S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MICHIGAN ALTERNATIVE HOUSING, Plaintiff-Appellee,	UNPUBLISHED May 5, 1998
v DELTA COMMERCE PROPERTIES, GEORGE A. GROF, THOMAS P. KENNY, HAROLD & DORIS BAKER, CARL McINTOSH & CAPITOL EXPLORATION CO., Defendants-Appellants.	No. 197186 Ingham Circuit Court LC No. 94-078530-CH

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Following a bench trial on plaintiff's claims of breach of contract, fraud and promissory estoppel, judgment was granted in favor of plaintiff in the amount of $157,694.46. On defendants' motion for new trial, remittitur or judgment notwithstanding the verdict, the judgment was adjusted to $154,061.32. Defendants appeal as of right, and we reverse.

I

Plaintiff (MAH), a real estate developer, was formed in 1992 to develop assisted living facilities for persons with Alzheimer's disease. John Peckham, an officer in MAH, was also president of Martin Development Properties (MDP), a commercial real estate development company which Peckham and Van Martin formed in 1985. Martin was also a principal in MAH. MAH contracted with MDP for MDP to identify potential sites in six Michigan cities. MAH was responsible for purchasing land and financing the living facility projects, and the sites would then be turned over to Assisted Living Alternatives (ALA), a corporation which would operate and manage the facilities. The principals of ALA were shareholders in MAH. Peckham testified that he acted primarily in his capacity as MDP's president.

The property at issue was owned by defendant Delta Commerce Properties (Delta), and consisted of approximately 2 acres of a larger parcel consisting of a six-lot commercial/residential park of about thirty acres. The larger six-lot parcel was the subject of a blanket mortgage. In order for the small parcel at issue to be sold, a partial release from the mortgagee bank was needed.

From 1989 to 1992, Delta kept current its interest payments to Key State Bank, the holder of the mortgage on the six-lot parcel, but was unable to reduce the principal or pay the outstanding taxes and assessments. During that time, the property was listed with Martin Commercial Properties (MCP), a realty company owned by Martin which operated out of the same office as MDP. Barbara Hepler, a broker in Martin's office, handled the listing. Delta terminated its listing with MCP in February 1992 under pressure from Key State Bank, because it had not received any offers to purchase through MCP.

On October 1, 1992, plaintiff, through Hepler, submitted a purchase offer for the 2.2 acre parcel at issue. The purchase offer was prepared by Peckham, an employee of Peckham's, and Hepler. Peckham testified that he looked through MCP's Delta property files.

Peckham and Hepler had been acquainted with defendant Grof, a managing partner of Delta, for years. All were knowledgeable and experienced in commercial real estate. Plaintiff's agents had years of commercial real estate sales' experience; Peckham was a licensed real estate salesperson, Martin was a licensed real estate broker, and Hepler had been in commercial sales for fifteen to twenty years. Defendant Grof also had been involved in real estate transactions for years.

On September 30, 1992, Delta received a demand letter from Key State Bank for payment of the outstanding balance on the mortgage loan. On October 1, 1992, plaintiff submitted a purchase offer to Delta which became part of the purchase agreement, and provided that the purchase would be financed by cash with "full purchase price upon execution and delivery of Warranty Deed." The offer further provided in pertinent part:

> 8. SALE shall be closed within 10 days after all necessary closing documents are ready provided, however, that **if title defect(s) exist(s) and SELLER is notified of same, in writing, 30 days from such notice shall be allowed SELLER to cure such defect(s), in default of which this Agreement shall terminate**, unless otherwise agreed to in writing between PURCHASER and SELLER . . .
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> * * *
>
> 11. PURCHASER HEREWITH DEPOSITS $2,000 upon acceptence [sic] evidencing PURCHASER'S good faith, said deposit to be deposited in Martin Commercial Properties, Inc. (REALTOR BROKER) trust account . . ., and apply as part of the purchase price. If this offer is not accepted, or title is not marketable or insurable . . . this deposit to be refunded forthwith. [Emphasis added.]

The underlined portions were inserted by plaintiff.

An addendum (# 1) to the purchase offer set forth the following contingencies:

> 1. . . . . A surveyor shall determine the net two acres of usable land contained within Lot 6 . . .
>
> 2. Seller represents that water, sewer, electric and natural gas are at the subject two acres.
>
> 3. Purchaser's written approval of the Phase I Environmental Audit which shall be completed at the Purchasers sole cost and expense. Purchaser will order the Environmental Audit within fourteen (14) days after Sellers written acceptance of this offer.
>
> 4. Purchaser's written approval of soil test results, which shall be completed at Purchaser's sole cost and expense. Purchaser will order said tests within fourteen (14) days after Sellers written acceptance of this offer.
>
> 5. Purchaser obtaining desired zoning, special use permit and site plan approval acceptable to the Purchaser for intended use from Delta Township.
>
> 6. Purchaser obtaining acceptable financing for the intended project to be developed.
>
> 7. Closing shall occur no later than forty-five (45) days after all above referenced contingencies have been satisfied.

Defendants submitted a counter-offer, in the form of an amendment to the purchase offer, which was agreed to by plaintiff and signed on October 28, 1992. The counteroffer provided:

> 2. Purchasers to use best efforts to close this transaction by December 29, 1992.
>
> * * *
>
> ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED.
>
> * * *
>
> SELLER UNDERSTANDS THAT CONSUMMATION OF THE SALE OR TRANSFER OF THE PROPERTY DESCRIBED IN THIS AGREEMENT WILL NOT RELIEVE THE SELLER OF ANY LIABILITY THAT THE SELLER MAY HAVE UNDER THE MORTGAGE(S) OR OTHER INDEBTEDNESS(ES) TO WHICH THE PROPERTY IS SUBJECT UNLESS OTHERWISE AGREED TO BY THE LENDER OR REQUIRED BY LAW OR REGULATION.

B

Before the purchase agreement was finalized on October 28, 1992, the bank commenced foreclosure by advertisement on the entire six-lot parcel on October 6, 1992, and the property began being advertised on a weekly basis in the newspaper.

Plaintiff received title work it had requested on the subject property in late November 1992, which indicated that Delta owed taxes and assessments on the entire six-lot parcel for each year from 1989 to 1992, that a tax sale had been held in May 1992 for taxes owed for fiscal year 1989, and that proof of redemption would be necessary for the purchase to go through. Peckham and Hepler reviewed this title work.

On February 15, 1993, the parties executed another addendum (#2) to the agreement, which enlarged the lot size from 2.2 acres to 2.49 acres.

The entire six-lot parcel was sold at a sheriff's sale on April 9, 1993 and a sheriff's deed was recorded on April 16, 1993. Plaintiff learned of the foreclosure on June 10, 1993, at the latest, [1] when it received title work on the subject property for the second time. By letter dated June 24, 1993, NBD notified plaintiff that it had approved its loan application for financing the purchase. Plaintiff accepted the financing package. On July 7, 1993, an addendum to the purchase agreement was executed which stated that "Purchasers are removing all contingencies." By letter dated July 22, 1993, plaintiff advised defendants that it had removed all contingencies, wanted to move forward to close the transaction, and that if closing did not occur by August 6, 1993, it would purchase an alternate site:

> . . . . All contingencies relative to the Buy Sell Agreement dated October 1, 1992, have been removed, and it is our desire to close this transaction as quickly as possible.
>
> As of this date, the outstanding issues relative to the purchase of the property are delinquent taxes, special assessments and foreclosure proceedings by Key State Bank against Delta Commerce Properties.
>
> I understand that you are working with Key State Bank, Eaton County Road Commission, Eaton County Drain Commission and Delta Township to resolve these issues.
>
> **Michigan Alternative Housing has made the decision that if closing cannot occur on or before August 6, 1993, an alternative site will be purchased**. It is clearly the intent of Michigan Alternative Housing to close this transaction. If we may be of any assistance relative to the outstanding issues, please do not hesitate to call. [Emphasis added.]

On August 26, 1993, before the expiration of defendants' six-month period of redemption, plaintiff sent a purchase offer to Key State Bank,[2] and an addendum stating that plaintiff would use its best efforts to close by October 23, 1993. The offer included the same contingencies as the original purchase agreement between plaintiff and Delta. The bank did not counter-offer.

Defendants did not redeem the property within the six-month redemption period, which expired on October 9, 1993. Plaintiff purchased a different parcel of property and closed on that property on March 17, 1994.

II

On September 7, 1994, plaintiff filed a three-count complaint alleging breach of contract, promissory estoppel, and fraudulent misrepresentation. Plaintiff alleged that defendant failed to disclose that the property was the subject of foreclosure at the time the parties entered into a purchase agreement, that plaintiff expended $33,387.46 to prepare the site for closing, that MPD expended an additional $5,400, and that "prior to closing" Chemical Key Bank, formerly Key State Bank, foreclosed on the property. Plaintiff alleged that defendants had redemption rights for the property but failed to redeem the property and that defendants "defaulted on the Buy/Sell Agreement when [they] failed to deliver title to the land to Plaintiff once all contingencies had been removed."

Plaintiff's breach of contract claim alleged that defendants failed to deliver marketable title once the contingencies had been removed, thus breaching the contract, and that defendants' breach resulted in lost profits of $53,159.00.

Plaintiff's promissory estoppel claim alleged that defendants knew that plaintiff intended to incur expenses to prepare the land for purchase, that plaintiff relied on defendants' promise to convey good title once those preparations were complete and the purchase price was delivered, and that defendants either refused or were unable to deliver marketable title.

Plaintiff's fraudulent misrepresentation claim alleged that defendants represented to plaintiff that they would deliver marketable title to plaintiff at closing, that defendants failed to disclose that the property was subject to foreclosure proceedings, that defendants acted in a reckless manner when they represented that they would be able to deliver marketable title at closing, that plaintiff acted in reliance on this representation and entered into the purchase agreement and incurred expenses including attorney fees.

Defendants' answer set forth as affirmative defenses that plaintiff failed to state a claim on which relief could be granted and that plaintiff breached the purchase agreement.

The trial court found that plaintiff established both breach of contract and fraudulent misrepresentation. The court found that defendants breached the contract by failing to deliver marketable title within forty-five days of the date all contingencies were satisfied, and failing to redeem the property within the redemption period, which ended October 9, 1993. The court found that lost profits were foreseeable and a natural consequence of the breach of contract.

The court found that defendants had a duty to disclose, but failed to disclose, that foreclosure proceedings had commenced on October 6, 1992, that such constituted a misrepresentation of material fact, and that plaintiff entered into the contract relying on defendants' representation that it could deliver good title at closing. The court found that plaintiff suffered the same damages under the fraudulent misrepresentation count as it did for breach of contract.

III

A

Defendants first argue that the trial court erred by preventing them from relying on one of the contract provisions as a defense. We agree. The provision provided:

> Sale shall be closed within 10 days after all necessary closing documents are ready provided, however, that if title defect(s) exist(s) and seller is notified of same in writing, 30 days from such notice shall be allowed to cure such defect(s), in default of which this agreement shall terminate, unless otherwise agreed to in writing between Purchaser and Seller . . .

During opening statements, defendants sought to rely on this provision in defense of the breach of contract claim. The trial court determined that the provision in the purchase agreement was an affirmative defense that had not been pleaded and it refused to allow defendants to defend on the basis of the provision.

The contract provision was not an affirmative defense that was waived by defendants' failure to plead it. "An affirmative defense is a defense that does not controvert" the establishment of a prima facie case, "but that otherwise denies relief to the plaintiff." *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). To recover on the breach of contract claim, plaintiff had to establish the existence of a contract and that defendants breached that contract. Defendants' argument that they did not breach the contract because it terminated without breach thereof, directly disputes plaintiff's prima facie case. Therefore, it is not an affirmative defense. Moreover, by making an argument based on their interpretation of the contract language, defendants did not take plaintiff by surprise or otherwise prejudice plaintiff at trial. MCR 2.111(F)(3)(c). Thus, the trial court should have allowed defendants to pursue this defense.

B

Under the provision, the contract terminated if defendants failed to cure defects in the title within thirty days of receiving written notice of the defects. Pursuant to that provision, the purchase agreement terminated on or about August 21, 1993, i.e., thirty days after plaintiff sent defendants a letter stating that the foreclosure, delinquent taxes and special assessments needed to be resolved. Under that provision, plaintiff was entitled to the return of its $2,000 deposit, but was not entitled to breach of contract damages.

Further, under the circumstances that a closing was never scheduled; plaintiff never tendered the purchase price to defendants; and plaintiff stated in its July 22, 1993 letter to defendants that if closing did not occur by August 6, 1993, it would purchase an alternative site, i.e., stated that it was abandoning the contract before defendants had thirty days to cure title defects as provided under the contract (which would have been August 21, 1993);[3] plaintiff could not maintain a breach of contract claim for failure to deliver marketable title.[4]

IV

Nor can the judgment and damage award be upheld on plaintiff's alternate theory of liability, fraud. Generally a seller has no duty, when entering into a preliminary agreement for the sale and purchase of real estate that provides that the seller will provide a commitment for the issuance of title insurance, to inform the purchaser of encumbrances that have been recorded and that will, therefore, appear in the commitment. Thus, generally the seller has no duty to inform the purchaser that there has been a failure to pay real estate taxes, water bills, special assessments, or installments due under a recorded mortgage, nor that a recorded mortgage is being or has been foreclosed.

Before making substantial expenditures, the purchaser should insist on receiving a currently dated commitment for the issuance of a policy of title insurance, and, upon receipt, is on inquiry of the mortgagee whether the seller is current in performing all the mortgagor's obligations under the mortgage. Here, plaintiffs were at least aware that defendant was in default under the mortgage for failure to pay taxes.

Further, assuming a fraud action could properly be maintained under these circumstances, plaintiff did not establish that defendant's failure to advise it of the pendency of foreclosure proceedings was a cause of its damages. The initial title commitment revealed that over $200,000 was owing in back taxes, well more than the purchase price under the contract. Plaintiff went forward with the transaction nevertheless. Later, after learning of the foreclosure, plaintiff still proceeded toward the purchase. The significant factor in this transaction was the presence of a blanket mortgage covering a larger parcel that included the parcel that was the subject of the purchase agreement. The deal fell through because either in June 1993 or sometime thereafter, the bank apparently indicated it would not grant a partial release of the subject parcel. The issue of the connection, if any, between the bank's eventual refusal to grant a partial release and the pendency of foreclosure proceedings was not developed at trial. There is nothing in the record that would support a finding that defendants did not believe that the mortgagee would release the parcel that was to be sold from the lien of the mortgage upon payment of the proceeds of sale to the mortgagee. The testimony at trial was that the bank was willing to give a partial release at least through April 1993, after the foreclosure. Further, there was no evidence that defendants, rather than plaintiff, were responsible for the long delay in closing.

Additionally, there is no basis to award lost profits. When the seller is unable to convey the land due to the inability to convey good title, the purchaser may recover back what he has paid, plus interest and expenses. If the seller acted in bad faith, (i.e., was aware of the defects at the time the contract was made, or having sufficient title, refuses to convey by a voluntary act such as conveying to a third party) the purchaser may recover loss of bargain damages. Loss of bargain damages are usually measured by the difference between the agreed price and the value of the land at the time of the breach. *Soloman v Western Hills Development Co (After Remand)*, 110 Mich App 257, 265-267; 312 NW2d 428 (1981). Here, there was no evidence that the value had appreciated.

Lastly, plaintiff's promissory estoppel claim must also fail. The doctrine of promissory estoppel is applied in cases where there is a promise "gratuitous at least in the sense that there is no consideration to make it binding." Williston on Contracts (4th ed 1992), § 8:5, pp 85-89. That is not the case here where the parties executed a purchase agreement.

Reversed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White

[1] Peckham wavered on his testimony regarding whether he learned of the foreclosure in April 1993 or on June 10, 1993. He testified that he first learned of the foreclosure during a conversation with Jack Harrison of Key State Bank in April 1993. He later testified that he first learned of the foreclosure on receiving the title work on June 10, 1993.

[2] Peckham testified that Jack Harrison responded to the offer by phone, and told him that the bank was not going to split the parcel. Harrison, however, testified that the bank was willing to split the parcel and release the property until the redemption period expired on October 9, 1993.

[3] Plaintiff's failure to attempt a closing meant that defendants were never in a position to force the bank to take a definite position regarding the partial release. A bank representative testified that the bank would have granted a partial release though October 9, when the equity of redemption expired.

[4] 17A CJS, § 399, p 484, states:

> The grounds for termination of a contract under express provisions therein are controlled by such provisions, which ordinarily will be enforced according to their terms, subject to such restrictions as may be imposed by statute.

Cameron, I *Michigan Real Property Law,* 2d ed, § 12.19, p 432, states in pertinent part:

> Where a seller who is required to deliver marketable is unable to do so, the seller is probably given the right to cure title defects when the contract is executory, that is, before the closing. *See Chappus v Lucke*, 246 Mich 272, 224 NW 432 (1929). And there is some authority for the proposition that, in the absence of an agreement to the contrary, even if title is not marketable the buyer must be prepared to make a tender of performance to be entitled to call a default. *See Fisk v Powell,* 349 Mich 604, 84 NW2d 736 (1957). However, in *Deane v Rex Oil & Gas Co,* 325 Mich 625, 39 NW2d 204 (1949), the court held that where an escrow agreement provided that the purchaser's money was to be returned if title was not merchantable and acceptable to

> the purchaser, the purchaser could demand that the money be returned upon discovery of a substantial title defect without giving the seller notice of the defect.
>
> These kinds of problems can be avoided if the parties' contract includes a specific contractual provision dealing with the rights of both the seller and the buyer in the event that a title defect is discovered.

In the instant case, the parties' contract specified that the seller had thirty days from receiving written notice of title defects to cure the defects, and if the defects were not cured, the contract terminated and the seller was required to return the purchaser's deposit.