# STATE OF MICHIGAN

# COURT OF APPEALS

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STONEY CREEK VILLA,

Plaintiff-Appellant,

v

FRANKLIN BANK, N.A.,

Defendant-Appellee.

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UNPUBLISHED
February 8, 2000

No. 210602
Macomb Circuit Court
LC No. 97-000359 CK

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff Stoney Creek Villa appeals as of right the trial court's grant of summary disposition to defendant Franklin Bank, N.A pursuant to MCR 2.116(C)(10). We affirm.

The parties entered agreements concerning Stoney Creek's construction of an apartment complex. Stoney Creek alleged that Franklin Bank agreed to secure permanent mortgage financing for Stoney Creek's project, but ultimately failed to obtain this financing. The complaint further averred that Franklin Bank breached the parties' contract when it refused to return to Stoney Creek a $32,000 prepaid brokerage fee.

Stoney Creek contends that the circuit court erred when it granted summary disposition in favor of Franklin Bank because a genuine issue of material fact existed regarding whether Stoney Creek obtained the requisite occupancy rate to satisfy a condition precedent to Franklin Bank's performance. We review de novo a trial court's summary disposition ruling. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available. *Id*. The court reviews the evidence in the light most favorable to the party opposing the motion to determine whether the moving party is entitled to judgment as a matter of law. If the moving party has supported its position with documentary evidence and the opposing party fails to present any documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Our resolution of this case requires consideration of the parties' agreement. The cardinal rule in interpreting contracts is to ascertain the parties' intention. *Amtower v William C Roney & Co*, 232 Mich App 226, 234; 590 NW2d 580 (1998). Contract language should be given its plain and ordinary meaning. *Michigan National Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998).

Here, Stoney Creek and Franklin Bank entered into a contract, labeled "Letter Agreement," on April 1, 1991, which provides in relevant part as follows:

> At this time, the parties have agreed that permanent mortgage financing will not be provided by Franklin. The fees paid to date by Borrower for the Franklin Commitment and its extensions total $69,750.00 (the "Commitment Fee"). The Commitment Fee has been fully earned by Franklin. However, in order to preserve and promote a mutually beneficial relationship, Franklin and Borrower have agreed as follows:
>
> 1. $23,250.00 of the Commitment Fee will be returned to Borrower immediately upon the execution hereof by both parties;
>
> 2. $14,500 of the Commitment Fee will be retained by Franklin; and
>
> 3. The balance of the Commitment Fee in the amount of $32,000.00 will be held by Franklin as a good faith deposit for payment of a brokerage fee (the "Brokerage Fee") to be earned by Franklin [in] accordance with the terms set forth hereinafter.
>
> *With respect to the brokerage arrangement, Franklin shall have a period ending upon the latter of (i) 18 months from the date of acceptance of this Letter Agreement or (ii) 60 days from the date the Property achieves 90% occupancy, within which to obtain a firm, written commitment (the "Mortgage Commitment") for permanent mortgage financing from a regionally recognized lending institution or life insurance company (the "Lender").*
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> * * *
>
> In the event that Franklin obtains the Mortgage Commitment in substantial conformity with the terms outlined above or on such terms as Borrower may subsequently agree to, then, and in that event, the Brokerage Fee (i.e., $32,000.00) shall be deemed immediately earned by Franklin and may be retained by Franklin free of the Claims of Borrower.
>
> In the event that Franklin is unable to obtain the Mortgage Commitment as set forth above, then, and in that event, Franklin shall promptly return the good faith deposit to Borrower. [Emphasis added.]

An integration clause follows, demonstrating the parties' intent that their written agreement fully represent their entire agreement.

The trial court determined that the parties' agreement contemplated Stoney Creek's construction of a 120-unit complex. In further support of this interpretation of the contract, the trial court noted that a subsequent letter identifying the handwritten modifications in the agreement and signed by both parties referred to the complex having 120 units. The court found that undisputed evidence established that as of October 25, 1993, after Stoney Creek had requested that Franklin Bank obtain permanent financing, only one hundred of the complex units were constructed. The trial court figured that ninety percent of 120 units equaled 108 units, and concluded that because Stoney Creek had not obtained ninety percent occupancy as required under the parties' agreement, the condition precedent to Franklin Bank's performance had not been satisfied.

Stoney Creek challenges the validity of the 120-unit standard within the parties' agreement. According to Stoney Creek, representatives of the parties modified and executed the "Letter Agreement," designating their acceptance of particular hand written modifications by initialing these. One modification, the number of apartment units in the project, was changed from 100 to 120, but was not initialed by Stoney Creek's representative. Stoney Creek argues that therefore the 120-unit designation did not represent a term of the contract because no meeting of the minds occurred regarding this number. Stoney Creek presented the affidavit of Gerald J. Carnago, its representative, in which Carnago states that he intentionally and deliberately avoided initialing this modification, and that the parties understood that the complex would consist of either 100 units or 120 units and divided into two phases, with the financing adjusted accordingly. According to Stoney Creek, the lack of initials by the modified number of units rendered invalid the attempted modification of the contract. Using the 100-unit occupancy number, Stoney Creek contends that the complex's occupancy exceeded the required ninety percent figure when it notified Franklin Bank of its duty to obtain financing.

Even assuming, as Stoney Creek suggests, that from the uninitialed modification to the letter agreement's 100-unit figure we reasonably may infer an invalid unilateral attempt to change this term of the parties' agreement, a valid, subsequent modification supports the trial court's grant of summary disposition to Franklin Bank. Generally parties are free to take from, add to or modify an existing contract, provided that any changes reflect a meeting of the parties' minds. *Port Huron Education Ass'n v Port Huron Area School Dist*, 452 Mich 309, 326-327; 550 NW2d 228 (1996). A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 317; 575 NW2d 324 (1998).

Stoney Creek and Franklin Bank executed the following modification to their initial letter agreement:

> The Letter Agreement dated March 13, 1991, was agreed to and accepted on April 1, 1991 subject to the indicated modifications attached hereto.

> The Loan amount will be determined by the Lender. It appears that $4,000,000 will be obtainable *for the 120 apartment units in this complex*.
>
> Notwithstanding, anything to the contrary set forth in our Letter Agreement upon the issuance of a minimum $4,000,000 Commitment Letter, Franklin Savings Bank shall be entitled to a commitment fee of 1% of the amount of loan over $3,100,000 in addition to the $32,000 fee required under our Letter Agreement. [Emphasis added.]

The objective evidence shows the parties' agreement that Stoney Creek's complex would consist of 120 units, *Marlo Beauty Supply*, *supra*: the modification language clearly and plainly states that the complex is to contain 120 units, *Michigan Nat'l Bank*, *supra* (If contract language is clear and unambiguous, its construction is a question of law for the court. Contract language should be given its ordinary and plain meaning.); no handwritten markings or other indications exist that a party objected to the number 120; and both parties' representatives signed the modification, thus assenting to its terms. According to the clear language of the parties' initial letter agreement, Franklin Bank was not obligated to secure permanent financing for Stoney Creek until occupancy of the complex reached ninety percent. Stoney Creek does not challenge the trial court's finding that the occurrence of a ninety percent occupancy rate represents a condition precedent to Franklin Bank's performance. *MacDonald v Perry*, 342 Mich 578, 586; 70 NW2d 721 (1955) (A condition precedent constitutes a fact or event that the parties intend must take place before a right to performance exists.). Because it is not disputed that no more than 100 units of the Stoney Creek complex were occupied or even constructed when it requested that Franklin Bank obtain permanent financing, which quantity fell below the 108 units that represented ninety percent of the complex's total of 120 units, the condition precedent was not satisfied. Accordingly, the trial court properly granted Franklin Bank summary disposition of plaintiff's breach of contract claim pursuant to MCR 2.116(C)(10). *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 420; 533 NW2d 838 (1995) (Failure to satisfy a condition precedent prevents a cause of action for failure of performance.).

To the extent that the affidavit of Gerald J. Carnago contradicts the letter agreement and subsequent modification, the affidavit does not create any genuine issue of material fact precluding summary disposition. While the affidavit discusses the parties' alleged understandings with respect to their letter agreement, the letter agreement itself contains an express integration clause. "When two parties have entered into a written contract and have expressed their intention that the writing constitute the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Michigan Nat'l Bank*, *supra* at 714-715.

Lastly, Stoney Creek suggests that a genuine issue of material fact exists regarding whether the parties intended forfeiture of the $32,000 prepaid brokerage fee. The letter agreement plainly states that while Franklin Bank already had earned the $69,750 commitment fee, the parties would consider that $32,000 of the commitment fee would "be held by Franklin as a good faith deposit for payment of a brokerage fee . . . to be earned by Franklin [in] accordance with the terms" of the agreement. Franklin Bank's performance was not invoked because Stoney Creek failed to satisfy a condition precedent to performance. Thus, the terms of the letter agreement were not fulfilled, and the money

remained fully earned by Franklin Bank. While the agreement contains a provision regarding Franklin Bank's return of the $32,000 "[i]n the event that Franklin is unable to obtain the Mortgage Commitment as set forth above," this provision assumes that Stoney Creek will have initially satisfied the condition precedent invoking Franklin Bank's performance. Read in context, the agreement states that Franklin Bank already earned the money, but was willing to designate a portion as the brokerage fee if Stoney Creek complied with its portion of the letter agreement, which it did not. Because no forfeiture occurred, plaintiff's argument is without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage