STATE OF MICHIGAN

COURT OF APPEALS

F. CHARLES SUCK, Trustee of the ANNE M. WILSON SUCK TRUST,

Plaintiff-Appellant,

v

MICHAEL P. SULLIVAN,

Defendant-Appellee.

UNPUBLISHED
August 27, 1999

No. 207488
Kalamazoo Circuit Court
LC No. 95-001498 CH

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Plaintiff, as trustee of the Anne Suck Trust, appeals as of right the trial court order finding the option agreement between Anne Suck and defendant to be valid and enforceable.[1] We affirm.

When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997). A trial court's findings of fact are considered clearly erroneous where this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

I

Plaintiff first contends that the option agreement is void for lack of consideration. An option to purchase must be supported by consideration to be enforceable. *Bd of Control of Eastern Michigan Univ v Burgess*, 45 Mich App 183, 185; 206 NW2d 256 (1973). An option agreement becomes binding only when the grantor has actually received consideration for the agreement. See *Bailey v Grover*, 237 Mich 548, 554; 213 NW 137 (1927).

The trial court found that the consideration for the option agreement was defendant's assumption of the obligation to order a survey of the property.[2] Under the agreement, defendant was required to obtain a survey of the property regardless whether the option was exercised. Although the

agreement provided that Suck was to reimburse defendant for the cost of the survey, payment would only occur if and when defendant exercised the option. The record establishes that defendant had already obtained the survey, at a cost of $2,800, when Suck attempted to repudiate the option agreement.

Plaintiff argues that the survey cannot serve as consideration for the option agreement because it was not regarded as such by the parties. We disagree. Consideration for an agreement exists where there has a benefit on one side or a detriment suffered, or services done, on the other. *Dep't of Natural Resources v Bd of Trustees of Westminster Church of Detroit*, 114 Mich App 99, 104; 318 NW2d 830 (1982). The essence of consideration is legal detriment that has been bargained for and exchanged for the promise. *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978). The record reveals that the parties bargained over who would bear the initial cost of the survey: Suck told defendant she did not want to spend any money up front, so defendant structured the agreement so that she would not have to pay until the time of closing. Thus, under the agreement, Suck obtained the benefit of having her property surveyed, while defendant suffered a detriment by arranging and paying for the survey. Accordingly, the trial court did not err in finding that defendant's obligation with regard to the survey was the consideration for the option agreement.

Plaintiff contends that the contract was ambiguous regarding which party was responsible for obtaining the survey. However, uncertainty in a contractual provision can be removed by the subsequent acts of the parties. *Waites v Miller*, 244 Mich 267, 272; 221 NW 171 (1928); see also *Brotman v Roelofs*, 70 Mich App 719, 727; 246 NW2d 368 (1976) ("Written provisions which are indefinite may be clarified by extrinsic factors."). The trial court found that the facts presented at trial demonstrate that defendant was responsible for ordering and paying for the survey. This finding is not clearly erroneous.

II

Plaintiff next contends that the agreement is unenforceable because it does not state the purchase price with sufficient certainty and definiteness, and the trial court erred in "rewriting" the contract for the parties. Plaintiff maintains that because the agreement does not specify the number of lots in the parcel, defendant could buy the property for as little as $60,000 or as much as $525,000.

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998). The trial court specifically found that the parties intended that the property would be divided into eight lots. Defendant testified at trial that he expected to divide the property into seven or eight lots. Suck testified at her deposition that defendant had told her that the property would be split into eight parcels. Considering the above testimony, the trial court's finding is not clearly erroneous.

Furthermore, contrary to plaintiff's argument, the purchase price for the property is set forth with sufficient certainty. The agreement provides that the price for the entire parcel is $525,000. Pursuant to the agreement, defendant may exercise the option by purchasing one lot at a time; the price

of the first three lots purchased is $60,000, with the remainder to be apportioned equally among the remaining lots.

Plaintiff maintains that the trial court exceeded its authority in ruling that the requirement that the property would be divided into a minimum of eight lots was part of the option agreement. We disagree. Where a contract is open to construction, the court must determine, if possible, the parties' true intent by considering the contract language, its subject matter, and the circumstances surrounding its making. *Sands Appliance Services v Wilson*, 231 Mich App 405, 412, 587 NW2d 814 (1998). As already discussed, the trial court's finding that the parties intended that the property would be divided into eight lots is not clearly erroneous. Moreover, in Suck's first amended complaint, she requested as alternative relief reformation of the agreement. Plaintiff cannot now complain because the court complied with Suck's request.

III

In his final issue, plaintiff contends that the option agreement should not be enforced because of defendant's alleged ethical breaches. In support of this assertion, plaintiff raises a number of arguments.

Plaintiff contends that defendant, who is an attorney, violated MRPC 4.3 by failing to advise Suck to consult an attorney. We disagree. First, MRPC 4.3 is not implicated because defendant was not dealing on behalf of a client.[3] In addition, MRPC 4.3 does not impose a duty on an attorney to recommend that a person who is not represented by counsel confer with an attorney under any circumstances.[4] In the present case, Suck testified that she never thought that defendant was acting as her attorney, and there is nothing in the record to indicate that she misunderstood his role in the transaction. Accordingly, defendant was not required by MRPC 4.3 to take any particular action.

Plaintiff also claims that the agreement is unfair because it permits defendant to purchase only the most desirable parcels while allowing the option on the remaining lots to lapse. Reasonableness is the primary consideration in determining whether a contract is unenforceable as unconscionable. *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998). The record establishes that the parties negotiated the terms of the option agreement. There is no evidence of any disparity in the relative bargaining power of the parties that would indicate Suck's options were limited when the agreement was executed. See *id*. The fact that defendant may choose not to purchase all the lots does not render the agreement unfair.

In addition, plaintiff maintains that the agreement is unfair because the purchase price is "wholly inadequate." The trial court found that the value of the property was between $880,000 and $1,300,000. The record shows that Suck rejected the initial figure offered by defendant, and the final contract price of $525,000 was calculated using a formula suggested by Suck's husband. Under these facts, we cannot find that the trial court erred in concluding that the purchase price, while below the value of the property, was not so inadequate as to shock the conscience. See *Moffit v Sederlund*, 145 Mich App 1, 11; 378 NW2d 491 (1985).

With regard to plaintiff's remaining claims of inequity, the trial court found that Suck was mentally competent, she was not unduly influenced or coerced into entering the agreement, and

she was not defrauded by defendant. Plaintiff has made no showing that these findings are clearly erroneous.

Affirmed.

/s/ Gary R. McDonald
/s/ Mark J. Cavanagh

[1] Anne Suck died while this appeal was pending.

[2] The agreement in this case contained a paragraph entitled "Consideration," which provided that Anne Suck would receive a life estate in the property. However, the trial court correctly held that the life estate cannot serve as consideration for the agreement. The holder of an option to purchase land has no interest in the land before exercising the option. *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 38; 257 NW2d 260 (1977).

[3] MRPC 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[4] The comment to MRPC 4.3 does not impose an affirmative duty on a lawyer to advise an unrepresented person to consult an attorney; it merely states, "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."