STATE OF MICHIGAN

COURT OF APPEALS

VAN DYKE PARTNERS, L.L.C.,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF WARREN and DOWNTOWN DEVELOPMENT AUTHORITY,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
December 28, 2010

No. 293721
Macomb Circuit Court
LC No. 2008-000928-CH

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

Plaintiff brought an action, related to a real estate transaction, against defendants (collectively "the City"). Both sides filed competing motions for summary disposition. Plaintiff appeals as of right an order granting, in part, and denying, in part, both motions for summary disposition. Defendant's cross-appeal from the same order. For the reasons set forth in this opinion, we affirm the rulings of the trial court.

This case arises from a dispute between the parties over a parcel of land in Warren, Michigan. Plaintiff purchased a piece of property on the east side of Van Dyke, which was located between Old 13 Mile Road and 14 Mile Road in Warren, Michigan. The property previously housed a hotel, but plaintiff's plans were to develop the property into a senior citizen residential community. At around the time of plaintiff's purchase, Richard Doherty, an engineer with the City, approached Lorenzo Cavaliere, who was an employee of plaintiff, and inquired about obtaining the right-of-way on Van Dyke in order to create a boulevard on Van Dyke. This was part of a larger plan to create a boulevard, stretching along Van Dyke from 11 Mile Road up to 14 Mile Road. After preliminary discussions, it was decided that the City, who owned the 86 foot wide right-of-way on Masonic, would exchange that interest for the Van Dyke right-of-way. Both right-of-ways were essentially the same size.

The City later determined that it could not convey the entire 86 feet of the Masonic right-of-way. Instead, the City could only convey the southern half of it, which was 43 feet wide. Plaintiff began making the improvements and modifications on the property, along Masonic and Van Dyke, consistent with the plan to transfer the Van Dyke right-of-way to the City. Plaintiff completed the improvements in 2005. Negotiations continued between the City's mayor and

plaintiff over the price the City would pay to plaintiff for the property. However, the recommendation was never submitted to the Warren City Council. On November 6, 2007, James R. Fouts was elected the new Mayor of Warren. Mayor Fouts's term began just days after the election, and he was not interested in proceeding with the right-of-way plan. In January 2008, plaintiff transferred the right-of-way to the City via warranty deed.

Plaintiff then filed suit on February 28, 2008, alleging four counts: specific performance, condemnation, breach of contract, and inverse condemnation. Defendants moved for summary disposition, pursuant to MCR 2.116(C)(8) and MCR 2.l116(C)(10). Defendants argued that, since only City Council can authorize contracts, plaintiff's breach of contract (and specific performance) claims must fail. Additionally, defendants argued that there could have been no condemnation when there were no condemnation proceedings and there could have been no inverse condemnation because the City never took any affirmative actions, aside from abandoning negotiations that caused a decline in value of plaintiff's property. Plaintiff responded and filed its own motion for summary disposition based on MCR 2.116(C)(9) and MCR 2.116(C)(10). Plaintiff argued that defendants were estopped from denying that a contract existed between the parties and, because plaintiff fully performed, plaintiff was entitled to specific performance. Plaintiff also argued that it should win on its inverse condemnation claim because the City engaged in a de facto taking of the property when it failed to pay for the transferred property.

The trial court, noting that the parties relied on matters outside the pleadings, decided the summary disposition motions under MCR 2.116(C)(10). The trial court found in favor of defendants for the specific performance, condemnation, and inverse condemnation counts but granted summary disposition in favor of plaintiff on the breach of contract count. The trial court then ordered the City to convey the Van Dyke right-of-way back to plaintiff, which it described as a remedy "akin to rescission."[1] In addressing plaintiff's motion for reconsideration, the trial court stated that it did not rescind the contract; it was merely providing a remedy that was *akin* to rescission. Furthermore, the trial court noted that monetary damages were not required after a finding of a breach of contract. This appeal ensued.

A. IMPLIED-IN-LAW CONTRACT

Defendants, on cross-appeal, argue that the trial court erred when it determined that a contract existed between the City and plaintiff. A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to

[1] The trial court's order left the City's conveyance of the Masonic right-of-way to plaintiff intact.

establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

In order for a contract to be valid, there must be an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006). While the parties' original intent was to conduct a land-for-land exchange, where each parcel transferred was to be essentially the same size, the City determined that it could only provide half of what it originally intended. This resulted in negotiations that spanned at least three years, which continued through November 2007. The final communication related to these negotiations was sent to plaintiff by then Warren Mayor Mark Steenbergh on October 30, 2007. Mayor Steenbergh's letter suggested a price of $225,590 be paid to plaintiff to account for the land-size discrepancy. There was, however, no evidence that this latest offer was accepted by plaintiff. Even if plaintiff's conveyance of the Van Dyke right-of-way to the City in January 2008 is considered an acceptance of the offer, a contract still did not exist between plaintiff and defendant. Cities and municipal corporations can only contract through the method prescribed by law. *Div 26 of Amalgamated Ass'n of St Elec Ry & Motor Coach Emp of America v City of Detroit*, 330 Mich 195, 212-213; 47 NW2d 70 (1951). Here, Warren's City Charter, § 14.1, vested the City Council with the exclusive power to make and authorize contracts. But the City Council never approved any contract related to the acquisition of the Van Dyke right-of-way. Thus, because the City, through its Council, never authorized any contract, there was no agreement to enforce.

However, there are two types of implied contracts that could be relevant in this matter. The first type is an implied-in-fact contract. An implied-in-fact contract requires a meeting of the minds, though it is established through words or conduct. *City of Detroit v City of Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949). The second type of implied contract is an implied-in-law contract. This second type does not require a meeting of the minds, but is imposed by fiction of law, in order to enable justice be accomplished, even if no contract was intended. *Id.*

> A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation. [*In re McKim Estate*, 238 Mich App 453, 457; 606 NW2d 30 (1999).]

Because there was no express contract and because there was no meeting of the minds between the parties, we hold that an implied-in-law contract is the relevant theory on which plaintiff may prevail.[2] Our Supreme Court later clarified that municipalities may become liable

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[2] Defendants argue that municipalities cannot be held liable on implied contracts. In support of this, defendants rely on *City of Detroit v Robinson*, 38 Mich 108 (1878). *Robinson*, however, dealt with the situation where the defendant-city municipal officials illegally (*ultra vires*) let a

on an implied contract when (1) the subject matter of the implied contract is *intra vires* and (2) the benefits of the contract were accepted by the contract-making body of the municipality. *Baker v City of Kalamazoo*, 269 Mich 14, 20; 256 NW 606 (1934). Here, the subject matter of the land acquisition was *intra vires* since the City had the power to enter into such a contract.[3] Additionally, the benefits of the contract, the acquisition of the Van Dyke right-of-way were accepted by the City.[4] Accordingly, because it would be patently unjust for the City to keep the Van Dyke right-of-way without having to pay any money, when the amounts discussed in the lengthy negotiations were in the neighborhood of $225,000, a court should impose an implied-in-law contract.

Here, without using the term, "implied-in-law contract," the trial court essentially imposed one when it found that "[t]he parties' part performances as well as the doctrines of equitable estoppel and quantum meruit are sufficient to remove any statute of frauds issue." The trial court's determination that the City was unjustly enriched is consistent with our analysis. Accordingly, the trial court's judgment, that plaintiff was entitled to relief, is not erroneous.

B. REMEDY FOR IMPLIED-IN-LAW CONTRACT

Plaintiff argues that the trial court erred when it ordered the City to convey the Van Dyke right-of-way back to plaintiff instead of an award of monetary damages. A trial court's granting of equitable relief is reviewed for an abuse of discretion. See *Tkachik v Mandeville*, ___ Mich ___; ___ NW2d ___ (Docket No. 138460, decided July 27, 2010), slip op, p 3, stating in relevant part, "and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case." *Id.*

Recovery on an implied-in-law contract is equitable in nature. *In re McKim Estate*, 238 Mich App at 458. The goal is to prevent the one party's unjust enrichment. See *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007). Typically, this is accomplished by having the unjustly enriched party to monetarily compensate the other party, however, nothing requires this as a resolution to the unjust enrichment. Historically, the function of equity is to provide "such relief as justice and good conscience require." *Sinicropi v Mazurek*, 279 Mich App 455, 465; 760 NW2d 520 (2008). Here, the trial court recognized the fact that the City was unjustly enriched because it received the Van Dyke right-of-way without tendering any

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contract without competitive bidding, which was contrary to municipal charter. *Id.* The *Robinson* Court determined that in such instances, a plaintiff could not recover – even through a quantum meruit theory. *Id.*

[3] No parties argue that the City or City Council did not have the power to enter into this agreement, rather defendants assert that the City Council never exercised this power. Additionally, § 14.3(a) of the Warren City Charter provides, "The city shall not purchase, sell, or lease any real estate or any interest therein except by resolution concurred in by at least five members of the council."

[4] No parties argue that the City never received title to the Van Dyke right-of-way.

monetary amount to compensate plaintiff for the property or the improvements thereto. To correct this inequity, the trial court ordered the City to convey the right-of-way back to plaintiff. We find this remedy directly addressed and eliminated the City's unjust enrichment. We therefore rule that the trial court did not abuse its discretion in ordering the City to convey the right-of-way back to plaintiff.

C. CONDEMNATION CLAIM

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendants on plaintiff's condemnation claim. "'Eminent domain' or 'condemnation' is the power of a government to take private property." *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373; 663 NW2d 436 (2003). A governmental body "takes" property through formal condemnation proceedings. *Chelsea Inv Group, LLC v City of Chelsea*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288920, issued April 27, 2010), slip op, p 12. The mere fact that the City holds title to the Van Dyke right-of-way is insufficient to establish a "taking." There is no dispute that condemnation proceedings were never commenced or contemplated by the City. The City acquired title through the voluntary actions of plaintiff when it issued a warranty deed transferring title in January 2008. There was no evidence that plaintiff was compelled in any fashion to transfer title to the right-of-way. Accordingly, summary disposition in favor of defendants was warranted, and the trial court did not err.

D. INVERSE CONDEMNATION CLAIM

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendants on plaintiff's inverse condemnation claim. Inverse or reverse condemnation occurs when property has been taken for public use without the commencement of condemnation proceedings. *Blue Harvest, Inc v Dep't of Transp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 281595, issued April 29, 2010), slip op, p 6. While there is no exact formula to establish such a de facto taking, "there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). In order for a plaintiff to prevail, the plaintiff must prove (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Additionally, a plaintiff must prove a causal connection between the government's action and the alleged damages. *Id.* When determining whether a taking occurred, "the form, intensity, and deliberateness of the governmental actions towards the injured party's property must be examined." *Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009).

Plaintiff argues that the City's actions caused a diminution of value of the property. Specifically, plaintiff alleges that the City went beyond mere negotiating and recommending when the City Council approved the transfer of the Masonic right-of-way to plaintiff. The record

clearly supports the finding that following the City's transfer of the Masonic right-of-way to plaintiff, the value of plaintiff's land necessarily *increased* because of the increased size.[5] Plaintiff only argues that the land decreased in value because of renovations *it* did in contemplation of transferring the Van Dyke right-of-way to the City. Any causal connection between the government's actions and any decrease in property value is, thus, attenuated. It was plaintiff's *own voluntary actions* that, arguably, reduced the value of the property. Thus, plaintiff cannot meet the first prong of the inverse condemnation test because it cannot establish a causal connection between the government's actions and any decrease in property value. Furthermore, plaintiff cannot meet the second requirement. Plaintiff cannot show how the government abused its powers in affirmative actions directly aimed at the property. Again, all that has been established is that plaintiff and the City entered into negotiations, where the City later abandoned those negotiations once a new mayor was elected. This type of "behavior" on the part of the City can hardly be viewed as an abuse of any power, nor were these actions sufficiently directly aimed at the property. Accordingly, plaintiff's inverse condemnation claim fails. Plaintiff's argument, that it detrimentally relied on any promises or expectations that the City expressed, is more suited for a breach of contract or estoppel claim.

E. SPECIFIC PERFORMANCE

Plaintiff argues that the trial court abused its discretion when it did not order defendant to specifically perform. A trial court's decision to grant or deny specific performance is reviewed for an abuse of discretion. *Zurcher v Herveat*, 238 Mich App 267, 300; 605 NW2d 329 (1999). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"Specific performance of *an agreement* may be an appropriate remedy where enforcement of *the promise* is necessary to avoid injustice." *Thermatool Corp v Borzym*, 227 Mich App 366, 375; 575 NW2d 334 (1998) (emphasis added). Hence, specific performance is only applicable when there is a promise or agreement to enforce. This has been a long-standing premise in this state:

> The jurisdiction of equity in specific performance proceeds on the supposition that the parties have not only agreed, as between themselves, upon every material matter, but that the matters so agreed on are of such a nature, and the subjects of enforcement so delineated or indicated, either directly or by reference to something else, or so raised to view by legitimate implication, that the court can and may collect, and in their proper relations, all the essential elements, and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed. [*Czeizler v Radke*, 309 Mich 349, 357-358; 15 NW2d 665 (1944), quoting *Blanchard v Detroit, Lansing & Lake Mich R Co*, 31 Mich 43, 53 (1875).]

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[5] This is because plaintiff would not convey the Van Dyke right-of-way for another three years.

If a court cannot determine that all the essential terms of a contract are agreed upon, it cannot create these unknown terms and then order specific performance. *Czeizler*, 309 Mich at 358. When determining whether specific performance is warranted, "[t]he test to be applied in such cases is: Are the sellers obligated to sell and the purchaser to buy?" *Id.* at 359.

As previously stated in this opinion, there was no enforceable contract and no meeting of the minds. There were negotiations between plaintiff and the mayor of defendant City, however the Mayor could not enter the City into a binding agreement since that power is expressly reserved for the City Council. Thus, plaintiff was not obligated to convey the Van Dyke right-of-way to the City, and the City was not obligated to pay any amount to plaintiff. Consequently, specific performance is not an available remedy.[6]

Affirmed. Neither party having prevailed in full, no costs are accessed. MCR 7.219.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello

[6] In reaching this conclusion, we note that Plaintiff's reliance on *Boelter v Blake*, 307 Mich 447; 12 NW2d 327 (1943), is misplaced. In *Boelter*, all the facts surrounding the offer were known to the wife who acquiesced through her silence. In this case, (1) the amount of money that the City was to pay plaintiff was undetermined and (2) the City, through the City Council, never agreed, let alone was aware, of the negotiations between the Mayor and plaintiff.