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

TECORP ENTERTAINMENT LIMITED, Plaintiff/Third-Party Defendant-Appellee/Cross-Appellant,	UNPUBLISHED February 9, 2001
v HEARTBREAKERS, INC., Defendant-Appellant/Cross-Appellee.	No. 209861 Wayne Circuit Court LC No. 96-642169-CZ
and THOMAS PETTY, SUSAN PETTY, JOSEPH S. GIORDANO, a/k/a JOE GIORDANO, and CANDYCE GIORDANO, Third-Party Defendants.	

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment awarding plaintiff restitution for unjust enrichment after the trial court found the parties' agreements void ab initio. Plaintiff cross-appeals the court's denial of plaintiff's request for specific performance, the court's entry of judgment against defendant instead of third-party defendants, and the court's depreciation of improvements in determining restitution. We affirm in part, reverse in part, and remand for further proceedings.

Third-party defendants Joseph Giordano and Thomas Petty created defendant Heartbreakers to operate a country western bar in Dearborn Heights. After financial difficulties in 1995, defendant negotiated an agreement with plaintiff for the sale of the business. The parties signed two agreements: an asset purchase agreement (hereinafter "purchase agreement"), through which plaintiff purchased the business assets, and a participating and management agreement (hereinafter "management agreement") that allowed plaintiff to operate the business pending the transfer of defendant's liquor license to plaintiff. The management agreement was incorporated by reference into the purchase agreement through an addendum to the purchase agreement. Paragraph 10(D) of the management agreement specifically provides as follows:

> Nothing in this Agreement shall be construed in such a manner as to violate federal, state or local law or the Michigan Liquor Control Act or General Rules. In the event a determination is made that any provision hereof violates any such laws or rules, it shall immediately be amended to comply therewith.

Plaintiff also signed a lease with third-party defendants for the building in which the bar was located.

After the Michigan Liquor Control Commission (MLCC) approved the management agreement, plaintiff renovated the building and began operation of a bar and billiard hall. In June 1996, the MLCC reversed its position and informed the parties that the management agreement did not comply with its regulations. Specifically, the MLCC objected to two terms of the agreement. First, the MLCC objected to the provision in the parties' agreement that all sales taxes shall be paid under plaintiff's tax identification number and that defendant's tax identification number shall not be used for any reason. The MLCC stated that the payment of sales taxes was an "incident of ownership" that must be retained by the owner of the liquor license. Second, the MLCC objected to the provision that plaintiff would receive ten percent of the gross sales of the business as compensation only if there were funds remaining after payment of all expenses of the operation of the business. The MLCC noted that under such terms, it would be possible that plaintiff would receive no remuneration for its services and labor, and that this is a risk "customarily associated with ownership."

Plaintiff prepared an amended management agreement and submitted it to the MLCC for review. After the MLCC approved the amended management agreement, plaintiff presented the agreement to defendant for signature. When defendant refused to sign the new agreement, plaintiff filed suit for specific performance, breach of contract, and injunctive relief. The trial court conducted an expedited bench trial in January 1997, after which the court concluded that the asset purchase agreement, the management agreement, and the lease between plaintiff and third-party defendants were void ab initio because there was no meeting of the minds on at least two essential terms in the management agreement: (1) which party's tax identification number would be used and (2) the terms under which plaintiff would be paid for managing the business.

The court subsequently conducted a bench trial to determine a remedy. The court determined that defendant had been unjustly enriched because plaintiff had made improvements to the property at issue and that plaintiff was entitled to restitution measured by the difference between the value of the improvements to the property and the rent owed by plaintiff to defendant. The court entered a net judgment for plaintiff of $33,701.93 plus interest and dismissed third-party defendants with prejudice.

Defendant argues on appeal that the trial court erred in determining that the purchase agreement was void ab initio because the issues presented at trial involved only the management agreement. Defendant does not challenge the trial court's determination that the management agreement was void ab initio, except to state that the evidence did not support the court's conclusion that there was no meeting of the minds. We address first the issue whether the management agreement was void ab initio to clarify the basis for the court's conclusion.

Contract interpretation is a question of law that this Court reviews de novo. *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). One of the essential elements of a valid contract is mutuality of assent. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). "Meeting of the minds," which is similar in meaning to mutual assent, is the express agreement reached by the parties. *Stark v Kent Products, Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975). A meeting of the minds must exist on all essential terms and material facts for the contract to be valid. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). Whether there was a meeting of the minds between the parties is a question of fact, which is reviewed for clear error. *Martin v DeYoung*, 232 Mich 112, 118; 205 NW 142 (1925); *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165, 171; 530 NW2d 772 (1995). Clear error exists when this Court is left with the firm conviction that a mistake was made. *Id.*

Here, although the parties appeared to mutually assent to the management agreement as originally written, that agreement contained a clause providing that the agreement would be amended if it were determined to be out of compliance with MLCC regulations. Essentially, the contract contained an agreement to agree later to an amendment, if necessary. A contract to make a subsequent contract is not per se unenforceable and may be just as valid as any other contract. *Heritage v Wilson*, 170 Mich App 812, 819; 428 NW2d 784 (1988). However, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations. *Id.* With regard to agreements to contract, our Supreme Court has referenced the following:

> "If all the conditions of the postponed agreement are specified in such agreement, it is an agreement *in praesenti.* But where the conditions of the deferred contract are not set out in the provisional one, or where material conditions are omitted, it is not a contract *in praesenti*, because the minds have not met and may never meet." [*Socony-Vacuum Oil Co, Inc v Waldo*, 289 Mich 316, 322-323; 286 NW 630 (1939), quoting *Peer v Hughes*, 25 Ariz 105; 213 P 691 (1923). (Citations omitted.)]

See also 17A Am Jur 2d, Contracts, § 35, p 64.

Here, no specifics regarding the manner in which the management agreement could be amended were included in the clause providing for amendment, and, arguably, the management agreement could have been amended in any number of ways to satisfy the MLCC requirements. When the MLCC informed the parties that their agreement did not comply with its requirements, plaintiff proposed an amendment that was approved by the MLCC, but rejected by defendant. While the record shows that the parties subsequently engaged in some negotiations on amendment of the agreement, ultimately they were not able to agree. Further, testimony showed that the terms not yet agreed upon were essential to the parties' agreement. Because the original contract did not comply with the MLCC regulations, and the parties could not agree on an amendment, there was no meeting of the minds and the contract was void. In other words, because the parties failed to agree on an amendment required by the original management agreement, there was a failure of the agreement as a whole. Thus, the trial court properly found the management agreement to be void ab initio.

Defendant argues that even if the trial court was correct in its decision to void the management agreement, the asset purchase agreement was a valid contract that was capable of enforcement. Generally, the failure of a distinct part of a contract does not void valid, severable provisions. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 641; 534 NW2d 217 (1995). The primary consideration in determining whether a contractual provision is severable is the intent of the parties. *Id.* Our Supreme Court has explained as follows:

> Two principal factors are considered: first, "whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other"; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties. 3 Williston, Contracts (3d ed), § 532, p 764. However, "[e]ven though the consideration for each agreement is distinct, if the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded . . . as entire and not divisible." *Id.*, p 765. [*Dumas v Auto Club Ins Assoc*, 437 Mich 521, 616-617, n 87; 473 NW2d 652 (1991).]

Here, the asset purchase agreement included a severability provision. Clearly, however, without a management agreement that provided for plaintiff's operation of the bar and billiard hall under defendant's liquor license, the business would be of little value to plaintiff. Testimony at trial showed that the parties treated the agreements as a "package deal," and that the management agreement was added to the purchase agreement to facilitate operation of the business that was the subject of the purchase agreement. Indeed, plaintiff's agent testified the management agreement was essential to the entire transaction. Thus, while the parties may have intended that specific terms of the purchase agreement be severable under the severability provision, because the management agreement and purchase agreement were "so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both," and the consideration paid by plaintiff could not be apportioned "without doing violence to the contract or making a new contract for the parties," *Dumas, supra*, the trial court did not err in finding the purchase agreement, as well as the management agreement, void ab initio.

Plaintiff argues in its cross-appeal that the trial court erred in not granting its request for specific performance. However, because the parties' agreements were void ab initio, the remedy of specific performance is not available. See *Bailey v Bailey*, 321 Mich 166, 177; 32 NW2d 429 (1948).

Plaintiff argues next that the trial court erred by entering judgment for unjust enrichment against defendant instead of against third-party defendants. We review a trial court's conclusions regarding equitable determinations de novo and review the court's findings of fact for clear error. *Forest City Enterprises v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998).

Even where no valid contract exists, a person who has been unjustly enriched at the expense of another is required to make restitution to the other. *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999). The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, and (2) which benefit it is inequitable that the defendant retain. *B & M Die Co v Ford Motor Co*, 167 Mich App 176, 181; 421 NW2d 620 (1988). Although we review a trial court's conclusions regarding equitable relief de novo, this Court will not reverse the trial court's determinations unless the findings are clearly erroneous or this Court is convinced that it would have reached a different result. *Day v Lacchia*, 175 Mich App 363, 372; 437 NW2d 400 (1989).

Defendant contends that neither defendant Heartbreakers, Inc. nor third-party defendants Thomas and Susan Petty and Joseph and Candyce Giordano were unjustly enriched because none of those parties received a benefit from plaintiff's improvements to the property. However, the fact that one or more of the parties was unjustly enriched is well supported by record evidence that plaintiff expended considerable sums in remodeling the building and that some of those renovations improved the value of the property, irrespective of its future use. See *Pakulski v Ludwiczewski*, 291 Mich 502, 511; 289 NW 231 (1939).

The question is whether defendant benefited from the improvements to the property or whether third-party defendants received the benefit. Review of the trial court's findings indicates that the court did not differentiate between the corporate defendant, Heartbreakers, Inc., and the individual third-party defendants. For example, the court found that plaintiff owed rental payments to "defendant," and the court further noted that "defendant has possession and title to the property." However, the evidence presented showed that the lease for the premises was between plaintiff and third-party defendants. Further, Joseph Giordano testified that defendant corporation's only business was operating a bar and, at the time of trial, defendant had no business. In addition, the district court action for unpaid rent was filed by third-party defendant Joseph Giordano against plaintiff, and defendant corporation was not a party to that action. Also, defendant corporation did not submit any evidence that it had possession of the property after plaintiff vacated the premises or intended to utilize the property in the future.

On this record, we conclude that the trial court erred in assuming that defendant Heartbreakers, Inc. had some ownership or possessory interest in the property. Because it is not possible to determine from the record whether defendant had sufficient interest in the property to receive a benefit from plaintiff's improvements, we reverse the portion of the trial court's order dismissing third-party defendants with prejudice and remand to the trial court for additional proceedings to determine whether defendant Heartbreakers, Inc., or third-party defendants, the Pettys and Giordanos, were unjustly enriched.

Plaintiff argues next that the trial court erred in determining the amount of restitution it owed defendant when it depreciated plaintiff's improvements to the property. A trial court should be accorded considerable latitude in fashioning equitable remedies. *Governdale v City of Owosso*, 59 Mich App 756, 762; 229 NW2d 918 (1975). The measure of compensation for improvements on the property of another for the purpose of unjust enrichment is the amount the property is enhanced by reason of the repairs and improvements. *Pakulski, supra*.

Plaintiff challenges the trial court's decision to reduce the amount of the value of improvements to the property for "wear and tear." According to plaintiff, this allows double recovery by defendant against plaintiff: first for payment of rent, and again for wear and tear on the property. Contrary to plaintiff's assertion, we conclude that the court was not taking into account normal wear and tear on the premises and was properly focusing only on wear and tear to specific improvements that plaintiff made and used during the business operation. These devaluations are supported by evidence introduced at trial and are not unreasonable or clearly erroneous.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E.Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins