# STATE OF MICHIGAN

# COURT OF APPEALS

---

CHEMICAL BANK,

Plaintiff-Appellant,

v

LONG'S TRI-COUNTY MOBILE HOMES,

Defendant,

and

RICHARD E. LONG and JEANNETTE LONG,

Defendants-Appellees.

---

UNPUBLISHED
February 15, 2011

No. 294009
Sanilac Circuit Court
LC No. 07-032078-CK

Before: CAVANAGH, P.J., AND STEPHENS AND RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff seeks to enforce personal guaranties executed by defendants Richard and Jeannette Long on three lines of credit advanced by plaintiff to the Longs' business, Tri-County Mobile Homes (Tri-County). After a bench trial, the trial court held that plaintiff had breached the contract between the parties and that as a result the Longs obligation under the guarantees was limited. We affirm in part, reverse in part, and remand for further consideration by the trial court.

Tri-County was in the business of selling mobile and modular homes. In 2002, plaintiff approached defendants about switching Tri-County's financing from their then bank to plaintiff. The terms of their agreement were set forth in an October 7, 2002 loan commitment letter. Plaintiff extended three lines of credit totaling $3,000,000 to Tri-County, and defendants pledged certain specified items of collateral, including a mortgage on the property on which the business operated, which was owned by defendants personally. The commitment letter also specifically included a provision regarding "buy-back" agreements, which stated that agreements from each manufacturer supplying the homes to buy them back from Tri-County had to be received and approved. Three promissory notes were executed in favor of plaintiff and signed by Richard Long in his capacity as president of Tri-County. The notes also include defendants' personal guarantees on the indebtedness, secured by the same real estate as pledged in the loan contract.

In 2007, plaintiff chose to call the loans due and Tri-County was unable to pay. The amount outstanding at the time of trial was $1,707,183.96. The parties agreed that judgment should be entered against Tri-County for that amount. Trial was then held on the question of whether defendants were personally liable for the entire balance due as guarantors of the promissory notes. The court concluded that plaintiff was the party responsible for obtaining the buy-back agreements, and that it was in material breach of the loan contract because it had only obtained two such agreements. The court further held that, as a consequence of plaintiff's breach, defendants were not obligated on the guarantees for any units for which a buy-back agreement was not obtained, except to the extent of the value of the mortgaged real estate.

At the heart of this appeal is the determination of which party was obligated to obtain the buy-back agreements. Plaintiff argues that the court erred in concluding that this responsibility fell to it. The commitment letter did not specifically allocate the responsibility to either party. It states as follows:

> **Collateral to be pledged:**
>
> A. First security interest in model unit being floor planned. Manufacturers [sic] buyback agreements required.
>
> B. First security interest in unit being ordered (prior bank approval required on each order by manufacturer). Manufacturers [sic] buyback agreements required.
>
> * * *
>
> **REQUIREMENTS:**
>
> * * *
>
> Receipt and approval of buy back agreements from all manufacturers.
>
> * * *

We conclude that the contractual language is ambiguous as its language can be reasonably understood in differing ways. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566-567; 596 NW2d 915 (1999). Specifically, while it is reasonable to conclude that the agreement requires defendants to receive and approve the buy-back agreements, it is equally reasonable to conclude that the obligation was plaintiff's. The meaning of an ambiguous contract is a question of fact to be determined by the finder of fact. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). When contract language is ambiguous, the court may use extrinsic evidence to determine the intent of the parties. *Id.*

After considering extrinsic evidence, the trial court found that the buy-back provision "was breached by the plaintiff for all except two units." The determination that plaintiff breached the provision must be based on the unspoken conclusion that plaintiff bore the responsibility of obtaining the buy-back agreements. Upon reviewing the evidence presented below, we cannot conclude that the trial court erroneously found that plaintiff was required to

receive and approve the buy-back agreements. Doug Herringshaw testified that Tri-County was required to provide the buy-back agreements and that defendants, and not plaintiff, had obtained the two buy-back agreements that existed. Conversely, Richard Long testified that Herringshaw told him that plaintiff would handle all of the requirements, including the buy-back agreements. Long stated that he had no involvement in obtaining the two buy-back agreements for plaintiff, that he had not obtained such agreements for the prior bank providing financing to the business, and that he never had possession of copies of any type of agreement between manufacturers and either bank. The Longs' daughter also testified that Tri-County had no involvement in obtaining the existing agreements. In light of the evidence adduced, and after deferring to the court's superior capacity to evaluate witness credibility, MCR 2.613(C), we are not left with a firm impression that these findings are erroneous.

Because we have concluded that the trial court did not err in finding that plaintiff was obligated to receive and approve the buy-back agreements, we must next determine whether the trial court properly concluded that the obligation constituted a condition and that the failure to perform that condition excused defendants' performance. Specifically, the trial court found that the buy-back provision was "an important condition of the contract," and given plaintiff's breach, "[d]efendants are not obligated on the guarantee agreement on any units for which a buy back agreement was not obtained, beyond the real estate upon which the business was located." While it is generally true in Michigan that a party that first breaches a contract is precluded from seeking relief for the other party's subsequent breach, that rule only applies where the initial breach was substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). "To determine whether a substantial breach occurred, a trial court considers 'whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive.'" *Able Demolition v Pontiac*, 275 Mich App 577, 585: 739 NW2d 696 (2007), quoting *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990).

In the present case, it is certainly true that defendants viewed the buy-back agreements as being an essential portion of the agreement. However, it does not automatically follow that the lack of buy-back agreements prevented defendants from receiving the benefit that they reasonably expected to receive from the contract. Plaintiff substantially performed its portion of the contract by providing defendants with $3,000,000 in funding. Defendants have not shown how the presence of buy-back agreements would have substantially affected their liabilities under any of the contracts. The buy-back agreements that were admitted into evidence required that rights be exercised within one year of the sale. Only two units in Tri-County's inventory were less than one year old at the time that plaintiff asserted its right to possession. The remaining balance on the two units totaled $96,805.00. While that amount is certainly not insignificant, we cannot conclude that the lack of buy-back agreements prevented defendants from receiving the benefit of the contract. Consequently, it follows that the trial court erred in concluding that plaintiff's breach of contract was substantial and that it negated the guaranty.

We affirm in part, reverse in part, and remand for consideration of defendants' damages for plaintiff's breach, with said amount to be offset against defendants' personal liability under the promissory notes. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause