STATE OF MICHIGAN

COURT OF APPEALS

MISTER Z'S, INC., d/b/a MR. Z'S STEAK HOUSE,

Plaintiff-Appellee,

v

MICHAEL KRIKORIAN and PHILLIP KRIKORIAN, Trustees of the ELENA KRIKORIAN TRUST,

Defendants-Appellants.

UNPUBLISHED
August 21, 2003

No. 238157
Wayne Circuit Court
LC No. 01-10572-CK

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's declaratory judgment dividing insurance proceeds between the parties. We reverse and remand.

I.

In 1995, the parties entered into a twelve-year lease agreement for property in Redford Township. Plaintiff was the lessee and defendants were the lessors. An addendum to the lease gave plaintiff an option to purchase the property. Plaintiff purchased insurance for the real property and personal property contained therein. Plaintiff named defendants as payees with regard to the real property. Plaintiff named itself as payee for the personal property. In July 2000, the building and its contents were damaged by a fire. The insurer disbursed two payments in the amounts of $83,767.58 and $299,004.34.

In August 2000, defendants served plaintiff with a notice to quit/termination of tenancy based on nonpayment of taxes and rent. After plaintiff made assurances of payments which were not forthcoming, defendants served another notice to quit/termination of tenancy in October 2000. Finally, defendants served a third notice to quit/termination of tenancy based on the contractual provision that the lease would terminate if more than half the building was destroyed by fire. In response, plaintiff filed this action alleging breach of contract, unjust enrichment, fraud/conversion, and requesting injunctive relief in the form of a restraining order prohibiting defendants from evicting plaintiff. The trial court entered a temporary restraining order.

On February 20, 2001, the parties agreed to a settlement based on which the trial court entered a consent judgment stating, in relevant part: (1) plaintiff will purchase the property from defendants for $462,500 with a $25,000 nonrefundable down payment; (2) defendants will sign over the two insurance payments totaling $382,771.92; and (3) "all other costs associated with the transfer of said property shall be paid by Plaintiff, however, the parties agree to allocate $300,000 to the real property and building, and allocate the balance to the fixtures." The consent judgment also provided that plaintiff had thirty days to obtain financing for the purchase. Plaintiff was unable to obtain financing within this time and the sale was not completed.

On June 1, 2001, the parties reached a second agreement which the trial court also entered as a consent judgment. The June consent judgment extended the terms of sale included in the February consent judgment. It also provided that in the event of failure to close by June 20, 2001:

> . . . Defendant shall automatically receive the following: . . . The immediate payment of all of the building insurance proceeds by the escrow agent, upon presentment of a demand letter for those proceeds, which may be delivered by fax to the escrow agent. The parties may then proceed to resolve any dispute concerning any remaining insurance proceeds.

Because plaintiff did not obtain financing and the sale did not close by June 20, 2001, defendants filed a motion to enforce the settlement. At the first hearing on this motion, the trial court ruled that it could not determine what amount should be allocated to real and personal property. Defendants filed a motion for rehearing arguing that, based on the February consent judgment, $300,000 should be allocated to the real property with the remainder allocated to personal property. At the second hearing, an insurance adjuster testified that even though the $299,004.34 was paid for restoration of the building, the amount covered both the building and personal property. Relying upon the adjuster's testimony, the trial court allocated $122,030.04 of the $299,004.34 to plaintiff for personal property damaged in the fire. The trial court awarded $83,767.58 to plaintiff for personal property. The trial court also ruled that the February consent judgment was abrogated to the extend it conflicted with the June consent judgment.

II.

Defendants first argue the trial court erred in abrogating the February consent judgment because its terms were dispositive with regard to division of the insurance proceeds. We disagree.

Consent judgments are to be interpreted as contracts between the parties, with the preeminent consideration being the intent of the parties. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). We find that the February consent judgment was not dispositive with regard to division of the insurance proceeds. Therefore, the issue whether the trial court erred in abrogating the February consent judgment is moot. An issue is moot if an event has occurred rendering it impossible for this Court to grant relief to a party even if it should decide in favor of that party. *City of Jackson v Thompson McCully, Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000).

The February consent judgment was essentially a purchase agreement whereby plaintiff agreed to purchase the property from defendant for $462,500. Included in the agreement, was a provision that defendant would sign over both insurance checks which plaintiff would place in an IOLTA account "pending completion of this property transfer." It also provided: "all other costs associated with the transfer of said property shall be paid by Plaintiff, however, the parties agree to allocate $300,000 to the real property and building, and allocate the balance to the fixtures." However, the agreement did not provide for division of the insurance proceeds if the property transfer was not completed, as it was not.

In contrast, the June consent judgment provided if the parties failed to close the sale, defendant would immediately receive payment of the building insurance proceeds, and the parties would determine how to divide the remaining proceeds. However, the June consent judgment did not provide a method for determining the amounts allocated to real and personal property. Therefore, the trial court properly conducted a hearing to make this determination.

III.

Defendants also contend that the court erred in allocating $122,030.04 of the $299.004.34 to plaintiff for personal property loss. We agree.

This Court reviews a declaratory judgment by a trial court de novo, and the trial court's factual findings for clear error. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). A finding of fact is clearly erroneous when, although there is evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

In dividing the insurance proceeds between the parties, the trial court relied on the testimony of an insurance adjuster who testified that $122,030.04 of the $299.004.34 was for plaintiff's personal property loss. He arrived at this figure by comparing a bill of sale with the construction estimates. However, based on the bill of sale, it is unclear whether the personal property was owned by plaintiff or defendants. Upon cross-examination, the adjuster failed to justify his conclusions; he was not specific about the items included, the value of the items, or ownership of the items. We conclude that the trial court's findings were erroneous because the adjuster's testimony inadequately supported them.

Neither party contests that defendants are entitled to $176,900 for the building and plaintiff is entitled to $83,767.58 for personal property. We hold that the remaining disputed insurance proceeds in the amount of $122,030.04 shall be held in escrow pending another hearing wherein the trial court shall determine (1) the amount of proceeds allocated to real or personal property and (2) ownership of the personal property. Proceeds allocated to the real property shall be awarded to defendants. Proceeds allocated to personal property proceeds shall be awarded to the owner of the particular property. All other matters determined by the trial court shall remain undisturbed because they were not challenged on appeal.

We reverse and remand for a hearing to determine the proper allocation of $122,030.04 of the insurance proceeds. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly