STATE OF MICHIGAN

COURT OF APPEALS

ROCK CONSTRUCTION, INC.,

Plaintiff-Appellant,

v

JAMESON ONYEBUCHI and CECILIA ONYEBUCHI,

Defendants-Third-Party Plaintiffs-Appellees,

v

WORLD WIDE HOME LENDING,

Third-Party Defendant.

UNPUBLISHED
May 25, 2001

No. 222503
Washtenaw Circuit Court
LC No. 99-010667-CK

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

This case arises out of a contract for the sale of a home to defendants which was built by plaintiff. The contract required defendants to close on the house within five days of being notified that it was completed. When defendants failed to close, plaintiff brought a motion asking the circuit court to require defendants to show cause why they failed to close and also asking the court to declare that pursuant to a liquidated damages clause in the contract, plaintiff was entitled to keep defendants' $13,000 down payment. Plaintiff also asked the court to declare that defendants had waived their rights in the house and, therefore, plaintiff could sell the house to another buyer. Plaintiff appeals from the trial court's ruling that defendants were excused from performance under the contract due to impossibility, that the liquidated damages clause within the contract was unenforceable, and that plaintiff was barred from further suit for damages.

Plaintiff first argues that the court had not been presented all the evidence necessary to find that defendants' performance under the contract was impossible. Plaintiff complains that the posture of the case and the lack of evidence presented at the hearings on plaintiff's motion to

show cause resulted in the court ruling prematurely in favor of defendants. However, plaintiff is responsible for the posture in which the court found this case.

Plaintiff moved for the order to show cause, and its motion asserted that defendants had breached their contract with plaintiff, from which plaintiff suffered damages. The motion further asked the court to demand that defendants show cause why defendants "have been unable to close of [sic] the property." We conclude that defendants, at the hearings, complied with the court's order to show cause. They asserted the defense of impossibility, which the court ultimately accepted, and plaintiff now complains about this result. Thus, plaintiff's assertion that the posture of the case was imperfect to decide the case in the manner in which the court decided is simply an argument that the court was incorrect because the court did not grant the relief for which plaintiff prayed. A party cannot request a certain action of the trial court or stipulate to a matter and then argue on appeal that the resultant action was error. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997).

Nevertheless, finding that the posture of the case did not preclude the court's ruling does not mandate a conclusion that the trial court correctly found that defendants were entitled to the defense of impossibility. Impossibility of performance as a defense to a claim for breach of contract applies "in the event that unanticipated circumstances beyond the contemplation of the contracting minds and beyond their immediate control make strict performance impossible." *Bissell v L W Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967). Defendants assert that such unanticipated circumstances appeared in this case when third-party defendant failed to follow through with its promise to provide financing for defendants. We do not agree.

Defendants' failure to secure financing was reasonably foreseeable by the parties at the time of contracting. The very terms of the contract indicate that defendants' failure to obtain financing had been expressly considered and contemplated by the parties. For example, any failure to obtain a commitment letter or to fulfill conditions of the commitment letter obligated defendants to notify plaintiff of such failure and was a ground under which the parties could rescind the contract. Because the event was foreseeable, contemplated, and anticipated, the failure to obtain financing cannot be excused by the defense of impossibility. The trial court erred when it concluded otherwise.

Plaintiff next complains that the trial court erred when it found the liquidated damages clause in the contract was unconscionable and refused to enforce it. We believe that, although the trial court used the word "unconscionable," the context in which the court used the word indicates that the court actually made a poor word choice rather than a finding that the liquidated damages clause was unconscionable. The court said, "This is actually is [sic] an order to their benefit and I do find that the $13,000. [sic] as liquidated damages, under these circumstances, is unconscionable and it is to be returned." In general, unconscionability has been described as a doctrine that focuses on the question whether the clause or contract at issue is reasonable under the circumstances as they appeared at the time of contracting. *Hubscher & Son Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998). After reviewing the discussion surrounding that quote, it is clear that the trial court was referring to the factual circumstances as they stood at the time of the hearing, not to the circumstances at the time of the contracting. The trial court would have been more accurate had it used the word "inequitable" rather than "unconscionable" and we

believe that from the context, that is what the court really meant. Further, such a conclusion is consistent with the posture in which this suit was brought, i.e., as one asking the court to fashion an equitable resolution.

Declaratory actions such as the instant case are equitable in nature. *Coffee-Rich, Inc v Dep't of Agriculture*, 1 Mich App 225, 228; 135 NW2d 594 (1965). We find that the court's order returning the $13,000 to defendants complies with the equitable rule that when asked to grant relief, a court acting in equity "looks at the whole situation and grants or withholds relief as good conscience dictates." *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). An examination of this case reveals that plaintiff was awarded the home, which, it acknowledged, had increased in value during the period between the contract and the lawsuit. Defendants, on the other hand, were deprived of the opportunity to purchase the home but were allowed to recover their down payment. We conclude that given the equities in this case, the trial court did not err when it granted defendants the $13,000 they paid as a down payment.

Plaintiff next asserts that the trial court incorrectly ruled that plaintiff was barred from further suit by the doctrines of res judicata and collateral estoppel. Because both of those doctrines require comparison of the claims or issues litigated in an initial suit with those pleaded in a subsequent suit, a court may not invoke those doctrines without knowledge of the claims or issues involved in a second suit between the parties. See *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (res judicata requires that matter litigated in the second suit was or could have been litigated in the first); *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998) (collateral estoppel requires knowledge of the issues involved in a second suit). In this case, the parties have not been involved in a second lawsuit. Thus, the court erred to the extent that it prospectively applied those doctrines to plaintiff's hypothetical future claims against defendants. The court's ruling on this issue was premature.

We affirm the trial court's order granting plaintiffs the right to sell the house and defendants the right to recover their $13,000 down payment. We reverse without prejudice the lower court's ruling regarding res judicata and collateral estoppel. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin