STATE OF MICHIGAN

COURT OF APPEALS

JOHNSTONS ENTERPRISES, LLC,

Plaintiff/Counterdefendant-Appellant,

v

AMERITRUCKING, INC.,

Defendant/Cross-Defendant-Appellee,

and

YELLOW TRANSPORTATION, INC.,

Defendant/Cross-Plaintiff/Counterplaintiff,

and

BURR & TEMKIN SOUTH, INC. and GERALD A. RAUCH,

Defendants.

UNPUBLISHED
June 22, 2010

No. 289253
Branch Circuit Court
LC No. 06-010642-CH

JOHNSTONS ENTERPRISES, LLC,

Plaintiff/Counterdefendant-Appellant,

v

AMERITRUCKING, INC.,

Defendant/Cross-Defendant-Appellee,

and

YELLOW TRANSPORTATION, INC.,

No. 291072
Branch Circuit Court
LC No. 06-010642-CH

Defendant/Cross-
Plaintiff/Counterplaintiff,

and

BURR & TEMKIN SOUTH, INC. and GERALD A. RAUCH,

Defendants.

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff/counterdefendant Johnstons Enterprises, Inc. appeals by leave granted the trial court's orders denying summary disposition under MCR 2.116(C)(10). We reverse and remand for proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2003, defendant/cross-defendant Ameritrucking, Inc. was the owner of certain property in Coldwater, Michigan. The property contained a trucking terminal with 114 loading positions, an office, two shops, a storage building, and a gatehouse.

In April 2003, Ameritrucking entered a lease agreement with defendant/cross-plaintiff/counterplaintiff Yellow Transportation, Inc. The lease agreement provided for a right of first refusal in favor of Yellow Transportation in the event that Ameritrucking received an offer for purchase of the property. Pursuant to the agreement, Yellow Transportation would have 15 days to determine whether to match the offer terms and conditions.

In 2006, Ameritrucking decided to list the property for sale and employed defendants Burr & Temkin South, Inc. and Gerald Rauch as real estate brokers. In early April 2006, Johnstons Enterprises responded to the listing, inspected the property, and made a verbal offer to purchase the property. According to Johnstons Enterprises, during the site visit, Rauch represented that Yellow Transportation had decided not to exercise its right of first refusal, but that he would nevertheless inform Yellow Transportation of the offer and confirm the waiver. Rauch then sent Johnstons Enterprises a letter of intent to confirm Johnstons Enterprises' offer.

After negotiations between Ameritrucking and Johnstons Enterprises, they executed a final purchase agreement in July 2006. Johnstons Enterprises agreed to purchase the property for $2.5 million, and Ameritrucking promised to convey title to the property to Johnstons Enterprises on or before November 24, 2006, or such later date as mutually agreed upon by the parties. In reliance on the purchase agreement, Johnstons Enterprises then forwarded a $50,000 earnest money deposit to a title company, ordered a title insurance commitment, and obtained environmental assessments, surveys, title work, and appraisals for the property.

However, in August 2006, Rauch finally sent correspondence to Yellow Transportation, which purported to be written notice of the purchase agreement with Johnstons Enterprises and extended Yellow Transportation an opportunity to exercise its right of first refusal. Yellow Transportation responded, stating its intent to exercise its right to purchase the property. And a copy of Yellow Transportation's response was sent to Johnstons Enterprises' counsel. Johnstons Enterprises' counsel then contacted Ameritrucking, objecting to Ameritrucking's notice to Yellow Transportation and contending that the purchase agreement did not contain any contingency for waiver, release, or consent of any third party. Johnstons Enterprises' counsel asserted that Ameritrucking should have first secured Yellow Transportation's waiver or consent before executing the purchase agreement with Johnstons Enterprises. Ameritrucking subsequently informed Johnstons Enterprises that it nevertheless intended to execute a purchase agreement with Yellow Transportation. And in October 2006, Ameritrucking ultimately executed a purchase agreement with Yellow Transportation.

In October 2006, Johnstons Enterprises filed a complaint, alleging specific performance and breach of contract. In August 2007, Johnstons Enterprises was able to obtain Yellow Transportation's waiver of its right of first refusal for additional consideration. And in January 2008, Ameritrucking ultimately agreed to close on the property and convey it to Johnstons Enterprises.

Johnstons Enterprises moved for partial summary disposition against Ameritrucking, arguing that there was no genuine issue of material fact that Ameritrucking breached its promise, pursuant to the fully executed purchase agreement, to convey title of the property to Johnstons Enterprises no later than November 24, 2006.

Ameritrucking responded, contending that it was just as surprised as Johnstons Enterprises when Yellow Transportation exercised its right of first refusal because, on the basis of representations from Rauch, it too believed that Yellow Transportation did not want to purchase the property. Regardless, Ameritrucking argued that: (1) Johnstons Enterprises knew all along that Yellow Transportation's waiver of its right to first refusal was a condition precedent to Ameritrucking's performance under the purchase agreement; (2) by closing on the property, Johnstons Enterprises waived or consented to a new closing date and was barred from claiming breach of contract; and (3) Ameritrucking fulfilled its obligations under both the purchase agreement and the lease agreement. Ameritrucking requested that the trial court deny Johnstons Enterprises' motion and instead grant summary disposition in Ameritrucking's favor under MCR 2.116(I)(2).

After hearing oral arguments on the motion, the trial court held that summary disposition was not appropriate:

> After looking at all of the facts in the light most favorable to the opposing party, which obviously has to be the defendant in this particular case, the Court is going to determine that as Johnstons [Enterprises] clearly were [sic] aware of the lease and the right of first refusal that they were cognizant of the fact that the closing could not occur until the issues with Yellow [Transportation] were resolved. As a consequence, the Court would determine that the defendants were not in breach of the purchase agreement and will deny the motion for summary disposition. This does not, in the Court's mind, negate all together the issue of

> damages, as clearly there was a delay, and those and other damages as well as contributions by others towards those damages may have to be addressed perhaps yet though the facilitation that has been engaged upon.

Counsel for Ameritrucking then inquired whether the trial court was ruling that there was no breach of contract. The trial court responded, "I'm simply denying the motion for summary disposition at this time[.]" Thereafter, the trial court entered its order denying Johnstons Enterprises' motion for summary disposition and denying Ameritrucking's motion for alternative relief. The trial court also later denied Johnstons Enterprises' motion for reconsideration.

Ameritrucking then moved for summary disposition, asserting the same grounds that it advanced in opposition to Johnstons Enterprises' original motion. Johnstons Enterprises requested that the trial court deny Ameritrucking's motion and instead grant summary disposition in Johnstons Enterprises' favor under MCR 2.116(I)(2).

After hearing oral arguments on the motion, the trial court ruled that it would

> just continue the same train of thought, I guess, as the—or I believe as the previous judge in this particular case.[1] I do understand that there's a clean slate. At the same point it time, do [sic] not want to second guess my predecessor who has an extreme long amount of time in this particular case as well and believe that the motion should be denied.

Counsel for Ameritrucking then sought clarification of the trial court's ruling: "[I]s the Court's finding that there was a breach or was not a breach of contract?" The trial court responded:

> Well, I don't think the Court previously found that there was a breach or was not a breach looking at—I think that the comments that were previously made by this Court was not a ruling that there was no order of that, and then the Court appeared to clarify itself in basically saying that the Court did not rule that there was or was not a breach. It wasn't ruling on that. I think that . . . the previous judge did misspeak briefly and corrected that. I think by the presentation it showed that you can't say no breach and then say, well, then we're going to have damages. Well, we got to have duty. We have to have breach, causation[,] and damages. So does that clarify your question, sir?

Counsel for Ameritrucking responded, "I think so[.]" Accordingly, the trial court entered its order denying Ameritrucking's motion for summary disposition and denying Johnstons Enterprises' motion for alternative relief. Johnstons Enterprises now appeals.

---

[1] The prior judge retired from the bench in January 2009.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.[2] The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[3] The non-moving party then has the burden to produce admissible evidence to establish disputed facts.[4] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[5] "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."[6] We review de novo the trial court's ruling on a motion for summary disposition.[7]

Further, if a contract's language is clear, its construction is a question of law for the court that is subject to de novo review.[8] When presented with a contractual dispute, a court must read the contract as a whole with a view to ascertaining the intention of the parties, determining what the parties' agreement is, and enforcing it.[9]

B. ANALYSIS

The right of first refusal clause in Yellow Transportation and Ameritrucking's lease agreement provided:

> In the event that the Lessor would receive an offer to purchase the total property, and the Lessor desires to accept the offer, then the Lessor shall extend the offer to purchase to the Lessee of which the Lessee would have fifteen (15) days to match the same terms and conditions. Should Lessee fail or choose not to exercise this Right of First Refusal, and Lessor sells the property consistent with

---

[2] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Smith v Globe Life Ins, Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

[3] MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

[4] *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

[5] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[6] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[7] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[8] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[9] *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000), citing 3 Corbin, Contracts, § 549, pp 183-186 (contracts are to be interpreted and their legal effects determined as a whole); *Detroit Trust Co v Howenstein*, 273 Mich 309, 131; 262 NW 920 (1935); *Whitaker v Citizens Ins Co*, 190 Mich App 436, 439; 476 NW2d 161 (1991).

the terms of the offer, then Lessee's Option to Purchase shall expire and have no further force and effect.

A condition precedent "is a fact or event that the parties intend must take place before there is a right to performance."[10] "A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor."[11] "Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language of the contract."[12] "The reason of this disinclination is that such a construction prevents the court from dealing out justice to the parties according to the equities of the case."[13] "Accordingly, unless the contract language itself makes clear that the parties intended a term to be a condition precedent, this Court will not read such a requirement into the contract."[14]

Ameritrucking argues that Yellow Transportation's waiver of the first right of refusal was a condition precedent to Ameritrucking's performance under Johnstons Enterprises' purchase agreement because Johnstons Enterprises knew about the condition all along and because the existence of the lease agreement was repeatedly referred to in the purchase agreement. We disagree.

Nothing in the language of the purchase agreement suggests that Yellow Transportation's waiver of the first right of refusal was a condition precedent to Ameritrucking's duty to convey the property to Johnstons Enterprises.[15] And contrary to Ameritrucking's contention, mere reference in the purchase agreement to the existence of the lease agreement was not sufficient to make clear that Yellow Transportation's waiver of the first right of refusal was a condition precedent.[16]

The record does demonstrate that the parties expected that Yellow Transportation's waiver of the first right of refusal was required before Ameritrucking could sell the property to Johnstons Enterprises.[17] In fact, Johnstons Enterprises concedes that it knew about Yellow

---

[10] *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993), overruled in part on other grounds *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005).

[11] *Id*.

[12] *Id*.

[13] *MacDonald v Perry*, 342 Mich 578, 586; 70 NW2d 7217 (1955).

[14] *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006).

[15] See *MacDonald*, 342 Mich at 582, 586-587; *Vergote v K Mart Corp*, 158 Mich App 96, 107; 404 NW2d 711 (1987).

[16] *Real Estate One*, 272 Mich App at 179; *McCall v Freedman*, 35 Mich App 243, 246; 192 NW2d 275 (1971) ("In the instant case, it cannot be said that defendants demonstrated that a condition precedent was intended by the parties, nor does the language indicate that this was intended.").

[17] *McCall*, 35 Mich App at 246.

Transportation's right of first refusal from the time of its first inspection of the property. However, the parties' understanding that Ameritrucking's ability to sell the property was subject to Yellow Transportation's waiver of the first right of refusal does not mean that Yellow Transportation's waiver was an intended condition precedent to Ameritrucking's performance under the executed purchase agreement. Indeed, we find it significant that the record establishes that Ameritrucking and Johnstons Enterprises entered the purchase agreement under the belief that Yellow Transportation had in fact waived its first right of refusal. The fact that that belief turned out to be mistaken does not absolve Ameritrucking of liability. Under the terms of the lease agreement with Yellow Transportation, it was Ameritrucking's obligation to provide notice of the pending offer to Yellow Transportation and secure Yellow Transportation's waiver of its right of first refusal. Ameritrucking relied to its own detriment on its agent's representation that this had been done. Ameritrucking could have waited to execute the purchase agreement with Johnstons Enterprises until after it received written verification of Yellow Transportation's waiver or it even could have added verification of Yellow Transportation's waiver as an express contingency along with the list of other contingencies and conditions stated in the purchase agreement. But Ameritrucking failed to take either of these courses of action, and such failure is not a defense to a breach of contract claim.[18]

Further, the fact that Johnstons Enterprises obtained a waiver of Yellow Transportation's first right of refusal and ultimately closed on the property does not bar it from pursuing its breach of contract claim. The record evidences that when the parties agreed on the new closing date, they specifically preserved all claims and counterclaims against each other. In a December pretrial order, the trial court ordered that "[t]he real estate closing shall take place on or before February 1, 2008" and that "[a]ll claims and counter-claims are preserved."

We agree with Johnstons Enterprises that the trial court erred in denying summary disposition because there is no question of material fact that Ameritrucking breached the clear terms of the purchase agreement by failing to convey the property to Johnstons Enterprises on or before November 24, 2006.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[18] *Dikeman v Arnold*, 78 Mich 455, 469-470; 44 NW 407 (1889) ("The fact that one did not have the legal title at the time he made the contract, and could not procure it afterwards, has never been recognized as a legal defense to an action for breach of the contract."); see also *Joyce v Vemulapalli*, 193 Mich App 225; 483 NW2d 445 (1992).