STATE OF MICHIGAN

COURT OF APPEALS

WILHELM & ASSOCIATES,

Plaintiff-Appellant,

v

THE ORCHARDS GOLF LIMITED PARTNERSHIP,

Defendant-Appellee.

UNPUBLISHED

No. 202541
Wayne Circuit Court
LC No. 96-632802 CK
December 15, 1998

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. We affirm.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because it improperly made findings of fact concerning the meaning of the ambiguous terms of the written agreement. We disagree. We review a trial court's decision to grant summary disposition de novo. *Terry v Detroit*, 226 Mich App 418, 423; 573 NW2d 348 (1997). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 361; 575 NW2d 290 (1998). The trial court must consider the pleadings, affidavits, depositions, and other documentary evidence, give the benefit of any reasonable doubt to the nonmoving party, and draw any reasonable inferences in favor of that party. *Smith, supra,* 227 Mich App 362.

The agreement between plaintiff and defendant was entitled "Brokerage Commission Agreement" and consisted of the following language:

> The Orchards Golf Limited Partnership agrees to pay Wilhelm & Associates a 6% brokerage commission when the following conditions have been satisfied.

1. Wilhelm & Associates facilitates an agreement between The Orchards Golf Limited Partnership and a builder for the purchase of a minimum of 25 single-family lots at The Orchards Tournament, and

2. The builder is acceptable to The Orchards Golf Limited Partnership, and

3. The agreement is reached no later than Friday, October 20, 1995, and

4. Terms and conditions of both the agreement and brokerage commission payment(s) are satisfactory to The Orchards Golf Limited Partnership.

The agreement was signed by Brian Dalby, in his capacity as plaintiff's Vice President, and Thomas Wilhelm.

Commission agreements are construed in the same fashion as contracts. *DeMello v McNamara*, 178 Mich App 618, 622-623; 444 NW2d 149 (1989). The initial question of whether the contract language is unambiguous is a question of law. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). If the contract language is unambiguous, then its meaning is also a question of law. *UAW-GM Human Resource Center, supra*, 228 Mich App 491. Contractual language is to be construed according to its plain and ordinary meaning and that plain meaning may not be impeached with extrinsic evidence. *UAW-GM Human Resource Center, supra*, 228 Mich App 491; *Zurich Ins v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

" 'The primary goal in the construction or interpretation of any contract is to honor the intent of the parties.' " *UAW-GM Human Resource Center, supra*, 228 Mich App 491, quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). The parties are presumed to understand the import of a written contract and have the intention manifested by its terms. *Zurich Ins, supra*, 226 Mich App 604. Accordingly, a written contract is construed according to the intentions expressed in the contract, when those intentions are clear from the face of the instrument. *Id*.

Plaintiff argues that the term the "Orchards Tournament" did not reflect the understanding that plaintiff had.

> However, when ascertaining the intent of the parties to a contract, "it must not be supposed . . . that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument."
>
> . . . We must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the

> parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning. [*Zurich Ins, supra*, 226 Mich App 603-604, quoting *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941).]

The words used in the parties' commission agreement were clear and unambiguous and had a definite meaning. *Zurich Ins, supra*, 226 Mich App 604. In order to receive its six percent commission, plaintiff had to facilitate an agreement between defendant and an acceptable builder for the purchase of a minimum of twenty-five single-family lots at the Orchards Tournament. However plaintiff argues that the Orchards Tournament is ambiguous because plaintiff and defendant agreed that plaintiff would receive a commission for a sale of any property in the Orchards development and that this agreement was confirmed in all of the parties' conversations. Plaintiff offered the deposition testimony of Wilhelm and Loulakis in support of this argument. Wilhelm and Loulakis both testified that they thought they had authority to sell any of defendant's land. However, neither Wilhelm nor Loulakis could point to any language in the brokerage commission agreement which allowed them to receive a commission for any land sold outside of the Orchards Tournament. Moreover, both Loulakis and Wilhelm were actively involved in drafting the brokerage commission agreement. In any event

> it is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of the contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms. [*Zurich Ins, supra*, 226 Mich App 604.]

As a result, Loulakis and Wilhelm's deposition testimony is extrinsic evidence and does not create a genuine issue of fact in avoidance of defendant's motion for summary disposition. *Id.*

Plaintiff also argues that summary disposition was inappropriate because it performed the conditions of the parties' brokerage commission agreement. We disagree. As opined, *supra*, the brokerage commission agreement was unambiguous and adequately described the land which was subject to the agreement. However, plaintiff did not perform any of the requirements of the brokerage commission agreement which would have entitled it to a six percent commission.

Neither Rizzo and Henderson nor Westcreek Estates bought any lots in the Orchards Tournament. Wilhelm admitted that plaintiff never sold any lots in the Orchards Tournament. Loulakis also testified that none of the builders that he introduced to defendant purchased lots in the Orchards Tournament. Accordingly, summary disposition was appropriate because plaintiff did not present any evidence that it performed the conditions which would have entitled it to a six percent commission.

Finally, plaintiff argues that the parties' original, written commission agreement was orally modified and that defendant was estopped from asserting the statute of frauds as a bar to the orally modified agreement because of Ronald Dalby's alleged judicial admission that an orally modified contract existed. Again, we disagree.

The Michigan statute of frauds, MCL 566.132(e); MSA 26.922(e), requires that contracts to pay a commission upon the sale of any real estate must be in writing. *Craib v Committee on Nat'l Missions of the Presbyterian Church of Detroit of the United Presbyterian Church USA*, 62 Mich App 617, 621; 233 NW2d 674 (1975). Specifically, MCL 566.132(e); MSA 26.922(e) provides that:

> In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract or promise:
>
> * * *
>
> (e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

The purpose of the statute is to protect real estate owners against unfounded or fraudulent claims by brokers. *Schultes Real Estate Co, Inc v Curis*, 169 Mich App 378, 384; 425 NW2d 559 (1988).

Therefore, in order to circumvent the statute of frauds and recover on an alleged orally modified contract, plaintiff argues defendant was estopped from asserting the statute of frauds as a defense. In Michigan, a statement made by a party, in the course of trial, is a binding judicial admission if it is a distinct, formal, solemn admission made for the express purpose of dispensing with the formal proof of some fact at trial. *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969).

Because no Michigan case is directly on point, plaintiff relies on case law from other jurisdictions for the proposition that a party who admits the existence of a contract otherwise outside the statute of frauds is bound by that admission. However, neither Ronald Dalby nor Brian Dalby ever admitted the existence of an oral contract in pleadings, affidavits or deposition testimony. In his affidavit, Ronald Dalby stated that at the end of the meeting with Rizzo and Henderson, Ronald Dalby said to Wilhelm and Loulakis, something like, "I'll take care of you," or "let me take care of you." Brian Dalby confirmed that Ronald Dalby made this statement. Brian Dalby testified that he remembered his father saying, "I'll take care of you," to Wilhelm. These are the statements that plaintiff asserts constituted judicial admissions which estop defendant from asserting the statute of frauds as a defense.

Defendant may be estopped from denying that Ronald Dalby ever said, "I'll take care of you," because defendant is bound by its deposition testimony. *State Farm Fire & Casualty Co v Moss*, 182 Mich App 559, 562; 452 NW2d 816 (1989). However, these statements are not formal admissions of an oral contract which would estop defendant from asserting the statute of frauds as a defense to plaintiff's claim of an alleged orally modified contract. *Timberlake v Heflin*, 180 W Va 644, 649; 379 SE2d 149 (1989). Neither Ronald Dalby nor Brian Dalby admitted either the existence of the contract or all essential terms of the contract. *Bentley v Potter*, 694 P2d 617, 621 (Utah, 1984). Instead, Ronald Dalby's affidavit and Brian Dalby's deposition testimony are recollections of a past

statement. Ronald Dalby did not testify that the parties had orally modified the contract. Rather, Ronald Dalby testified that he had made the statement, "I'll take care of you." Moreover, Ronald Dalby testified that he knew that he did not have an agreement with plaintiff when plaintiff brought Rizzo and Henderson to meet with Ronald Dalby and Brian Dalby.

Even if this Court were to adopt a judicial admission exception to the statute of frauds for contracts involving the sale of land, plaintiff has not presented sufficient evidence to invoke such an exception. Accordingly, summary disposition was appropriate because plaintiff's claim of an orally modified contract was barred by the statute of frauds.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer