal v Tuori*, 107 Mich App 141, 147; 309 NW2d 588 (1981). However, if "evidence of resale price is the only evidence of market value, the plaintiff has the burden of establishing that resale occurred within a reasonable time, at the highest price obtainable, under terms as favorable as the original contract, and that there has not been a decline in market value." *Id*.

Here, while plaintiff presented evidence of the damages it sustained, the trial court seemed to indicate that no evidence was presented establishing the market value of the house at the date of the breach other than the price at which the home actually sold.[9] In setting the market value at the resale price, however, the trial court failed to consider whether plaintiff bargained for the highest price obtainable under terms as favorable as the original contract. Moreover, while the court noted that plaintiff attempted to resell the house shortly after discovering that defendants had reneged on the purchase agreement, such a finding contradicts its prior decision denying plaintiff's request for additional damages on the grounds that plaintiff failed to adequately mitigate damages. As the court explained at the damages hearing:

> [T]he court is not going to allow any of [plaintiff's additional] damages . . . based on the testimony that plaintiff really took no affirmative action in attempting to mitigate damages until [Randazzo] was forewarned about mitigation or apprised to mitigation by defense counsel during a deposition, some seven or eight months after institution of this litigation. And within two weeks of actively trying to secure a buyer in this property, the property was, in fact, sold, albeit at a reduced price . . . .[10]
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> So those damages are all a result of the delay in the sale from the time of the original closing until it was ultimately sold, which . . . in this court's opinion, are due to the failure to mitigate appropriately in this matter. [Footnote supplied.]

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[9] We note that defendants attached an appraisal of the Rosewood house, dated September 6, 2006, to their motion for new trial and asserted that was sufficient evidence of market value as of the date of breach. However, defendants could have submitted the appraisal at trial, and therefore, the court did not err in failing to consider it. MCR 2.611(A)(1)(f).

[10] At Randazzo's deposition of June 14, 2007, defense counsel inquired into whether Randazzo had attempted to mitigate damages.

The trial court's finding in this respect is significant because it is inconsistent with (1) its later finding at the hearing on defendants' motion for a new trial that plaintiff placed the house back on the market shortly after discovering defendants would not purchase the Rosewood house and (2) the showing required under *McNeal* that the resale occurred within a reasonable time. When this inconsistency is considered in conjunction with the court's failure to consider the other required showings noted previously, we cannot conclude that the court's denial of defendants' motion for a new trial fell within the range of reasonable and principled outcomes.

Additionally, it is unclear that *no* evidence existed to establish fair market value other than the resale price as the trial court seemed to indicate. Of particular note on this point is that the court made no finding on whether the house purchased was comparable to the Rosewood house. Indeed, if that were the case, the court's findings that defendants took advantage of a "slumping" housing market and that plaintiff was forced to sell the home in deteriorating market conditions, considered in conjunction with the sale price of the purchased house and the resale price of the Rosewood house, would be good indicators of the fair market value of the Rosewood house as of the date of breach.[11] And of course in that event, the resale price would not be the *only* evidence of fair market value as the court seemed to indicate. Without a finding with respect to the comparability of the homes, however, the court's findings regarding defendants' opportunism and a deteriorating market would be insufficient in and of themselves because any determination of fair market value would be merely speculative.

Finally, we note that the court's finding as to the exact date of breach is unclear. In particular, the court only indicated that there was "a strong argument that suggest[s] the breach occurred in November or December when [defendants] failed to appear for that last closing [of November 22, 2006]." But the court never made a specific finding of the breach date. *In re Day Estate*, 70 Mich App at 246-247. In light of the foregoing, we conclude the court's denial of the motion for a new trial was an abuse of discretion.

## III. CONCLUSION

We affirm the court's order finding defendants liable under the purchase agreement. However, in light of the court's contradictory and incomplete findings underlying its determination that the resale price was the fair market value at the time of the breach, we reverse the court's award of damages and case evaluation sanctions as well as the order denying defendants' motion for new trial and entry of new judgment, and remand for reconsideration and specific findings of fact on the issue of damages in light of this opinion. In remanding this case, we are of the same mind as the *McNeal* Court, and "intimate no view regarding the conclusion to be drawn by the circuit court after weighing all the evidence, that is, the trial judge must still determine which, if any, evidence is credible in establishing market value, [and] whether the market value of the property at the time of breach exceeded, equalled, or fell short of the contract

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[11] While evidence existed on this point, the court failed to address the issue. Specifically, Randazzo testified that the two houses were essentially comparable and noted that the house purchased was in foreclosure. However, he also testified that he had not been inside the house purchased and was unaware of whether the house had comparable flooring or landscaping.

price." *McNeal*, 107 Mich App at 148. We leave it to the trial court as to whether additional evidence is necessary to decide the damages issue.

We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Jane M. Beckering