

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE FAYSAL,

Plaintiff-Appellant,

v

CENTURY 21 TOWN & COUNTRY
COMMERCIAL GROUP, INC., and
HAROLD NIMCHONOK,

Defendants-Appellees.

UNPUBLISHED

September 18, 2008

No. 278641

Wayne Circuit Court

LC No. 06-624464-CZ

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

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants in this case arising from a failed real estate transaction. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff had a listing agreement with defendants to sell his jewelry store at the time he entered into a purchase agreement with Donald and Gerald Ferrier. They were going to purchase the business for \$139,000. Plaintiff claims that the down payment was to be \$39,000, and the remaining \$100,000 would be financed.¹ Defendant Nimchonok filled out the purchase agreement. Section four of the purchase agreement pertained to the price. Nimchonok indicated that the price was \$139,000. He wrote that the down payment would be \$39,000, and then he wrote the words “Bank Finance \$100,000.00.” Nimchonok also included the words “Subject to Financing” at the end of section four. When the buyers failed to purchase the jewelry store, plaintiff sued them for breach of the purchase agreement. The trial court in that case ruled that the “subject to financing” term at the end of section four referred to the entire of section four, including the down payment. Accordingly, a judgment in favor of the buyers was rendered.

Thereafter, on August 28, 2006, plaintiff brought this action against defendants alleging that defendants, as plaintiff’s agents, breached their fiduciary duty and duty of care by improperly drafting an ambiguous purchase agreement. Plaintiff further alleged that “[d]efendants owed an affirmative fiduciary duty to expressly ensure, discover, clarify or

¹ According to plaintiff’s complaint, he “guaranteed to finance the \$100,000.00 to the buyers in order to procure the sale and obtained such financing authority from Comerica Bank.”

disclose the ability or inability of the buyers to pay the \$39,000 down payment which was not subject to financing.” Plaintiff also asserted a “gross negligence and reckless conduct” claim. Plaintiff primarily alleged that defendants owed a duty to properly conduct the sale of the jewelry business and “breached that duty and were otherwise negligent or reckless in failing to disclose fully, clarify and reduce to writing the intentions and material terms of the purchase agreement, namely that the down payment of \$39,000 was not to be financed but only the remaining \$100,000 was subject to financing.” Plaintiff requested a judgment of \$139,000 in his favor to compensate him for his monetary loss that resulted from defendants’ wrongful conduct.

On April 16, 2007, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants argued that plaintiff’s claims must fail because “there is a lack of causal connection between Defendants’ acts and Plaintiff’s alleged injury.” Defendants argued that the reason the deal fell through was because of the lack of financial ability and/or the lack of cooperation by the buyers, not because the purchase agreement contained the term “subject to financing.” Accordingly, plaintiff could not show that defendants’ alleged negligence was a cause in fact and legal cause of his purported injuries. Thus, defendants were not negligent in drafting the purchase agreement and did not breach their fiduciary duties.

On May 11, 2007, plaintiff responded to defendants’ motion for summary disposition. Plaintiff argued that defendants negligently drafted the purchase agreement. In particular, the additional language that Nimchonok handwrote into the contract without specificity “mischaracterized and misconstrued the substance and character of the terms of the previously negotiated purchase agreement to the extent that the buyers’ obligations to Plaintiff were drastically reduced in comparison to the purchase agreement anticipated by the parties to the sale.” The ambiguous additional language was the “subject to financing” term written at the end of section 4 of the purchase agreement. Further, plaintiff argued, “the [b]uyers’ reduced obligations to seller under the contract, due to the handwritten language added to the contract, created an opportunity for buyers to breach the terms of their anticipated, bargained-for agreement without penalty or liability.” The evidence in support of this argument was that, after the sale fell through, plaintiff sued the buyers for breach of the agreement but he did not recover for his loss because the court in that action held that the “subject to financing” term referred to the whole purchase. Thus, plaintiff argued, in light of the many disputed, material factual issues, the motion for summary dismissal should be denied.

On November 5, 2007, oral argument was held on the motion. Defendants argued that the purchase of the jewelry store was subject to the buyers obtaining financing. The buyers could not secure the financing and that was the cause of the deal not being completed. Plaintiff argued that, because of the ambiguously drafted purchase agreement, his lawsuit against the buyers for breach of the purchase agreement was not successful. The “subject to financing” term appeared to apply to the entire sale, not just the \$100,000 portion of the sale price as the parties had purportedly agreed. The trial court noted that the buyers could not buy the jewelry store because they did not have the money. After holding that there was nothing wrong with subjecting the sale to financing, the trial court held “there is no duty breach by Mr. Nimchonok. I further find that if it’s for appellate purposes that he didn’t owe a duty except to comply with the terms of the Faysal agreement that the parties entered and he did.” The trial court then granted the motion for summary dismissal. This appeal followed.

Plaintiff argues that defendants were not entitled to summary dismissal because Nimchonok breached his fiduciary duty and duty of care when he negligently added an ambiguous term to the purchase agreement which greatly reduced the buyers' obligations under the contract and eliminated their liability for its breach. We review de novo the trial court's decision to grant summary disposition to determine whether a genuine issue of material fact exists. See MCR 2.116(C)(10); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiff argues that "Nimchonok's act of hand writing "Subject to Financing" under the entire section 4 [of the purchase agreement] which referred to both the \$39,000.00 down payment and the remaining \$100,000.00 payment created an ambiguity in the contract between the parties, allowing the contract to be interpreted as making the entire \$139,000.00 purchase price subject to financing, whereas their negotiations had established that only the \$100,000.00 was to be subject to financing. This introduction of ambiguity into the contract by Defendant-appellee Nimchonok greatly reduced [the buyers] obligations to Plaintiff-appellant." It also reduced the buyers' liability for its breach.

Thus, plaintiff is claiming that Nimchonok breached his fiduciary duty by negligently drafting the purchase agreement and including an ambiguous term that did not comport with the parties' agreement. The result of this negligence was that plaintiff's remedy against the buyers for their breach was eliminated. In their motion for summary disposition, defendants focused their argument on the proximate cause element of the claim. They argued only that the interjection of the disputed term did not cause the deal to fall through. But that is not the claim that plaintiff has asserted in this case. Instead, plaintiff has asserted that he was denied a remedy for the breach of the purchase agreement because of the ambiguous term. In other words, the purported negligence proximately caused the loss of his remedy for breach of contract, not necessarily the loss of the sale.

It appears that the trial court also misapprehended plaintiff's claim in the same way as defendants. We reach that conclusion after review of the trial court's statements that (1) the buyers could not buy the jewelry store because they did not have the money, and (2) there was nothing wrong with subjecting the sale to financing. The trial court then went on to hold that "there is no duty breach by Mr. Nimchonok." Whether the buyers could not proceed with the sale for financial reasons does not address the issue raised by plaintiff. And we disagree that "there is nothing wrong with subjecting the sale to financing" if that is not what the parties intended. The trial court's conclusions do not address the issue whether Nimchonok's purported negligence in drafting the purchase agreement by interjecting an ambiguous term, that did not comport with the parties' agreement, caused plaintiff the loss of his remedy for its breach. In light of the confusion regarding this matter, we reverse the grant of summary disposition in defendants' favor and remand this case for further proceedings. Thus, we need not further address plaintiff's related issues on appeal. We express no opinion as to the merits of plaintiff's claim.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly