STATE OF MICHIGAN

COURT OF APPEALS

CERUZZI PROPERTIES, INC.,

Plaintiff/Counter-Defendant-Appellee,

v

TOM THOMPSON INC.,

Defendant/Counter-Plaintiff-Appellant,

and

FIRST MICHIGAN TITLE INSURANCE COMPANY,

Defendant.

UNPUBLISHED
August 22, 1997

No. 190458
Oakland Circuit Court
LC No. 94-475010-CK

Before: Donald E. Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant (and counter-plaintiff) Tom Thompson, Inc., appeals as of right an order confirming the trial court's previous grants of summary disposition in favor of plaintiff (and counter-defendant) Ceruzzi Properties, Inc., with respect to plaintiff's claims and defendant's counter-claims. We affirm.

In October, 1992, plaintiff and defendant entered into an agreement whereby plaintiff agreed to purchase a parcel of land from defendant (the "Property"). Plaintiff planned to join that parcel with other adjacent parcels to develop a large retail complex (the "Project"). The following provisions of the purchase agreement are at issue in this appeal:

> 4. Contingencies and Feasibility Period. Purchaser's purchase of the Property is contingent upon the conditions set forth below being waived or satisfied on or before the dates provided for below. *Purchaser may terminate this Agreement at any time by written notice to Seller if Purchaser determines that any of the conditions set forth in this Section will not be satisfied by the date provided for herein for the satisfaction of such contingency.* The contingencies provided for in the Section 4

shall be deemed not to be satisfied unless Purchaser, by the date by which the particular contingency is required to be satisfied, notifies Seller that such contingency has been satisfied. In the event any contingency is deemed not satisfied, this Agreement shall terminate.

a. Project Approvals. By the date which is six (6) months after the date of this Agreement, Purchaser shall obtain, in final and unappealable form, all governmental approvals and permits necessary or desirable to develop, construct, or use not less than 300,000 square feet of retail space on the Property and the adjacent parcels of land ("Project") for Purchaser's intended use in accordance with Purchaser's requirements, including, but not limited to, building permits, use permits, zoning approvals, site plan approvals and environmental approvals including any required pursuant to any State Environmental Policy Act (collectively "Project Approvals"); provided, however, that if Purchaser is proceeding diligently and in good faith to obtained [sic] the Project Approvals but has not obtain [sic] the Project Approvals by the date which is six (6) months after the date of this Agreement, then such date shall be automatically extended for six (6) additional months, so that Purchaser shall have twelve (12) months to obtain the Project Approvals. Additionally, Purchaser shall have an additional 180-day extension of this contingency period as set forth in Paragraph 2 of this Agreement. *Any conditions, on-site and off-site mitigation costs, local improvement districts, assessments and impact and permit fees imposed on the Project by any governmental entity having jurisdiction shall be in form and substance satisfactory to Purchaser and shall be subject to Purchaser's sole and absolute approval.*

* * *

c. Feasibility. By the date which is sixty (60) days after the date of this Agreement, Purchaser shall have determined in Purchaser's sole and absolute discretion, that the site plan, parking plan and access plan for the Property are acceptable, that utilities of adequate capacity serve the Property, and that the Property is economically and otherwise feasible for Purchaser's intended use. [(emphasis supplied).]

It is undisputed that at some point plaintiff waived the feasibility contingencies set forth in paragraph 4c.

Paragraph 14 of the agreement further provided, in relevant part, as follows:

If any condition to Closing shall not be satisfied, Purchaser, at its option, may terminate this Agreement. In the event of such termination, the Earnest Money shall be returned to Purchaser.

On December 29, 1993, plaintiff notified defendant that it was terminating the agreement in accordance with paragraph four because plaintiff had "determined in the course of its due diligence that it will be impossible to obtain approval for 300,000 square feet of retail space on the subject property." The notice of termination requested that defendant return all refundable deposits to plaintiff, i.e., approximately $72,000 in earnest money.[1]

When plaintiff failed to receive the earnest money, plaintiff filed an action sounding in, as relevant to this case, breach of contract. Specifically, plaintiff claimed that it had properly terminated the contract pursuant paragraph 4a, and that defendant had failed to return the earnest money, contrary to paragraph 14. Defendant filed a counter-complaint, seeking an award of the earnest money. In its claim labeled "Breach Of Contract Paragraph 4.a.," defendant contended that plaintiff was required by paragraph 4a to proceed diligently and in good faith to obtain the Project approvals, and that by claiming that the approvals were impossible to obtain, plaintiff was acting unreasonably, disingenuously, without due diligence, and not in good faith. Defendant's counter-complaint also alleged claims based on a breach of paragraph 4c, misrepresentation and negligent misrepresentation.

Plaintiff thereafter moved for partial summary disposition, contending that it had properly terminated the agreement in accordance with paragraph 4a and that it was entitled to a return of its earnest money. Defendant also moved for partial summary disposition, contending that plaintiff had not properly terminated the agreement in accordance with paragraph 4a, and that it was entitled to an award of the earnest money. The trial court found that plaintiff had terminated the agreement in accordance with paragraph 4a, reasoning as follows:

> This Court finds that Section 4 of the Agreement is clear and unambiguous. Purchaser's purchase of the Property was contingent upon Purchaser's satisfaction of obtaining "all governmental approvals and permits necessary or desirable to develop, construct, or use not less than 300,000 sq. ft. of retail space on the Property and the adjacent parcels of land ("Project"). In addition, "[a]ny conditions, on-site and off-site mitigation costs, local improvement districts, assessments and impact and permit fees imposed on the Project . . . shall be in the form and substance satisfactory to Purchaser and shall be subject to Purchaser's sole and absolute approval." Purchaser could terminate the Agreement at any time by written notice to Seller if any of the conditions were not to Purchaser's satisfaction.
>
> Purchaser reviewed the Project contingencies for approximately 14 months at a cost to Purchaser of approximately $350,000.2 After such review, Purchaser provided written notice to the Seller indicating its desire to terminate the Agreement because "it [would] be impossible to obtain approval for the 300,000 sq. ft. of retail space on the subject property." Among some of the reasons associated with the "impossibility [of] obtain[ing] approval," resulting in Purchaser's election to terminate the Agreement, were the following: Canton Township would not approve the Project unless Purchaser paid approximately $250,000 for the "Willow Drain" local improvement district (Purchaser's Exhibit 2 to Reply); the $400,000 cost involved for the acquisition of the

> First Federal Parcel to enable Purchaser to move the Project buildings forward toward Ford Road in response to the rear flood plan (Purchaser's Exhibit J); other associated costs involved to develop and construct the Project for Purchaser's intended use; and Purchaser's failure to obtain the required Governmental approval from the DNR for wetlands mitigation. Each of these reasons were expressly permitted in Section 4 of the Agreement as a basis for Purchaser's termination of the Agreement. Simply stated, Purchaser was not satisfied with the "on-site and off-site mitigation costs, local improvement districts . . . fees imposed on the Project" which were subject to "Purchaser's sole and absolute approval." Moreover, it is undisputed that notice of satisfaction of the Project contingencies was not provided by the Purchaser. As a result, the Agreement terminated on its own accord.
>
> As stated above, this Court finds that the Purchaser terminated the agreement in accordance with the provisions asserted therein. As a result, Purchaser is entitled to Earnest Money as provided in Section 14 of the Agreement . . . .

> 2. Purchaser proceeded diligently and in good faith in trying to obtain the Project approvals. This was evidenced by the Seller's acceptance of Purchaser's monthly extension payments, and the Purchaser's substantial non-refundable payments made in connection with its acquisition of the adjoining parcels. (Purchaser's Exhibit D). In addition, Seller testified that as of the date of the Termination Notice, it thought that Purchaser was acting in good faith (Purchaser's Exhibit 4 to Reply).

The trial court granted and denied plaintiff's and defendant's motions, respectively.

Plaintiff thereafter filed a supplemental motion for summary disposition of defendant's remaining counter-claims. The trial court also granted this motion.

On appeal, defendant argues that the trial court erred in granting plaintiff's motions for summary disposition.

As explained in *Tranker v Figgie International, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997):

> The trial court's disposition of a motion for summary disposition is reviewed de novo. . . . A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. . . . When we review a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), we consider all relevant affidavits, depositions, admissions, and other documentary evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. . . . We

> must then determine whether there exists a genuine issue of material fact on which reasonable minds could differ or whether the moving party is entitled to judgment as a matter of law. [(citations omitted).]

Specifically, defendant concedes that the trial court recognized and it did not dispute below "that the contingencies in the contract were subject to 'Purchaser's satisfaction.'" However, defendant contends the reasonableness and genuineness of plaintiff's dissatisfaction are questions for questions of fact for the jury.

As explained in *Isbell v Anderson Carriage Co*, 170 Mich 304, 312; 136 NW 457 (1912):

> If parties voluntarily assume the obligations and hazards of a satisfaction contract, their legal rights are to be determined and adjudicated according to its provisions. It is elementary that courts cannot make contracts for parties nor relieve them of the consequences of their contracts, however ill-advised.

Historically, this state's courts have categorized contracts that are premised on the satisfaction of one of the parties into two types. The first type is where satisfaction is dependent on the personal taste, feeling or individual judgment of the party to be satisfied. *Id*. The second type is where satisfaction is based on "mechanical utility or operative fitness in relation to which some standard is available are bargained for." *Id*. at 312-313. Where the contract is of the former type, the reasonableness or justice of the party's dissatisfaction cannot be questioned. *Id*. at 314. However, the party's dissatisfaction cannot be given in bad faith, dishonestly, insincerely, or fraudulently. *Id*. Where the contract is of the latter type, the party's dissatisfaction must be both genuine and reasonable. *Id*. at 313; *Cacavas v Zack*, 43 Mich App 222, 226; 203 NW2d 913 (1972); see also *American Oil Co v Carey*, 246 F Supp 773, 774 (ED Mich, 1965).

In this case, the record indicates that the trial court construed paragraph 4a as being of the former type, i.e., that plaintiff's satisfaction with "any conditions, on-site and off-site mitigation costs, local improvement districts, assessments and impact and permit fees imposed on the Project by any governmental entity having jurisdiction" was dependent on plaintiff's individual judgment. See *Isbell, supra*; see also *Walter A Wood Reaping & Mowing Machine Co v Smith*, 50 Mich 565, 571; 15 NW 906 (1883). We find no error in this construction of the agreement.[2]

Thus, plaintiff asserted dissatisfaction with the governmentally-imposed requirements must have been made in good faith. *Isbell, supra* at 314. However, contrary to defendant's assertion, the reasonableness of plaintiff's reasons for dissatisfaction may not be inquired into. *Id*. In this case, plaintiff submitted affidavits indicating that as a condition to plaintiff's development of the Project, Canton Township would require plaintiff to improve at plaintiff's cost the "'Willow Drain' located at the rear of the Project," and that "[t]his [a]dditional [c]ost was unsatisfactory to Ceruzzi and contrary to Ceruzzi's requirements for developing the lands."[3] Our review of the record indicates that defendant failed to submit any evidence indicating that drain improvement cost was not the actual reason for plaintiff's dissatisfaction. Rather, defendant has attacked only the reasonableness of plaintiff's claim of

dissatisfaction. Thus, we conclude that defendant failed to establish a genuine issue of material fact with respect to plaintiff assertion of dissatisfaction. Accordingly, we affirm the trial court's holding that plaintiff properly terminated the agreement pursuant to paragraph 4a.[4]

Next, defendant argues a question of fact was created concerning whether plaintiff breached paragraph 4c because plaintiff waived any claim of economic unfeasibility but nevertheless terminated the agreement on economic grounds. The trial court rejected this argument below. Although noting that the concerns addressed by paragraph 4a were "in some sense 'economic,'" the court concluded that that paragraph 4a and 4c "are treated separately by the Agreement" and that "[t]here is no basis for this Court to find that the termination of the Agreement under Section 4(a) represented a breach of Section 4(c)." We agree with this reasoning and affirm the trial court on this ground.

Finally, defendant argues that the trial court erred in granting summary disposition of defendant's misrepresentation claim because defendant relied on plaintiff's misrepresentation that plaintiff had downsized the project. A claim of misrepresentation requires that the plaintiff prove, among other elements, that the misrepresentation was material. *Christensen v Michigan State Youth Soccer Ass'n, Inc*, 218 Mich App 37, 44; 553 NW2d 638 (1996). In this case, the trial court found that any alleged misrepresentation by plaintiff concerning the size of the project was irrelevant to plaintiff's paragraph 4a termination because that paragraph gave plaintiff "the sole discretion to terminate the deal given certain contingencies." We again agree with this reasoning and affirm the trial court on this ground.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski

[1] Defendant had possession of approximately $22,000 of the earnest money. The balance was in an escrow account with defendant First Michigan Title Insurance Company. Pursuant to a stipulation of the parties, First Michigan paid the funds in this account to the court and was dismissed from this case.

[22] If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; ___ NW2d ___ (1997). Thus, we reject defendant's contention that paragraph 4 is ambiguous.

[3] As originally submitted by plaintiff, these affidavits did not conform to the court rules. However, as conceded by defense counsel below, plaintiff filed corrected affidavits conforming to the court rules before oral argument on the motion for summary disposition. Thus, we reject defendant's argument that the trial court relied on invalid affidavits.

[4] Therefore, we need not address defendant's argument that the court erred in finding that the agreement terminated of its own accord because "notice of satisfaction of the Project contingencies was not provided by the Purchaser."