

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SHREE SHIV HOSPITALITY, INC., d/b/a  
SOUTH HAVEN HOTEL, LIGHTHOUSE INN,

UNPUBLISHED  
November 13, 2008

Plaintiff-Counterdefendant-  
Appellee,

v

ROBERT SPILLANE, d/b/a SPILLANE &  
ASSOCIATES,

No. 280361  
Van Buren Circuit Court  
LC No. 06-550178-CK

Defendant-Counterplaintiff-  
Appellant.

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Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a bench trial, the trial court entered judgment in favor of plaintiff, awarding it \$25,000 in damages, plus costs and fees, and the court entered a judgment of no cause of action on defendant's counterclaim. This case involves questions regarding defendant's obligations with respect to an escrow agreement pursuant to which plaintiff deposited \$25,000 with defendant. We affirm, albeit for reasons that differ from those relied on by the trial court. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was in the business of operating hotels when defendant, a purported mortgage broker - financial consultant, contacted it about purchasing a hotel from a third-party. On May 18, 2005, plaintiff, as the buyer, entered into a purchase agreement for a hotel with the third-party vendor at a sales price of \$2.5 million dollars. The sale included all of the hotel's personal property that had a value of approximately \$750,000, but there was a personal property tax debt of around \$25,000 owed to the local municipality for 2004 taxes.

Under the purchase agreement, the vendor agreed to deposit \$25,000 into an escrow account with defendant for plaintiff's benefit for purposes of taking care of the existing tax debt and accompanying lien. Specifically, the purchase agreement provided in relevant part:

Seller shall indemnify and hold harmless Buyer from any and all debts or obligations of South Haven Hotel, II, LLC . . . provided, however, that Seller shall not be responsible for payment of any real or personal property taxes associated with the Property . . . but Seller shall deposit with Robert R. Spillane, CHA,

Spillane & Associates, \$25,000.00 to be held by Robert R. Spillane for payment of any personal property taxes that may be owing or for use in bidding at any personal property tax foreclosures. Robert R. Spillane shall be entitled to retain as consulting fees any amount of the \$25,000 in excess of that paid for the personal property taxes.

On June 3, 2005, shortly after the closing, the parties executed a document entitled "escrow holding agreement" (hereinafter agreement or contract), which incorporated the above language from the purchase agreement and added the following sentence:

When Robert R. Spillane purchases the personal property of the hotel it will remain the property of the Shree Shiv Hospitality, Inc d.b.a South Haven Hotel, Lighthouse Inn.

Despite multiple requests in the following months by the city for payment of the tax debt, of which defendant was aware, defendant refused to pay the amount due, electing instead to await a foreclosure sale, which would require, according to the city treasurer, that the hotel be closed for a period of at least five days. Even after plaintiff pleaded with defendant to pay the tax bill, defendant refused, and subsequently plaintiff paid the taxes to avoid a foreclosure sale and business closure. Nevertheless, defendant retained the escrowed funds and contended that he was entitled to keep them.

Plaintiff filed suit against defendant, alleging breach of contract, breach of fiduciary duty, and conversion. Plaintiff sought return of the \$25,000 placed into escrow with defendant. Defendant filed a counterclaim, alleging breach of contract and breach of implied contract. Defendant asserted that plaintiff committed a contractual breach by unilaterally paying off the outstanding personal property taxes. In response to the counterclaim, plaintiff did not allege that there was a lack or want of consideration as to the contract.

Following the presentation of proofs, the trial court ruled from the bench. The court found the contract to be ambiguous with respect to defendant's obligations and duties. The trial court, however, did not proceed to determine the intent of the parties on analysis of and reflection on the trial testimony. Rather, the court decided that the contract would be of no benefit to plaintiff if the contract granted defendant the option of waiting until foreclosure and then bidding on the property with use of the escrowed funds. According to the court, a contractual benefit to plaintiff would only occur if the funds were used to pay off the tax debt prior to foreclosure. The court further ruled:

I just don't think this contract is an enforceable contract. I don't see how you can go by the letter of the wording of this contract and find anything that benefits the plaintiff[] in any way beyond the payment or application of the \$25,000 on the taxes prior to foreclosure.

So what does that do with the cause of action? Well, there [are] two counts to this and one is an escrow agreement that places the fiduciary duty on the person holding the funds to act in the best interest of the person for whom the funds are held. Obviously they are held to satisfy the lien to get the taxes paid so that the plaintiff[] [is not] running a business where they're worried about having

their property taken in a sale and not having it available because the presumption is if you have the sale, Mr. Spillane is going to successfully be the highest bidder and the property is going to stay where it's at obviously or it wouldn't be any consideration whatsoever. That's not much consideration given the fact of the interruption of the business.

So I think that there has been established here by the plaintiffs a breach of fiduciary duty in retaining the money and how it was used. I think the holding agreement is in part without any consideration to the buyer[] whatsoever, the plaintiff[] in this case, and I think I have to find no cause of action on the counterclaim and find that the plaintiff[] [is] entitled to the \$25,000. . . .

It is somewhat difficult to decipher the court's ruling; however, it appears that the court was proceeding under either a presumption or a conclusion that the contract gave defendant the option to wait until foreclosure and then bid on the property instead of immediately paying off the tax debt. And exercising the option to await foreclosure would be of no benefit to plaintiff; therefore, the contract was unenforceable, permitting the court to ignore the contract and analyze the breach of fiduciary duty claim independent of the contract.

On appeal, defendant argues that he is entitled to the escrowed funds because the agreement was not ambiguous and should be enforced as written and because it expressly afforded him the option to either pay the taxes or to use the money to bid at a foreclosure sale. He further contends that because plaintiff unlawfully frustrated his attempt to bid on the personal property at the foreclosure sale, he is entitled to retain the escrowed funds. Additionally, defendant argues that contrary to the trial court's findings, no fiduciary relationship existed between the parties.

This Court reviews a trial court's findings in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). The interpretation of a contract constitutes a question of law, which we review de novo, *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004), "including whether the language of a contract is ambiguous and requires resolution by the trier of fact," *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003). Whether to recognize a cause of action for breach of fiduciary duty in a particular context is a question of law subject to review de novo on appeal. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 574; 603 NW2d 816 (1999).

An escrow agreement, like all contracts, is to be construed to effectuate the intent of the parties, and if the contract language is clear and unambiguous, its meaning is for the court to determine. See generally *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998); *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). On the other hand, where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *UAW-GM Human Resource Ctr, supra* at 491. A contract is ambiguous if its words may reasonably be understood in different ways. *Id.*

We first observe that only if the contract is unenforceable is it proper to consider an independent fiduciary duty to act. It would not be proper to conclude that a party breached a fiduciary duty to another party if a valid contract between the parties specifically addressed the subject matter and performance associated with the duty and expressly permitted what otherwise might be deemed a breach of the fiduciary duty independent of the contract. The contract must control.

We conclude that the trial court erred in finding the contract unenforceable for want of consideration. First, in response to defendant's counterclaim for breach of contract, plaintiff did not allege want of consideration as an affirmative defense, nor did plaintiff in its complaint allege that the contract failed for lack of consideration. Accordingly, the issue or defense of want of consideration was waived. MCR 2.111(F)(3)(a) (listing "want or failure of consideration" as an affirmative defense that must be timely pled); *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 599; 513 NW2d 187 (1994)(party waived defense of lack of consideration by failing to assert it in its responsive pleading). Moreover, even if timely raised and properly preserved, the contract did not fail for want of consideration. Consideration requires a bargained-for-exchange, resulting in a benefit on one side, or a detriment suffered, or service done on the other. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002). In general, courts do not inquire into the sufficiency or adequacy of the consideration. *Id.* at 239. It has been stated that a cent or a peppercorn constitutes valuable consideration in legal estimation. *Id.* A benefit to plaintiff under the terms of the contract was that defendant undertook the job of handling and negotiating the personal property tax matter, relieving plaintiff of having to spend any time on the issue. Also, plaintiff would benefit if the property taxes were paid. Further, assuming defendant had the option to utilize the escrowed funds for bidding at a foreclosure sale, plaintiff could still potentially benefit by having defendant purchase items with the funds in a manner that satisfied the tax debt and then turn over the purchased property to plaintiff, even if a negative consequence was a temporary shutdown of the hotel. We note that legal consideration can still exist under the plain terms of a contract even if a party's hopes, expectations, desires, or other inducements and motives that led to execution of the contract go unfulfilled. *Rose v Lurvey*, 40 Mich App 230, 234-235; 198 NW2d 839 (1972). The trial court here essentially found the contract to be partially lacking consideration. However, if there are several benefits or considerations to support a contract and some fail, and if the remaining consideration is good and adequate, such as the payment of taxes or the relief from handling the tax matters here, the contract will be sustained. *Nichols v Seaks*, 296 Mich 154, 160; 295 NW 596 (1941)("If we ignore completely this phase of the contract, there remains nevertheless sufficient consideration to support defendant's obligations."). Accordingly, the contract in the case at bar, contrary to the trial court's ruling, was enforceable.

We see no need to explore the intent of the parties outside the four corners of the contract. We are of the opinion, on de novo review, that the contract clearly and unambiguously contemplated an attempt by defendant to negotiate a lower tax liability, followed by the payment of personal property taxes by defendant after the close of negotiations if still feasible time-wise and, if no longer feasible, use of the funds in bidding at a foreclosure sale. The language entitling defendant to retain as a consulting fee any part of the \$25,000 in excess of the monies paid for personal property taxes reflects the parties' intent to allow defendant the opportunity to negotiate a better tax deal. Indeed, even if it were necessary to consider parol evidence as when a contract is ambiguous, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470; 663 NW2d

447 (2003), defendant repeatedly testified that his role under the contract was to attempt to negotiate a lower tax liability, which would benefit defendant by way of a consulting fee. However, when it became clear that the city would take no less than the full amount of the taxes due and owing, which was communicated to defendant in no uncertain terms, and given that foreclosure proceedings had not yet commenced, defendant became obligated under the contract to pay the personal property taxes. The language pertaining to plaintiff retaining ownership of property if defendant purchased the property would only be implicated if a foreclosure sale were necessitated and defendant purchased the property. Just like a tax foreclosure sale is the culmination of the failure to pay taxes and the imposition of a tax lien, which must first occur and necessarily precede any sale, the language in the contract at issue sequentially speaks first of payment of any personal property taxes, which, if accomplished, ends the need to look at any additional language. We understand and appreciate defendant's argument to the contrary, but reading the pertinent contractual language in context, we do not view it as allowing or giving defendant the option to simply await a foreclosure sale if there was no room for further negotiations and payment of the debt could still be made. Accordingly, defendant breached the contract by not paying off the tax debt when full payment, and nothing less, was demanded by the city. Given defendant's breach, plaintiff was well within its rights to pay the tax debt in an effort to mitigate damages and protect its interests. Therefore, defendant's counterclaim fails as a matter of law and was properly rejected by the trial court.

Affirmed.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Michael R. Smolenski