STATE OF MICHIGAN

COURT OF APPEALS

GERSTENBERGER FARMS, INC., Plaintiff-Appellant,	UNPUBLISHED April 22, 2010
v	No. 291318 Sanilac Circuit Court
BETTY GRIMES, NONA MOORE, NORM KOHN and DEAN BERDEN, Defendants-Appellees.	LC No. 08-032314-CK

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting defendants' motions for summary disposition in this action over whether plaintiff was entitled to specific performance and damages under its lease agreements. We affirm.

I. BACKGROUND

Plaintiff is a family-owned cash crop farming corporation that owns no property, but instead utilizes leased farmland to conduct its operations. Since the early 1980s, plaintiff has entered into and periodically renewed land rental agreements individually with defendant Norm Kohn and his sisters, defendants Betty Grimes and Nona Moore ("lessors"). The land rental agreements were drafted by plaintiff's part-owner and president, Richard Gerstenberger, and commenced their lease terms on January 1, 2007.[1] Notably, each agreement provided plaintiff "the opportunity to purchase the property" in the event the lessor elected to sell the property. Additionally, the agreements protected plaintiff's interest in its crops should a sale occur before plaintiff's crop was planted or harvested in the final year of each land rental agreement.

Despite entering into these agreements, it appears the lessors had intended to sell the farmland for sometime. Gerstenberger testified that by the fall of 2006, he had noticed a real

[1] Plaintiff's land rental agreements with Moore and Kohn ran from January 1, 2007, through December 31, 2007, while the agreement with Grimes ran from January 1, 2007, through December 31, 2010.

estate broker's sign on the farmland. In March 2007, Kohn informed Gerstenberger of the lessors' intent to sell the farmland, but Gerstenberger replied that he could not afford their asking price of $2,850 per acre. Towards the end of August 2007, Gerstenberger noticed another sign on the land, this time reading "Farm for Sale" with Kohn's telephone number listed.

With that, on September 5, 2007, Gerstenberger contacted Kohn to inquire about the status of the farmland. Kohn indicated that all the farmland plaintiff was leasing was in fact for sale. Gerstenberger then expressed his interest in purchasing the land and requested a couple of days to secure the necessary financing. Two days later, Gerstenberger, having secured financing, contacted Kohn to purchase the land. Kohn, however, indicated that he had already sold the property to defendant Dean Berden. Notably, Gerstenberger testified that he intended to purchase the farmland for himself and his wife individually. Notwithstanding the sale, plaintiff was able to harvest its crops for 2007 in accordance with the rental agreements. The leases on Kohn and Moore's land expired in due course at the end of 2007 and were not renewed. In March 2008, Gerstenberger received an eviction notice from Berden pertaining to the 40 acres of land plaintiff had leased from Grimes through 2010.

On March 24, 2008, plaintiff initiated suit seeking specific performance as well as damages because the farmland was sold to Berden in violation of the land rental agreements' "right of first refusal." Plaintiff also alleged that Berden improperly sought termination of plaintiff's tenancy. Defendants answered, and following discovery, filed motions for summary disposition.

In their motion, the lessors argued that summary disposition was appropriate under MCR 2.116(C)(10) because the leases failed to satisfy the statute of frauds, Gerstenberger rather than plaintiff was the true party in interest, and plaintiff had harvested its crops and sustained no damages. Berden concurred in the lessors' motion and additionally argued that summary disposition was appropriate under MCR 2.116(C)(8) because plaintiff failed to establish a right of first refusal and under MCR 2.116(C)(10) because Berden obtained the property without encumbrance under the race-notice statute, MCL 565.29, since plaintiff failed to record its alleged rights in the property.

After hearing arguments, the court ruled in favor of defendants because the land rental agreements provided no right of first refusal, plaintiff was given an opportunity to purchase the property, and the land rental agreements failed to satisfy the statute of frauds. The court also held that Berden was unaware of any alleged right of first refusal given plaintiff's failure to record such an interest. Plaintiff now appeals the orders granting defendants' motions and dismissing plaintiff's complaint.

II. ANALYSIS

A. LESSORS' MOTION FOR SUMMARY DISPOSITION

On appeal, plaintiff first argues that the lessors were not entitled to summary disposition where the land rental agreements provided a right of first refusal that was not honored. We review de novo the trial court's order granting summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law

because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).[2] We also review issues of contract interpretation de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

"'A right of first refusal . . . empowers its holder with a preferential right to purchase property on the same terms offered by or to a bona fide purchaser.'" *In re Egbert R Smith Trust*, 274 Mich App 283, 287; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008), quoting 17 CJS, Contracts, § 56, p 503. While leasehold contracts providing rights of first refusal are valid in Michigan, such rights are to be narrowly construed. *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 205; 530 NW2d 505 (1995). To determine whether such a right was conferred to plaintiff under the land rental agreements, we must examine and construe the plain language of the contract according to its ordinary meaning to determine and enforce the parties' intent. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008); *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *In re Egbert R Smith Trust*, 480 Mich at 24.

Turning to the contractual language at issue, nowhere in any of the land rental agreements do the words "right of first refusal" appear. Instead, the land rental agreements only provide that "[i]f the lessor decides to sell the property, the lessee will be given an opportunity to purchase the property." The *Random House Webster's Unabridged Dictionary* (2d ed, 1998) defines opportunity as "an appropriate or favorable time or occasion," "a situation or condition favorable for attainment of a goal," or "a good position, chance or prospect, as for advancement or success." *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007) (resort to a lay dictionary is appropriate to define a word that has not been given prior legal meaning). None of these definitions provides a basis for plaintiff's conclusion that the agreements conferred a right of first refusal that effectually conferred to plaintiff an option to purchase the property upon Berden's offer. Indeed, such an interpretation does not wash with the plain language and ordinary meaning of the contractual language.

Considering the plain meaning of "opportunity," we find that plaintiff had more than sufficient opportunity (or chance or prospect) to purchase the property. It is undisputed that Gerstenberger was informed by the lessors in March 2007 of their intent to sell the property, and that he specifically replied that he could not afford their offer. Additionally, Gerstenberger

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[2] While Berden also addressed this issue in the context of MCR 2.116(C)(8), the court necessarily looked outside the pleadings to the land rental agreements to render its ruling. Review is therefore appropriate under the standard of MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999).

noticed a "for sale" sign on the property in August 2007, and was informed by Kohn on September 5, 2007, of the lessors' intent to sell plaintiff's entire leasehold.[3] Summary disposition was appropriate.[4]

Plaintiff's claim for specific performance fails on a separate, independent ground – specifically, lack of definiteness.[5] Lack of definiteness in a lease may preclude specific performance where the description of the property subject to the lease is inadequate or insufficient. *Bushman v Faltis*, 184 Mich 172, 179-180; 150 NW 848 (1915); see also *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98-99; 508 NW2d 150 (1993) ("In order for an agreement to be a valid lease, it must contain . . . an adequate description of the leased premises . . . ."). A description may be adequate where, in view of the parties' situation and relation to the property, it discloses with sufficient certainty the quantity and location of the land so that the land may be identified. *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999); *Stanton v Dachille*, 186 Mich App 247, 259; 463 NW2d 479 (1990).

Here, with the exception of acreage, the land rental agreements are utterly devoid of *any* description of the property subject to the leases. And even when the acreage is considered in view of the parties' long relationship, we conclude the descriptions of the farmland were grossly deficient where they lack the faintest identifiers other than size. See *Atlas v Gunsberg Packing Co*, 240 Mich 141, 145; 215 NW 339 (1927) (finding a description of only the street address without naming the country, state or city insufficient); see also *Trotter v Gaddis & McLaurin, Inc*, 452 So 2d 453, 456 (Miss, 1984) (finding a description of a given number of acres without

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[3] Plaintiff concedes that Kohn acted for all the lessors when informing him the farmland was for sale. Further, while Gerstenberger correctly acknowledges that he acted in an individual capacity in offering to purchase the property on September 7, 2007, that is irrelevant to whether plaintiff was given an "opportunity" to purchase where Gerstenberger was plaintiff's president and learned the property was for sale while acting in that capacity. Specifically, Gerstenberger was informed of the lessors' intent to sell in March 2007 while signing the leases *on behalf of plaintiff* and Gerstenberger's initial call to Kohn on September 5, 2007, was to inquire about *the status of plaintiff's crops* in light of the "for sale" sign.

[4] We note that Gerstenberger also admitted that he declined to inquire about the property after seeing a real estate broker's sign on the property in 2006. However, that occurred before the current land rental agreements were in effect. Furthermore, while the lessors cite Kohn's testimony that plaintiff was aware of the lessors' willingness to sell the property since 1996, that portion of Kohn's deposition was not before the trial court, and thus our consideration of it at this juncture is improper. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

[5] Defendants frame this issue as pertaining to the statute of frauds. Whether contractual terms are sufficiently definite, however, goes to the substance of a binding contract governed by general contract law and is separate from a contract's sufficiency under the statute of frauds. See *Zurcher v Herveat*, 238 Mich App 267, 279-283, 290-291; 605 NW2d 329 (1999).

indicating their location within the larger tract insufficient). Plaintiff is not entitled to specific performance.[6]

B. BERDEN'S MOTION FOR SUMMARY DISPOSITION

Next, plaintiff contends that the trial court erred in granting summary disposition to Berden where (1) he was not a bona fide purchaser under the race-notice statute, MCL 565.29, because he had notice of the Grimes land rental agreement and (2) where he failed to honor the remainder of the lease term in the Grimes land rental agreement. Neither argument affords plaintiff relief.

First, application of the race-notice statute with respect to the right of first refusal is inconsequential in light of our conclusion that no such right was conveyed. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006) (under MCL 565.29, a bona fide purchaser is one who purchases without notice of defect in the seller's title). The trial court, therefore, was correct – albeit for the wrong reason – that specific performance was not an appropriate remedy. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994) (a trial court need not be reversed because it reached the right result for the wrong reason).

Second, plaintiff's claim for damages against Berden for evicting plaintiff is misplaced where the Grimes lease expressly contemplates damages from the lessor under the precise scenario before us. Specifically, that agreement provides: "If the lessor should sell the property before the 2010 crop is planted, the lessor will refund all expenses that accrued to lessee, plus any interest. If the lessor should sell the property after the crop is planted, the new owner may not take possession until the crop is harvested."[7] Notably, there is no provision for continuation of the lease if the property is sold before the 2010 crops are planted or for recourse against a future buyer in this event.

Regardless of this provision, neither plaintiff's complaint, its opposition to summary disposition, nor its argument on appeal seeks the actual recourse provided in the Grimes land rental agreement, i.e., a refund of "all expenses that accrued to lessee, plus interest." Instead, plaintiff's complaint merely alleges that Berden improperly sought to terminate plaintiff's tenancy under the lease agreement, and requested specific performance of the land rental agreement's right of first refusal in addition to incidental and consequential damages. As repeated throughout this opinion, however, that equitable relief is not available to plaintiff. And as an error correcting court, it is not our role to make an argument where it was not made by the

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[6] Before moving on, we note defendants' contention that the leases with Moore and Kohn failed to satisfy the signature requirement of the statute of frauds. See MCL 566.108. However, MCL 566.108 only requires a signature where the period of lease is greater than one year, and the duration of both the Moore and Kohn leases does not exceed that limit. Thus, to the extent the court's ruling was premised on this ground, it was incorrect. Regardless, summary disposition was appropriate for the reasons previously stated.

[7] The other rental agreements expired on December 31, 2007. In accordance with the those agreements, plaintiff was permitted to harvest his crops for that year.

party. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Burns v Detroit* (*On Remand*), 253 Mich App 608, 615; 660 NW2d 85 (2002), mod in part 468 Mich 881 (2003).

In any event, despite the fact that it is dubious whether plaintiff actually requested in its complaint the relief against Berden it requests on appeal (i.e., damages for the eviction), plaintiff is not entitled to enforce the lease and seek damages where, as we previously concluded, the lease failed to adequately describe the property.[8] *Atlas*, 240 Mich at 145; *De Bruyn Produce Co*, 202 Mich App at 98-99; see also *Trotter*, 452 So 2d at 456. Thus, irrespective of Berden's notice of the Grimes rental agreement at the time of his purchase, summary disposition was properly granted in his favor.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

[8] Moreover, the fact that the lease expressly provided a remedy to plaintiff in the event of a sale before the 2010 crop is planted necessarily presupposes that the lease would not survive a sale. Otherwise, there would be no need for such a remedy. Indeed, to hold the opposite would render this remedy meaningless and would thus violate the fundamental rule that "courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).