STATE OF MICHIGAN

COURT OF APPEALS

DAVID A. SPINDLER and BRENDA K. SPINDLER, Plaintiffs/Counter-Defendants-Appellants/Cross-Appellees,	UNPUBLISHED January 25, 2011
v	No. 294853 Macomb Circuit Court
MICHAEL L. WIEGAND, Defendant/Counter-Plaintiff-Appellee/Cross-Appellant.	LC No. 2008-004333-CK

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Plaintiffs appeal as of right a judgment against them and in favor of defendant. The trial court entered the judgment after granting partial summary disposition in favor of defendant under MCR 2.116(C)(8), and, subsequently, granting defendant summary disposition under MCR 2.116(C)(10) on his counterclaim and dismissing plaintiffs' complaint in its entirety. Defendant cross-appeals the trial court's denial of his motion for case evaluation sanctions. Because we conclude that the trial court's decisions under both MCR 2.116(C)(8) and MCR 2.116(C)(10) are erroneous, we reverse the trial court's judgment in favor of defendant and remand for further proceedings. In light of our decision to reverse, defendant's cross-appeal is moot.

This case arises from the parties' agreement concerning the purchase of real property. On September 19, 2007, the parties executed a purchase agreement, which provided that plaintiffs, by their signatures, accepted defendant's offer to purchase property in Lake Orion, Michigan for $295,000. The terms of the agreement included the following:

> This agreement is contingent upon the Purchaser being able to secure a conventional mortgage in the amount of $236,000.00 and pay $59,000.00 plus mortgage costs, prepaid items, and adjustments in cash. Purchaser agrees to apply for such mortgage at his own expense within 7 calendar days from Seller's acceptance of this offer to purchase, or from the date Purchaser receives an acceptable inspection report pursuant to Paragraph 25 below if applicable, and execute the mortgage as soon as the mortgage application is approved and a

> Closing date is obtained from the lending institution. . . . If a firm commitment for such mortgage cannot be obtained within 45 calendar days from the date of Seller's acceptance, at the Seller's written option, this offer may be declared null and void and the deposit shall be returned to Purchaser forthwith.

The agreement also provided for a $5,000 deposit by defendant, to be held by the broker and applied to the purchase price if the sale is completed. In early October 2007, the parties executed an addendum, agreeing that:

> 1.) The new sale price is ($280,000.$\frac{00}{}$) Two-Hundred, Eighty-Thousand and 00/.
>
> 2.) Commission is 4.$\frac{5}{}$% of the total sale price.
>
> 3.) All other terms & conditions to remain the same.

Plaintiffs' complaint alleged that defendant breached the parties' agreement when he refused to close on the home. Defendant filed a counterclaim in which he alleged that the contingency in the purchase agreement was not satisfied because he had been unable to secure a mortgage by the closing date. He claimed that plaintiffs' refusal to return the $5,000 deposit thus constituted a breach of the parties' contract.

Plaintiffs argue on appeal that the trial court erred in initially granting defendant partial summary disposition under MCR 2.116(C)(8), and also claim error in the court's subsequent order granting defendant summary disposition on his counterclaim under MCR 2.116(C)(10). We agree.

An appellate court reviews a trial court's decision to grant a motion for summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Mack v City of Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). The Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Brown*, 478 Mich at 551-552 (footnote omitted). The proper interpretation of a contract is a question of law that is also reviewed de novo. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). The trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 424; 766 NW2d 878 (2009).

First, we agree with plaintiffs that the trial court erred in concluding, in its initial ruling on defendant's motions for summary disposition, that the purchase agreement limits plaintiffs' remedies to specific performance or retention of the $5,000 deposit. The relevant provision of the purchase agreement provides that:

> In event of default by the Purchaser hereunder, the Seller may, at his option, *elect to enforce the terms hereof* or declare a forfeiture hereunder and retain the deposit amount as liquidated damages. [Emphasis added.]

Thus, the agreement gives plaintiffs the option of enforcing the terms of the contract or retaining the deposit as liquidated damages and forfeiting the rights they would otherwise have under the contract. The trial court essentially ruled that "elect to enforce the terms hereof" refers to specific performance and *only* specific performance and does not permit an action for breach of contract. We disagree. A seller bringing an action against a buyer for breach of a contract to purchase real property generally may chose between several remedies. 34 Causes of Action 2d 431, § 2, § 27. "Generally, absent clear contract language to the contrary, the non-breaching party will not be limited in his or her choice of remedies." 34 Causes of Action 2d 431, § 2. One remedy that is generally available is an action to recover damages for breach of contract. See 34 Causes of Action 2d 431, § 27 ("In an action against a buyer for breach of a contract to purchase real property, the plaintiff will be able to recover general damages, which are damages that may be regarded as the natural, probable, and foreseeable consequences of the breaching party's conduct."); 34 Causes of Action 2d 431, § 28 ("In an action for breach of a contract to purchase real property, the plaintiff may recover general damages placing the plaintiff in the same position or condition he or she would have been in had the contract been duly performed."); *Soloman v Western Hills Dev Co*, 110 Mich App 257, 265-267; 312 NW2d 428 (1981) (discussing the appropriate measure of damages for a seller's breach of a contract for the sale of land); *MacRitchie v Plumb*, 70 Mich App 242, 245-247; 245 NW2d 582 (1976) (sustaining an action by the seller's estate for breach of contract for the sale of real property, but holding that, contrary to the award of the trial court, the proper measure of damages was the difference between the contract price and the market price of the land on the date of breach).

Had the parties in this case intended to limit plaintiffs' contract-based remedies to an action for specific performance, they could have easily so stated. In light of the general availability of an action for breach of contract for the sale of real property, we see no logical reason to construe "enforce the terms hereof" to mean "seek specific performance." In addition, defendant cites no authority to support the proposition that "enforce the terms hereof" means, exclusively, "seek specific performance." Accordingly, we reverse the trial court's January 29, 2009, order granting defendant partial summary disposition under MCR 2.116(C)(8).

We also agree with plaintiffs that the trial court erred in subsequently granting defendant summary disposition on his counterclaim under MCR 2.116(C)(10), holding that defendant was entitled to the return of his $5,000 deposit, and dismissing plaintiffs' complaint. Moreover, the trial court abused its discretion in denying plaintiffs' motion for reconsideration of its MCR 2.116(C)(10) decision.

After the trial court issued its January 29, 2009, order, plaintiffs moved for reconsideration and submitted documentary evidence in support of their arguments. The trial court issued another opinion and order on July 1, 2009, granting plaintiffs' motion for reconsideration and, upon reconsideration, dismissing their complaint with prejudice and granting defendant summary disposition on his counterclaim under MCR 2.116(C)(10). The court reasoned that the purchase agreement was contingent on defendant securing a mortgage for $236,000 (or $224,000 if based on 80% of the "re-set purchase price" reflected in the addendum), and that "the check funding the mortgage was for only $219,718.31." The court apparently relied on a single exhibit submitted by plaintiffs: a copy of a Citizens Bank Money order payable to the title company in the amount of $219,718.31.

Plaintiffs then filed a motion for reconsideration of the court's July 1, 2009, order. They pointed out that other documents they had submitted in connection with their first motion for reconsideration reflected that the full loan amount was $224,000, and that the amount of the check ($219,718.31), plus deducted costs totaling $4,281.69 (including such costs and fees as a loan origination fee, pre-paid interest, and appraisal and processing fees), equaled $224,000. The trial court denied the motion for reconsideration by order of September 29, 2009. Although it acknowledged that defendant had secured a $224,000 mortgage, it reasoned that a $236,000 mortgage was still required because the addendum did not alter the mortgage contingency, only the purchase price. The court stated that defendant "was not able to secure the [$236,000] mortgage . . . ." It concluded that "defendant clearly did not secure the full amount of the contingent mortgage, the failure of which condition terminated the purchase agreement."

The trial court erred in granting defendant summary disposition on his counterclaim under MCR 2.116(C)(10), in its July 1, 2009, opinion and order. Contrary to the trial court's reasoning, the documentary evidence indicates that defendant was approved for a $224,000 loan. In addition to affidavits, discussed *infra*, indicating that all of the mortgage documents were completed and ready for closing, the documentation includes a form entitled "U.S. Department of Housing & Urban Development Settlement Statement," which listed $224,000 as "Principle Amount of New Loan(s)." Indeed, the trial court acknowledged in its September 29, 2009, order that defendant had secured a $224,000 mortgage.

The trial court also abused its discretion in denying plaintiffs' motion for reconsideration of the July 1, 2009, order. The trial court denied the motion despite its acknowledgment that the factual basis for its grant of summary disposition was incorrect. It reasoned that, despite the addendum revising the purchase price, defendant was still required to obtain a $236,000 mortgage, and that he had been *unable* to secure a $236,000 mortgage. The denial of the motion for reconsideration on this basis constitutes an abuse of discretion for at least two reasons. First, a trial court may not make findings of fact in deciding a motion for summary disposition, *Amerisure*, 282 Mich App at 433, and there was *at least* a question of fact about whether defendant was unable to secure a $236,000 mortgage. There was no indication, through affidavit or any other evidence, that defendant even *applied for* a $236,000 mortgage.[1] Instead, the evidence suggests that defendant applied and was approved for a $224,000 mortgage. Plaintiffs submitted two affidavits that provided unrebutted evidence that everything—including the mortgage—was in place for a closing, and that defendant simply failed to appear for the closing. There is no indication that defendant, around the time of the closing, informed plaintiffs or anyone else that he had been *unable* to secure the required mortgage, or that either party believed that the mortgage defendant *had* apparently obtained was insufficient. According to Kathy Claycomb, an escrow officer for the title company, Citizens Bank approved the revised settlement statement on December 3, 2007, and provided Claycomb with a draft for the mortgage

[1] If a $236,000 mortgage was required, and defendant failed to apply for a $236,000 mortgage, he breached the agreement. The purchase agreement provides, "[p]urchaser agrees to apply for such a mortgage at his own expense within 7 calendar days . . . ."

proceeds and assorted mortgage loan documents that were to be signed by defendant. Russell Glenn Clubine, a real estate agent who acted as dual agent for plaintiffs and defendant, called defendant on November 26, 2007, to tell him that the lender and the title company had informed the brokerage that it had been cleared to close and that a closing was being scheduled. According to Clubine, *defendant said that he probably would not attend and did not believe the property was worth what he had agreed to pay for it.* Two days later, defendant called Clubine and said that he had lost money in an investment and did not believe he would close. Clubine personally delivered the closing documents, including notice of the time, date, and place of the closing to defendant's place of business prior to the scheduled closing. Clubine also called defendant from the closing on December 3, 2007. Defendant indicated that he "wasn't coming" to the closing. Claycomb also indicated that plaintiffs appeared for the closing, but that defendant did not.

Second, the trial court's decision relies on an interpretation of the parties' agreement for which neither party had ever argued. Nor were the parties given the opportunity to brief the issue of the effect of the addendum, if any, on the mortgage contingency, or present oral arguments on this issue, after the trial court raised it. If a contract is subject to two reasonable interpretations, summary disposition is inappropriate. *Hoffner v Lanctoe*, ___ Mich App ___; ___ NW2d ___ (2010), slip op, p 6. Significantly, the parties were never given the opportunity to address whether extrinsic evidence should be considered in interpreting the agreement.[2] This is critical because the extrinsic evidence, discussed, *supra*, strongly suggests that defendant's $224,000 mortgage comported with the parties' understanding of the agreement at the time of the closing. For these reasons, we conclude that the trial court abused its discretion in denying plaintiffs' motion for reconsideration and allowing its erroneous MCR 2.116(C)(10) ruling to stand.

Plaintiffs also argue that they were denied due process because the trial court failed to give them notice and an opportunity to be heard concerning its reasoning that defendant's agreement to purchase the property remained contingent on his ability to secure a $236,000 mortgage, notwithstanding the reduction in the purchase price reflected in the addendum, and that the "failure" of this "condition" "terminated" the agreement. As noted, the trial court raised this line of argument *sua sponte* in its September 29, 2009, order and relied on it in denying plaintiffs' motion for reconsideration of the trial court's July 1, 2009, order. Because we conclude that the trial court's error in granting summary disposition in favor of defendant requires reversal, we decline to address this constitutional issue. See *Werdlow v City of Detroit Policemen and Firemen Retirement System Bd of Trustees*, 477 Mich 893, 893; 722 NW2d 428 (2006) ("[C]onstitutional issues should be avoided where a case can be resolved adequately on non-constitutional grounds.")

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[2] Extrinsic evidence is admissible to determine the parties' intent when a contract is ambiguous. *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). It is also admissible to prove the existence of a latent ambiguity. *Shay v Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010).

Given our decision to reverse the trial court's judgment in favor of defendant, defendant's argument on cross-appeal that he was entitled to case evaluation sanctions under MCR 2.403(O) is moot.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto