STATE OF MICHIGAN

COURT OF APPEALS

ROGER ANTKIEWICZ and VINCENT ANTKIEWICZ, d/b/a PEST ELIMINATION PRODUCTS, INC.,

Plaintiffs-Appellants,

v

JAMES L. SCRIVO and DAVID J. SCRIVO, d/b/a JDI, INC., and DARLENE CHERNENKO and NOELL WOODCRAFT, d/b/a PEST ELIMINATORS,

Defendants-Appellees.

UNPUBLISHED
August 22, 2000

No. 209308
Macomb Circuit Court
LC No. 97-001863 AV

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

In this breach of contract case, the district court on the close of plaintiffs' proofs dismissed plaintiffs' complaint and awarded defendants mediation sanctions and costs. Plaintiffs appealed to the circuit court, which affirmed the dismissal of plaintiffs' case, and affirmed in part and reversed in part the district court's award of mediation sanctions and costs. This Court granted plaintiffs' application for leave to appeal. We affirm the circuit court's judgment in part, reverse in part, and remand to the district court for further proceedings.

I

Plaintiffs, who are brothers, and defendants James and David Scrivo (hereinafter the "Scrivos"), father and son respectively, in the early 1980's started Pest Eliminators, a pest control business. After several years of operation, plaintiffs and the Scrivos divided the accounts and split into separate businesses, each of which by agreement used the name Pest Eliminators. In 1989, when plaintiffs briefly attempted a different line of business, the Scrivos purchased plaintiffs' interest in the pest control business. The contract of sale provided that the Scrivos would pay plaintiffs approximately $70,000 over a three-year period, and further provided that plaintiffs would not compete against the Scrivos' business.

During the course of the contract, defendants Darlene Chernenko and Noell Woodcraft (hereinafter "C & W") entered the business as the Scrivos' trainees, then purchased the business in February 1992. C & W assumed the Scrivos' monthly payments to plaintiffs. C & W ceased these payments in May 1992, however, after learning that plaintiffs had reentered the pest control business by engaging in retail sales of pest management products. At this time, approximately $20,100 remained due plaintiffs pursuant to their contract with the Scrivos.

Plaintiffs sued demanding the remainder of the purchase price, and defendants countercomplained, inter alia, that plaintiffs breached the 1989 contract's covenant not to compete. After mediation in the circuit court, the case was remanded to the district court for trial. At the bench trial, plaintiffs maintained that the contract on its face clearly did not limit their right to engage in retail sales of pest control products. Plaintiffs presented as adverse witnesses defendants James and David Scrivo, who testified that they understood they were acquiring exclusive rights to Pest Eliminators' retail business. Plaintiffs themselves did not take the stand, and they presented no witnesses to rebut the Scrivos' representations concerning the parties' intent.

At the close of plaintiffs' proofs, the district court ruled that the 1989 contract was ambiguous concerning whether the noncompetition provision included retail pest control product sales. The court interpreted the noncompetition clause in defendants' favor because plaintiffs presented only testimony favoring defendants' position concerning the understanding of the contracting parties. Having thus concluded that plaintiffs breached the covenant not to compete, the district court on defendants' motion dismissed plaintiffs' complaint. Defendants then agreed to voluntarily dismiss their counterclaims.

Although the district court expressed some concerns over how to decide the question of damages, the court apparently was persuaded by defendants' argument that because plaintiffs breached the noncompetition covenant, defendants were excused from tendering plaintiffs any further payments under the contract. The district court further awarded defendants mediation sanctions and costs.

The circuit court on appeal reversed the district court's award of mediation sanctions to C & W, but otherwise affirmed the district court's judgment. This Court granted plaintiffs' application for leave to appeal.

II

A

Plaintiffs first contend that the district court improperly found the 1989 contract ambiguous and construed it in light of parol evidence, arguing that the contract on its face clearly permitted plaintiffs to engage in retail sales of pest control products. Whether contract language is ambiguous represents a legal question that we review de novo. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

A written contract is ambiguous if after reading the entire document its language reasonably can be understood in differing ways. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467

NW2d 17 (1991). We find that reasonable persons could disagree on whether the instant noncompetition provision contemplates retail sales of pest control products. The contract's preamble describes the 1989 sale of Pest Eliminators as encompassing "equipment and customers relating to [plaintiffs'] pest control service." Given the absence of "inventory" or "products" within the preamble, this language alone appears not to envision as part of the contract the retail sales operation. Contract paragraph six, however, states that the "Sellers agree NOT to go back into this *business* or be connected with anyone in this *business* (pest control, exterminating, etc..[sic]) for a period of ten (10) years." [Emphasis added.] This language seems to reflect a broad exclusion regarding the business being sold, covering any connections with the pest control business generally, which one reasonably could construe to include retail sales of pest control products. Given the above two reasonable interpretations of the contract, the district court correctly found the contract ambiguous. *Id*.

The district court concluded that the Scrivos were responsible for drafting the covenant not to compete, and recognized its duty to construe the covenant against them. *Detroit Bank & Trust Co v Coopes*, 93 Mich App 459, 464; 287 NW2d 266 (1979) ("The rule of construction that a contract will be strictly construed against the drafter needs no citation."). The principle that contracts should be construed against their drafters does not signify, however, that all contract disputes are necessarily resolved against the drafter on the basis of this principle alone. Because the contract was ambiguous on its face, the district court properly considered parol evidence to ascertain the parties' intent. *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 206; 220 NW2d 664 (1974), vacated in part on other grounds, *id*. at 219. Here, the parol evidence consisted of plaintiffs' adverse witnesses' testimony that they understood the 1989 contract provided them exclusive rights to Pest Eliminators' retail business. Plaintiffs presented no witnesses supporting their contention that the parties intended to exclude from the noncompetition clause the retail sale of pest control products.

B

Plaintiffs also claim that the district court erred in denying their request to reopen the proofs. A decision concerning a motion to reopen proofs lies within the trial court's sound discretion. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959). Applications to reopen proofs must be meritorious and reflect reasonable diligence in obtaining the claimed newly discovered evidence. *Cowan v Anderson*, 184 Mich 649, 656; 151 NW 608 (1915). A critical inquiry where the trial court has declined to reopen proofs is whether the petitioning party was unfairly deprived of its opportunity to present its case. *Klee v Light*, 360 Mich 419, 424; 104 NW2d 207 (1960).

In this case, plaintiffs requested that the district court reopen the proofs when it found plaintiffs in breach of the contract in part because of the lack of evidence favorable to plaintiffs concerning the parties' understanding of the contract's ambiguous language. Plaintiffs sought to introduce their testimony concerning their understandings of the 1989 contract's scope.[1] It clearly was plaintiffs' trial

[1] Although plaintiffs incidentally mention on appeal that the district court did not ascertain actual damages or address the question of unjust enrichment, plaintiffs predicated their motion to reopen proofs solely on their desire to present one of the plaintiffs to testify to his understanding of the

strategy to urge the district court to interpret the contract in plaintiffs' favor solely by relying on the contract's language. Plaintiffs accordingly rested without exposing themselves to cross examination or otherwise offering their asserted understanding of the parties' intent. The motion to reopen proofs constitutes an attempt to pursue an alternative strategy, having failed at the first one. Plaintiffs had no new evidence to present that their due diligence failed to earlier obtain, and we do not find meritorious plaintiffs' offer of witnesses, who were readily available from the beginning of trial, in response to an unfavorable decision. *Cowan, supra*. The district court denied the motion, reminding plaintiffs' counsel that plaintiffs were in court the whole time and available to testify. We find no abuse of discretion in the district court's decision not to reopen proofs. *Klee, supra*; *Bonner, supra*.

C

In light of the uncontradicted testimony concerning the parties' intent, we cannot conclude that the district court clearly erred in interpreting the contract as excluding plaintiffs from engaging in retail sales of pest control products. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000) ("A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."). Furthermore, the district court set forth sufficient factual findings to support its decision. MCR 2.517(A); *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 302; 224 NW2d 883 (1975). The court explained that it found the contract ambiguous, that it found defendants responsible for drafting the noncompetition covenant, and the basis for its conclusion that the covenant nonetheless should be interpreted in favor of defendants.

The district court thus properly found plaintiffs in breach of the covenant not to compete.

III

Plaintiffs next correctly indicate that after determining that plaintiffs breached the 1989 contract, the district court provided no findings concerning damages.[2] The record reflects the following relevant observations of the district court:

---

contracting parties' intentions. Plaintiffs do not acknowledge that their motion to reopen proofs was preserved only with respect to their wish to offer into evidence their interpretation of the contract.

[2] Plaintiffs also allege that the district court failed to set forth factual findings regarding defendants' allegation of fraud. The allegation of fraud, stemming from the question whether a corporate entity listed in the 1989 contract among the sellers actually existed as a bona fide seller of the business, was among defendants' counterclaims against plaintiffs, and was voluntarily dismissed. Plaintiffs obviously suffered no harm from that action, and have nothing to gain from appellate review of it. Plaintiffs may not claim another party's appellate opportunities. *Branch Co Bd of Comm'rs v Service Employees International Union, Local 586*, 168 Mich App 340, 346; 423 NW2d 658 (1988); *Winters v National Indemnity Co*, 120 Mich App 156, 159; 327 NW2d 423 (1982). Therefore, the issue of fraud is not before us.

> However, there's another question I want . . . you gentlemen to advise me on, and that is a question of the breach. The contract was breached, and I think there was twenty thousand dollars owing. Now, what is the extent of the breach? Does the breach absolve the defendants from any further obligation, or would that be . . . would they be unjustly enriched? And . . . what's the extent of the breach, and I think maybe that's a question that we have to . . . face at this time.

The district court made no further findings of fact concerning the effect of plaintiffs' breach on the issue of damages, but apparently adopted defendants' position that plaintiffs' initial breach excused defendants' subsequent breach, specifically defendants' refusal to make any further contract payments after May 1992, and dismissed plaintiffs' claim.

It is true, as defendants contend and the trial court seemed to agree, that a general principle exists that a party first in breach of a contract cannot bring a suit based on the opposite party's breach of the contract. *Ehlinger v Bodi Lake Lumber Co*, 324 Mich 77, 89; 36 NW2d 311 (1949). This rule applies, however, only when the plaintiffs' breach has effected such a change in the essential operative elements of the contract that further performance by the other party is rendered ineffective or impossible, such as complete failure of consideration or prevention of further performance. *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 573-574; 127 NW2d 340 (1964).

> The question presented is one involving the doctrine of substantial performance. A promisor, it is true, is obligated to perform as he promised. This does not mean, however, that every deviation from the performance promised so goes to the essence of the contract as to privilege the other to refuse to render a reciprocally promised performance. Substantial performance, however, there must be. What amounts to substantial performance? There is no fixed formula. The question is one of degree, its determination involving the resolution of many factors. 3 Corbin on Contracts, § 704, puts the matter well in these terms:
>
> > "It is not easy to lay down rules for determining what amounts to 'substantial performance,' sufficient to justify a judgment for the contract price (subject to a counterclaim for injury, if asserted) in any particular case. It is always a question of fact, a matter of degree, a question that must be determined relatively to all the other complex factors that exist in every instance. . . . [*Antonoff v Basso*, 347 Mich 18, 28; 78 NW2d 604 (1956).]

If the plaintiff has performed under the contract valuable services for the defendant, of which the defendant has reaped the advantage, the plaintiff is entitled to recover therefor at the rate fixed by the contract, less any damages the defendant may have suffered by reason of failure in complete performance. *Id*. at 32.

In this case plaintiffs have substantially performed a major portion of the contract by transferring all of their business to defendants, who have profited therefrom. Consequently, plaintiffs' breach of the noncompetition clause does not absolve defendants of their legal obligation to pay the balance of the

purchase price. *Id*. Given the absence of any consideration by the district court of the extent of the parties' respective breaches or its calculation of the parties' respective damages, we remand to the district court for its determination regarding appropriate damages.[3]

Because no final determination with respect to damages exists, we vacate the district and circuit court's awards of mediation sanctions to the Scrivos. MCR 2.403(O). We need not consider plaintiffs' further, moot arguments on appeal regarding mediation sanctions. *BP7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

We affirm the district and circuit courts' interpretations of the 1989 contract and their determinations that plaintiffs breached the contract by entering the pest control retail business, we vacate the district and circuit courts' awards of mediation sanctions to the Scrivos, and we remand to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Hilda R. Gage
/s/ Michael J. Talbot

[3] We leave to the trial court to determine what damages, if any, have been proven or whether the parties may reopen their proofs on the complaint and countercomplaint.