STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF MARQUETTE, Plaintiff-Appellant, v CITY OF MARQUETTE, Defendant-Appellee.	UNPUBLISHED December 5, 2006 No. 268535 Marquette Circuit Court LC No. 03-040467-CK

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition on its breach of contract claim seeking money damages. We reverse and remand.

This dispute arises out of a contract entered into by the parties in 1982 which provided that defendant would provide water service to some of plaintiff's residents. The contract had a term of twenty years, which expired on December 31, 2002, with an option to renew for an additional twenty years. Specifically, the contract provided "that the CITY and the TOWNSHIP shall have the option of renewing this contract for an additional term of twenty (20) years which option can be exercised by either party by written notice to either party at least six (6) months prior to the expiration of the term of this Agreement . . . ." On April 16, 2002, defendant gave written notice to plaintiff that it did not intend to renew the contract. In response, on May 6, 2002, plaintiff gave written notice to defendant that it intended to exercise its option to renew the contract.

Although defendant never terminated water service, it maintained the position that renewal of the contract required the assent of both parties. Plaintiff took the position that the contract was renewable by either party and that it had done so. This litigation ensued. The trial court initially granted summary disposition on all but one of plaintiff's claims. It granted declaratory relief to plaintiff, concluding that plaintiff was correct that it could unilaterally exercise the option and renew the contract for an additional twenty years. Consistent with that ruling, the trial court also granted preliminary injunctive relief requiring defendant to maintain water service under the terms of the contract. These provisions were continued in the final order. After this initial grant of summary disposition, all that remained was plaintiff's count seeking money damages for breach of contract. Ultimately, however, the trial court granted summary

disposition in favor of defendant on this count. It is only that grant of summary disposition which is at issue in this appeal.

The claim for money damages largely has its roots in plaintiff beginning to build its own water supply system while this dispute was underway. Plaintiff essentially takes the position that, with defendant continuing to repudiate the contract, the future of defendant supplying water to plaintiff's residents continued to be in jeopardy and that construction of its own system was necessary as "cover" for an anticipated breach of the contract by defendant. The trial court summarized its ruling as follows:

> In summary, the Court finds and concludes the city did not breach this contract, that its statement of intent not to renew the contract while continuing to supply water during negotiations for a new contract does not rise to the level of anticipatory repudiation, and in any event, the damages claims by the township are not the foreseeable and natural consequences flowing from the Defendant City's non-binding statement of intent not to renew the existing contract (in light of this Court's ruling that the township properly exercised its option to renew and the city being under injunctive order to continue supplying water under the contract, pursuant to the terms of the contract, for the balance of the contract term). Summary disposition of dismissal of Count IV of Plaintiff's complaint is GRANTED pursuant to MCR 2.116(C)(10).

A ruling on a motion for summary disposition is reviewed de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In reviewing a ruling under MCR 2.116(C)(10), the factual support for a claim is tested by reviewing the documentary evidence submitted by the parties. *Id.* The evidence and all reasonable inferences thereon are viewed in the light most favorable to the non-moving party. *Id.* at 567-568. The non-moving party is entitled judgment as a matter of law if the proffered evidence fails to establish a genuine issue regarding any material fact. *Id.* at 568.

We agree with plaintiff that the trial court failed to properly observe its role in considering a motion for summary disposition under MCR 2.116(C)(10). It is not the court's role in such a situation to weigh the evidence and make findings of fact. Yet that is exactly what the trial court did here. Indeed, its opinion on the summary disposition motion is even entitled "Findings and decision." In short, its opinion reads like a decision following a bench trial, not the disposition of a summary disposition motion.

In our de novo review, we are satisfied that plaintiff has created a genuine issue of material fact regarding its claim for money damages. When viewing the evidence in the light most favorable to plaintiff, they do provide support for the claim that they proceeded with the water project in order to ensure an ongoing supply of water for its residents. It points to statements by defendant's agents which could support a conclusion that defendant would not live up to the terms of the contract for the next 20 years.

This is not to say that there are not valid points in defendant's favor, such as the fact that defendant never actually terminated water service, that the court did issue an injunction, that there is a serious question whether the scope of the project is larger than necessary to provide

cover for any anticipated breach by defendant. But these all represent competing factual issues that must be sorted out by the trier of fact following trial, not in a decision on summary disposition. That is, the trial court may be able to justify the decision reached following a trial on the merits, but it cannot justify it as a disposition of a motion for summary disposition.

When viewing the evidence in the light most favorable to plaintiff, plaintiff will be able to present witnesses who will testify that they were informed by agents of defendant that, even if the 20-year extension of the contract was enforceable, defendant would not honor it. Indeed, even during litigation defendant only agreed that it would not cut off water services to plaintiff without 90 days' notice, as evidenced by the terms of the Early Scheduling Order entered by the trial court. Furthermore, the positions of the parties must be viewed in the context that replacement of a municipal water supply is not something that can be achieved on short notice. The point being that, even if the litigation was ultimately successful in terms of establishing plaintiff's right to unilaterally renew the contract for a new 20-year term and to compel defendant to honor that renewal, plaintiff's actions of proceeding with the planning and construction of its own water supply system in anticipation of a breach by defendant may have been reasonably necessary and in response to an anticipated breach by defendant.

For that matter, even if plaintiff is not entitled to recover the complete cost of the construction of the new system, it may well be reasonable to conclude that plaintiff suffered some damages. Specifically, in light of the amount of time that construction of a system would take, plaintiff might be able to establish at trial that beginning the planning and construction of a new system shortly after learning of defendant's intent to repudiate the contract was a reasonable action to take to cover in anticipation of a breach. And, in such circumstance, plaintiff may be able to establish its right to recover expenses incurred from the point at which it reasonably anticipated a breach up to the point where it was clear that the court would enforce the contract extension and that defendant would submit to the court's determination. That is, the facts which may come out at trial may establish that plaintiff could reasonably have begun providing "cover" for the anticipated breach (i.e., developing a new water supply), but at some point it should have stopped its efforts. But even so, under such a scenario, plaintiff could establish damages for the expenses incurred in the interim.

Defendant argues on appeal that, even if it can be concluded that there was an anticipatory breach by defendant, plaintiff cannot seek both money damages for a breach and injunctive relief to enforce the contract. But defendant cites to no controlling precedent that creates such a rule. For example, defendant relies upon cases such as the Sixth Circuit's opinion in *Canderm Pharamacal Ltd v Elder Pharmaceuticals, Inc*, 862 F2d 597 (CA 6, 1988). We do not read *Canderm*, or the other cases cited by defendant, as supporting defendant's proposition that plaintiff had to choose between the remedies of damages for an anticipatory breach or injunctive relief to continue the contract. Rather, we read *Canderm* as standing for the relatively unremarkable proposition that, while the injured party may treat the contract as terminated due to an anticipatory breach by the other side, if it chooses to continue the contract, the injured party is also required to meet its own obligations under the contract. *Id.* at 603-604.

Indeed, one of the cases relied upon by defendant, *City Service Helix, Inc, v United States*, 543 F2d 1306 (USCC, 1976), actually supports plaintiff. As the court in *City Service* observed, whether the pursuit of one remedy by the plaintiff precludes another remedy is entirely

dependent upon the facts of the case. *Id.* at 1317, citing UCC § 2-703, Comment 1. It seems to us that the case at bar presents facts that might support the pursuit of both monetary damages and specific performance.

As discussed above, replacement of a water supply is hardly something that can be achieved on a moment's notice. This is not a case where plaintiff was contracting with defendant to supply bottled water and, in the event of a breach, plaintiff could simply call upon a different vendor to supply the water and seek damages from defendant for any additional cost that might be incurred due to the breach. Rather, in all likelihood, a sudden breach by defendant would have left the affected residents without a municipal water supply for a considerable period of time—the length of time it would take for plaintiff to build its own system to supply those residents. We think it would be unreasonable to expect that plaintiff would immediately renounce the contract in light of the anticipated breach, insist that defendant immediately stop supplying water and then begin the task of building its own system. Rather, the rational approach would be to do what was necessary to continue the current source of water, trying to keep that in place, until the new system could be completed.

Therefore, we believe that the facts of this case present such a situation where pursuit of both remedies may be appropriate: specific performance until defendant's performance was no longer required, then money damages for the cost of providing cover for defendant's breach in its refusal to no longer supply water under the terms of the contract.

Defendant also argues that Michigan's declaratory judgment rule, MCR 2.605, precludes an award of damages. Indeed, in making its argument, defendant boldly cites and quotes the Supreme Court's decision in *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997), dramatically out of context. Indeed, *Durant* actually explicitly supports the opposite proposition:

> [D]eclaratory judgment actions can result in monetary relief. Actions for declaratory relief are intended to minimize avoidable losses and the unnecessary accrual of damages. MCR 2.605 authorizes declaratory relief where other relief is also available.

Finally, defendant argues that plaintiff cannot recover the damages sought. This argument, however, is premature. At issue here is whether there is a genuine issue of material fact regarding whether plaintiff can make out a claim for breach of contract. The question of what damages, if any, plaintiff may be able to recover becomes an issue only once they establish their right to recover for an anticipatory breach. Furthermore, even if defendant is largely correct that the bulk of plaintiff's damages are not recoverable as they were not incurred until after it became apparent that defendant would honor the contract in light of the trial court's rulings in this litigation, we are not prepared to say that it is clear that plaintiff would not be able to establish the right to recover any damages at all.

In sum, while it is not at all clear that plaintiff will ultimately prevail in this action, when the evidence is viewed in the light most favorable to plaintiff, we are persuaded that a genuine issue of material fact does exist. It is possible that plaintiff will be able to establish at trial the right to the recovery as damages for an anticipatory breach at least some of the costs incurred as

a result of defendant taking the position that it would not honor a renewal of the water contract. The trial court acted prematurely in granting summary disposition in this matter.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald