STATE OF MICHIGAN

COURT OF APPEALS

BARRICK ENTERPRISES, INC.,

Plaintiff-Appellee,

v

2257 WATERMAN OPERATING COMPANY, L.L.C., MARSHALL STILLMAN, and ROCHELLE STILLMAN,

Defendants-Appellants.

UNPUBLISHED
March 4, 2008

No. 275038
Oakland Circuit Court
LC No. 2005-069822-CZ

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right an order of final judgment for plaintiff in the amount of $282,355.32. We affirm in part, reverse in part, and remand for further proceedings.

I. Basic Facts and Proceedings

Plaintiff agreed to supply defendant, 2257 Waterman Operating Co., LLC (Waterman), gasoline products under the Citgo brand name for 7 years, and Waterman agreed to purchase a minimum 300,000 gallons every 3 months at 2.5 cents over Citgo's posted daily price. Defendants Marshall and Rochelle Stillman executed personal guarantees of prompt payment under the contract.

The parties operated under the agreement for over 3 years, but according to plaintiff, "[a]s of June 2005, Defendant Waterman was behind in payment for gas deliveries made by Plaintiff Barrick in the amount of $54,000." Plaintiff maintained that, on or about June 19, 2005, Marshall Stillman (Marshall) approached Robert Barrick, president of plaintiff, and offered to quit claim rental property, which he believed worth $100,000, for security of his debt. Robert Barrick accepted the quitclaim deed. Waterman also failed to pay for deliveries on September 6, 12, 16, 22, and 27, 2005, and October 3, 2005.

On October 7, 2005, fire damaged the gas station. Waterman made a claim with its insurance carrier, which paid to have the station rebuilt. Once reopened, Waterman discontinued operating the station, but Eddie Zaban agreed to run the gas station while his agreement to purchase the station from defendants was pending.

Plaintiff filed a complaint and sought $158,006.88 for the past due gasoline deliveries. Plaintiff also claimed that it expended $15,497.40 to brand the Citgo gas and service station. Plaintiff maintained that Waterman breached the liquidated damages provision under paragraph 30 of the contract , which provides, in pertinent part, "If this Sales and Security Agreement is not completed to its natural full term, Buyer will be responsible for a 2 cent per gallon charge for every gallon not purchased using the minimum monthly gallons on the Face Page of the agreement, times the uncompleted portion of the agreement." Thus, plaintiff sought damages from Waterman in the amount of $158,006.88 for past due gasoline deliveries, $15,497.40 for branding the Citgo gas and service station, $119,779.88 in liquidated damages, and attorney fees, costs, and interest under paragraph 23 of the contract, totaling $293,284.16. Plaintiff also claimed Marshall and Rochelle Stillman were jointly liable under their personal guarantees.

Defendants responded, claiming that the "entire claim is 'a wash,' due to the facts that (a) Plaintiff took and registered the title for a parcel of property valued by the agreement of all at $100,000.00, (b) has continued to sell gasoline to the 2257 Waterman gas station location; (c) Plaintiff hasn't credited [$55,349.48] in payments, and (d) Plaintiff hasn't given the rebates that were due and owing." Defendants also maintained that they did not owe the $15,497.40, because the station was never "de-branded." Defendants also claimed that plaintiff was not entitled to liquidated damages because they continued to purchase from plaintiff, albeit Zaban issued the checks.

Plaintiff filed a response to defendants' reply, claiming that of the 17 checks defendants claimed were paid to plaintiff, 8 were not made payable to plaintiff, and that defendants failed to show that plaintiff had not credited defendants the remaining 9 checks. Plaintiff also claimed that defendants were only entitled to 1 rebate, at most.

The circuit court held that there was no genuine dispute that defendants did not pay for gasoline and thereby breached the contract. The circuit court also held, in light of the business records submitted by plaintiff, that plaintiff was entitled to the amount reflected by plaintiff's records, and that defendants were not entitled to rebates. Also, the circuit court held that defendants failed to show plaintiff accepted the deed in exchange for $100,000, but just as security. The circuit court also held that the liquidated damages clause was applicable until the station was re-opened by Zaban and was not applicable when the station was closed because of fire under the impossibility clause of the contract. The circuit court noted that "[t]he claim, however, is subject to reduction by the value of the property Defendants put up as security, and that value has yet to be determined. Thus, no judgment on this ruling can be entered at this time."

Plaintiff later filed a motion for entry of final judgment, taxation of costs, and authority to sell collateral. In the motion, plaintiff submitted that it was entitled to $102,222.34 in liquidated damages, excluding the 6 months the station was closed due to fire "as well as the volume of gasoline that Plaintiff has sold to the subject station after it re-opened." However, the value of the property was not determined, and the circuit court's final order indicates that defendants' liability would be reduced by the actual sale price the property.

II. Credit for Property

Defendants argue that the circuit court erred in not awarding them $100,000 credit for the property.

A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). In deciding the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539-540; 683 NW2d 200 (2004). Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 540; MCR 2.116(C)(10) and (G)(4).

B. Analysis

We agree with the circuit court that the deed represented security for debt.

> The power of a court of equity to construe an instrument in the form of an absolute deed of conveyance as security for the payment of a debt is not open to question. However, the burden of proof rests on the party asserting such a transaction to be a mortgage to establish his claim by clear and satisfactory proof. [*Wilson v Potter*, 339 Mich 247, 251; 63 NW2d 413 (1954).]

The intent of the parties to the deed, as evidenced by all of the surrounding circumstances, controls the question whether the deed represents security for the repayment of a loan. *Sheets v Huben*, 354 Mich 536, 540; 93 NW2d 168 (1958); *Wilson*, *supra* at 251; *Koenig v VanReken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). Some circumstances that persuasively signify the parties' intention that a deed constitute security for a loan include the inadequacy of consideration given in exchange for the deed, the grantor's existing indebtedness to the grantee, and the parties' unequal bargaining positions. *Sheets*, *supra* at 540-541; *Wilson*, *supra* at 251; *Koenig*, *supra* at 106-107. Of these circumstances, "'inadequacy of consideration is the most important.'" *Ellis v Wayne Real Estate Co*, 357 Mich 115, 119; 97 NW2d 758 (1959), quoting *Emerson v Atwater*, 12 Mich 314, 317 (1864).

Here, the relevant circumstances show that Marshall gave plaintiff the deed as security for debt. There is no evidence, and defendants do not suggest, that plaintiff gave anything in exchange for the deed. At the time of the transfer, Marshall believed that he owed plaintiff approximately $40,000, and actually owed more. Further, the parties' bargaining positions were unequal as Marshall stood in breach of a long-term requirements contract to plaintiff. The circuit court properly construed the absolute deed of conveyance as security for the payment of a debt. Accordingly, defendants' arguments that plaintiff accepted defendants' offer of the deed in lieu of $100,000, is without merit.

Defendants also argue that remand is required for a valuation of the property. The circuit court held that the property would be valued at the time of sale. Defendants specifically note that the circuit court stated plaintiff owned the property, and that plaintiff has failed to care of the property causing it to substantially decrease in value. Plaintiff cannot both own and have an equitable mortgage in the property. Here, plaintiff began to take control of the property by collecting rents and advertising for tenants, and eventually recorded the deed. We conclude the property should be valued at the time plaintiff recorded the deed. At that time, there was no ambiguity in regard to the owner of the property. Accordingly, we remand to the circuit court for valuation of the property at the time plaintiff recorded the deed.

III. Liquidated Damages

Defendants argue that the circuit court erred in awarding liquidated damages pursuant to the contract because plaintiff is placed in a better position than had he performed the contract.

A. Standard of Review

"The issue whether a liquidated damages provision is valid and enforceable is a matter of law that this Court reviews de novo." *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 270; 715 NW2d 914 (2006).

B. Analysis

> A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in the event of a breach and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive. Such a provision is particularly appropriate "where actual damages are uncertain and difficult to ascertain or are of a purely speculative nature . . . ." [*St Clair Medical, PC, supra* at 270-271 (citations omitted).]

Here, the liquidated damages provision provides, in pertinent part, "If this Sales and Security Agreement is not completed to its natural full term, Buyer will be responsible for a 2 cent per gallon charge for every gallon not purchased using the minimum monthly gallons on the Face Page of the agreement, times the uncompleted portion of the agreement."

The instant contract may generally be characterized as a requirements contract in which "the quantity term is not fixed at the time of contracting [and t]he parties agree that the quantity will be the buyer's needs or requirements of a specific commodity or service" over the life of the contract. Corbin, Contracts (rev ed), § 6.5, p 240. Also, the instant "[requirements] contract . . . set[s] a minimum . . . quantity" whereby "the buyer . . . promise[s] to take all that a buyer may need, but not less than a certain minimum." *Id*. at p 252; see *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 631 n 4; 358 NW2d 845 (1984), quoting MCL 440.2306 practice commentary, p 247 (indicating that a requirements contract is one in which the promisor-buyer is bound to accept any sufficiently definite quantity). Agreeing to a certain minimum quantity "enlarges the buyer's duty by depriving the buyer of any option below the minimum." Corbin, § 6.5, p 253.

We conclude that the liquidated damages provision is applicable. This is a long-term (7 year) requirements contract for gasoline. As recognized in White & Summers, Uniform Commercial Code, (4th ed practitioner treatise series), § 6-8, p 347, "[t]he contract quantity in a remote year will be as uncertain as the contract price; in a gas contract, it may be the function of both the seller's ability to deliver from a particular gas reservoir and the buyer's needs." "Every one of these complications—market, price, quantity, discount—introduces uncertainty into the damage calculation on breach of a long term contract." *Id.* "[T]he more remote in time are the events to be measured, the more inherently uncertain is the calculation of damages." *Id.* As stated previously, the liquidated damages provision is particularly appropriate "'where actual damages are uncertain and difficult to ascertain or are of a purely speculative nature . . . .'" *St Clair Medical, PC, supra* at 271 (citation omitted). Accordingly, the circuit court did not err in applying the liquidated damages provision during the time defendants failed to purchase the minimum amount of gasoline under the contract.

Defendants also argue that plaintiff elected to sell the gasoline to Zaban and cannot collect liquidated damages because plaintiff would be placed in a better position than had defendants not breached the contract.

The circuit court held,

> With respect to the liquated damages clause, the [c]ourt agrees that it is enforceable, but it is also subject to reductions based on the amount of gasoline [p]laintiff has sold to the station after it reopened under its new contractor. In addition, the provision is not enforceable during the time the business was shut down due to fire, pursuant to the doctrine of impossibility.

As stated previously, "[a] liquidated damages provision . . . is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive." *St Clair Medical, PC, supra* at 270-271. Here, defendants have failed to show that the liquidated damages provision is unreasonable in relation to the possible injury. First, plaintiff may qualify as a lost volume seller. That is,

> [t]o illustrate, assume a contract for the sale of a washing machine with a list price of $500. Assume further that the seller has or can obtain more machines than it can sell. The buyer breaches, and the seller resells the washing machine destined for the breacher at the same list price to another. However, the resale buyer is one of seller's regular customers who had intended to purchase a washing machine from seller anyway. If the seller's total cost per machine was $300, seller stood to gain an aggregate profit of $400, that is, $200 profit from each of two sales. Clearly the 2-708 contract-market differential formula is inadequate in this situation since it gives no damages to the seller who has lost a $200 profit because of the breach. In such a case the damage award should be the lost profit, that is, $200, for this will place the seller "in as good a position as performance would have done." [White & Summers, § 7-9, p 385.]

"A seller is not a 'lost volume seller' unless the seller would have made the sale to the breaching buyer and the sale to the party who purchased the buyer's goods." *Id.* at 386 (emphasis in original). Notably, Barrick testified that:

Q. So apart from the fire at the station here, during which time obviously they are not going to be able to operate, everything is pretty much going along per the contract, correct?

A. Other than the volume that's signed, the volume is way off.

* * *

Q. So, at this point then, you are not in breach of your contract with Citgo, other people are making up the difference, correct?

A. Correct.

Here, there is evidence that defendants' breach caused plaintiff to sell that unsold gasoline to buyers who would have purchased it in any event. Although defendants claim that plaintiff simply re-sold the unpurchased gasoline to Zaban, there is no evidence that Zaban purchased all the gasoline that defendants were required to buy under the contract. Thus, defendants have failed to show that the liquidated damages provision does not reasonably approximate plaintiff's lost profits.

Further, as previously stated, this is a long-term requirements contract with uncertain damages, i.e., the price of gasoline at the time its sold, cost of storing unsold gasoline, two trips to sell the same gasoline, etc. Thus, the liquidated damages provision is also reasonably related to plaintiff's incidental damages. Accordingly, defendants have failed to show that the liquidated damages provision is not reasonably related to the possible damage suffered.

IV. Credit for Checks Cashed

Defendants claim that the circuit court erred in not requiring plaintiff to provide a "dollar for dollar" account of defendants' payments to plaintiff.

A. Standard of Review

"An award of damages following an evidentiary hearing is reviewed on appeal pursuant to the clearly erroneous standard." *Woodman v Miesel Sysco Food Service Co*, 254 Mich App 159, 190; 657 NW2d 122 (2002). A finding is clearly erroneous if there is no evidence to support it or the appellate court is left with a definite and firm conviction that a mistake has been made. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

B. Analysis

Initially, we agree with plaintiff and the circuit court that defendants have only shown that 9 of the 17 checks were paid to plaintiff; the remaining 8 checks were payable to cash and Marshall.

However, we agree with defendants that it cannot be determined from plaintiff's business records whether any of the 9 checks were credited to defendants' account. The business records, which plaintiff's counsel indicated were complete, list numbered invoices showing credits and debits on defendants' account that do not match the amount of any one check with a

corresponding deposit. There could be several explanations, but the only evidence presented to support plaintiff's claim that defendants were credited are affidavits of Vickie Morton, account manager/controller of plaintiff, who averred that based on her review, the 9 checks were credited to defendants' account. In her supplemental affidavit, she specifically averred that:

> Based on my review of the account records of Barrick Enterprises, Inc. for the months of July, August, September and October 2005, the nine (9) checks, which are attached as Exhibit F to Defendants' Reply Brief and made payable to Barrick Enterprises, Inc., were properly credited to the account of 2257 Waterman Operating Company and would not constitute an additional setoff against the $158,006.88 that is owed to Barrick Enterprises, Inc. for product delivered to 2257 Waterman Operating Company LLC.

"The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Here, the checks do not appear in plaintiff's business records, and Morton's affidavits simply do not explain the apparent absence of these checks from plaintiff's business records. Although mathematical certainty is not required to establish damages, *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005), plaintiff has failed to show with reasonable certainty that any of the checks were credited to defendants' account. Thus, we are left with a definite and firm conviction that the damages in this regard were not proven to a reasonable certainty. Accordingly, we remand for further proceedings in regard to whether plaintiff credited any check payments to defendants' account.

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

/s/ William C. Whitbeck
/s/ Brian K. Zahra