STATE OF MICHIGAN

COURT OF APPEALS

MACATAWA BANK, Plaintiff-Appellee,	UNPUBLISHED June 16, 2009
v	No. 284445 Allegan Circuit Court
HIDDEN RIVER ESTATES, LLC, and JAMES SHEK, Defendants-Appellants.	LC No. 07-042173-CK

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this contract dispute, defendants appeal as of right from the trial court's order granting summary disposition in favor of plaintiff. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant Hidden River Estates, LLC (HRE) intended to develop a 33-unit modular home condominium project in Lee Township. To that end, it obtained $250,000 line of credit from plaintiff, secured by a mortgage, to use as working capital. HRE constructed the project infrastructure and built three speculation homes, but sales failed to materialize as expected. The original HRE principals then asked defendant Shek, an attorney who operated a real estate brokerage and manufactured home sales office, to become an owner and help them to implement a revised business plan. Shek agreed after plaintiff promised to cooperate in the extension of further financing to HRE. As part of the arrangement, plaintiff required that Shek sign a personal guaranty on HRE's debt.

The Guaranty states that Shek signed it "[f]or good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce MACATAWA BANK . . . at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of HIDDEN RIVER ESTATES, L.L.C. . . . ." Following Shek's signing of the Guaranty, plaintiff cooperated in the extension of further financing to HRE and made additional accommodations. However, plaintiff ultimately refused to extend further financing, and HRE eventually defaulted on its promissory note. According to plaintiff, the current principal balance due is $269,042.33 plus interest and late fees accrued from November 1, 2006 through October 16, 2007 (the date the Complaint was filed) of $22,092.61 and $1,128.95, respectively. The total amount due is $292,263.89 plus interest continuing to accrue under the promissory note, costs, and attorney fees.

Plaintiff filed this action claiming that HRE breached the promissory note and that Shek breached the personal Guaranty. Plaintiff sought foreclosure by judicial action in addition to a money judgment against HRE and Shek, jointly and severally. Representing both himself and HRE, Shek admitted HRE's liability, but contested his individual liability under the Guaranty. Defendants argued that the Guaranty was unenforceable because it was not supported by consideration or, in the alternative, because plaintiff failed to "perform its executory obligations." The trial court rejected those arguments and granted plaintiff's motion for summary disposition.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Plaintiff moved for summary disposition pursuant to both MCR 2.116(C)(9) and (10). The trial court failed to specify whether it was granting the motion for summary disposition pursuant to MCR 2.116(C)(9) or (10). However, in its ruling, the court referenced facts outside of the pleadings. Specifically, the court noted that Shek had presented plaintiff with various financing requests that were refused. Because a motion for summary disposition pursuant to MCR 2.116(C)(9) rests on the pleadings alone, we conclude that the trial court granted summary disposition pursuant to MCR 2.116(C)(10).

In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

"In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). In *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002), our Supreme Court stated:

> To have consideration there must be a bargained-for exchange. *Higgins v Monroe Evening News*, 404 Mich 1, 20-21; 272 NW2d 537 (1978). There must be '"a benefit on one side, or a detriment suffered, or a service done on the other.'" *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949).

Here, Shek signed the Guaranty in order to gain the opportunity to enter a business relationship with plaintiff. He wanted to induce plaintiff to make additional loans and accommodations to HRE so that, as an owner of HRE, he might make a profit on the Lee Township development. However, there is no evidence that plaintiff agreed to make any specific accommodations or loans to HRE in exchange for the signing of the Guaranty. Rather, plaintiff only agreed "at its option, at any time or from time to time to make loans or extend other accommodations." The question is whether this promise is illusory such that there is no consideration supporting Shek's promise to pay.

Our Supreme Court's decision in *General Motors*, *supra*, provides guidance in answering this question. In *General Motors*, the plaintiff had promised its customers that, in response to a customer complaint, it would consider paying for replacement parts that were no longer covered by a warranty. *General Motors*, *supra* at 234. Our Supreme Court addressed whether the plaintiff's promise to merely consider paying for the replacement parts was "consideration flowing to customers when they purchase a GM vehicle or merely an illusory promise." *Id*. at 238. The Court held that the promise was adequate consideration because it provided an "opportunity for dialogue and possible resolution of complaints." *Id*. at 239. The Court explained that although the plaintiff's promise was discretionary with respect to whether it would provide replacement parts, it was "not discretionary regarding the plaintiff's obligation to act reasonably and in good faith in response to a customer complaint." *Id*. at 240.

In the instant case, plaintiff's promise to provide additional accommodations or loans to HRE from time to time at its option is analogous to the commitment to negotiate customer complaints in good faith at issue in *General Motors*. Although plaintiff did not expressly promise to negotiate with HRE in good faith, "[w]here a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975); see also 3A Corbin, Contracts, § 644, pp 78-84. Under the reasoning of *General Motors*, plaintiff's promise was not illusory because it obligated plaintiff to consider HRE's future requests for accommodations and financing in good faith. Accordingly, this was a bargained-for exchange whereupon each party undertook a legal detriment. Thus, there was consideration supporting the Guaranty.

Contrary to defendants' assertion, plaintiff's eventual refusal to extend further financing and accommodations does not alter Shek's liability. There is no evidence that plaintiff failed to follow through on a specific promise to extend further accommodations or financing. Nor is there evidence that plaintiff acted in bad faith when it ultimately refused to extend further financing or accommodations. The Guaranty cannot reasonably be read to require that plaintiff provide any and all accommodations and financing that HRE requested. Thus, the trial court correctly held that plaintiff fulfilled its obligations and then exercised its right to withhold additional financing when it determined that providing further accommodations was not in its interest.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey