STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0246

D. R. Horton, Inc.-Minnesota,
a Delaware corporation,
Appellant,

vs.

Frederick Radintz, et al.,
Respondents,

Carla Manuel, et al.,
Respondents.

Filed September 15, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-06-2896

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Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant D. R. Horton, Inc.-Minnesota challenges the district court's determination that under the plain and unambiguous language of an option agreement for the purchase of real property, at the phase 1 closing appellant must pay to respondents (1) a $750,000 final option fee, and (2) 30% of the final purchase price. We affirm.

D E C I S I O N

Appellant and respondents executed an option agreement for the sale of approximately 225 acres of land in Maple Grove, Minnesota, for a purchase price of $16.2 million, subject to adjustments. The agreement gave appellant options to purchase the land in four separate phases. Appellant exercised its option to purchase phase 1, but for reasons not relevant to this appeal, some respondents resisted the closing of the phase 1 property. Appellant brought suit, and obtained an order specifically requiring the parties to close on the phase 1 property and perform the remaining terms of the agreement. The parties disagreed as to the amount due at the phase 1 closing and submitted the issue to the district court.

Construction of a contract presents a question of law, unless an ambiguity exists. *Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567, 571 (Minn. 1997). Whether a

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

contract is ambiguous is a question of law reviewed de novo. *Bank Midwest, Minn., Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004). Ambiguity exists when the language of a written document is reasonably susceptible to more than one meaning. *Trondson v. Janikula*, 458 N.W.2d 679, 681 (Minn. 1990). Here, both parties agree that the contract at issue is unambiguous.

When the "language used in a contract is plain and unambiguous, there is no opportunity for interpretation or construction." *Carl Bolander & Sons Inc. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974). We ascertain the meaning of a contract from the writing alone. *Id.* And we endeavor to declare the meaning of what is written in the instrument, not what was intended to be written. *Id.* We therefore gather the intent of the parties from the entire instrument, not from isolated clauses and, as far as reasonably possible, harmonize its parts. *Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 293, 135 N.W.2d 681, 685 (1965). And a party "cannot alter unequivocal language of a contract with speculation of an unexpressed intent of the parties." *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991).

I.

Appellant argues that the district court erred in determining that the option agreement requires appellant to pay a $750,000 final option fee at the phase 1 closing. We disagree.

A contract conferring an option to purchase land is nothing more than a seller's offer to sell land to the optionee. *Shaughnessy v. Eidsmo*, 222 Minn. 141, 145, 23

N.W.2d 362, 365 (1946). And it must, like any other offer, be accepted according to its terms. *Minar v. Skoog*, 235 Minn. 262, 265, 50 N.W.2d 300, 302 (1951).

Here, the agreement confers upon appellant the option to purchase land in four distinct phases. And the agreement provides that the option to purchase each phase is open for a particular period of time. Specifically, the agreement provides that the option to purchase phase 1 shall continue for 30 days after respondents receive notice of certain government approvals. And with respect to phases 2, 3, and 4, the options shall continue for periods of 12, 24, and 36 months, respectively, from the date on which respondents receive notice of appellant's exercise of its option to purchase phase 1 property.

In addition to describing the length of the option for each phase, the agreement provides for three types of option fees, one of which is at issue here. There is a "first option fee" of $50,000 payable upon execution of the agreement. And there is an "annual option fee" of $75,000. The parties agree that appellant has paid these option fees.

As for the "final option fee" at issue in this appeal, the agreement provides:

> *At the Phase 1 Closing*, as hereafter defined, *Purchaser shall pay directly to Sellers the "Final Option Fee" of Seven Hundred Fifty Thousand Dollars* ($750,000), one half of which shall be credited toward the Phase 2 Purchase Price and one half of which shall be credited toward the Phase 3 Purchase Price.

(Emphasis added.) Following its description of the option fees, the agreement provides for the failure to pay the option fees:

> If Purchaser fails to pay any portion of the Option Fees as required herein, and such failure continues for a period of ten (10) days after written notice from Sellers, then either Party

> may terminate this Agreement by written notice to the other at any time prior to the payment of such amount.

The district court determined that the agreement requires appellant to pay respondents the final option fee at the phase 1 closing. We agree.

The agreement states that the final option fee "shall" be paid at the phase 1 closing. Importantly, the district court's previous order, sought and obtained by appellant, requires that the parties close on phase 1 and "specifically perform the remaining terms of the Agreement." In addition, section 15 of the agreement, entitled "CLOSING," states that at the phase 1 closing, appellant "shall deliver" the final option fee to respondents. "It is a well-worn maxim that use of the term 'shall' reflects a mandatory imposition." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267 (Minn. 2004). But appellant raises several arguments in support of its position that payment of the final option fee is not mandatory.

Appellant contends that the final option fee is a fee that compensates respondents for giving appellant the option, for a period of time, to purchase phases 2 and 3. We disagree. The plain and unambiguous language of the agreement does not condition the grant of the option to purchase phases 2 and 3 upon payment of the final option fee. The agreement states that once respondents receive notice of appellant's intent to exercise its option to purchase phase 1, the options to purchase phases 2 and 3 shall continue for 12 and 24 months, respectively.

Appellant argues that making the final option fee mandatory is error because it means that there is no "option." We disagree. The "option" in this agreement is the

option to purchase land. Requiring appellant to pay the final option fee does not take away appellant's option to decide whether or not to purchase additional property. Moreover, the record indicates that appellant has previously exercised its option to purchase phases 2 and 3 in the manner required by the agreement.

Appellant also contends that payment of the final option fee is not mandatory because the agreement states that respondents' remedy for nonpayment of any option fees is termination of the agreement. We reject this argument based on the district court's prior order. Appellant brought suit seeking an order that required respondents to close on the sale of the phase 1 property and required all persons with an interest in the property to "specifically perform in accordance with the remaining terms of the Option Agreement." The district court granted appellant the relief it sought and specifically stated that respondents are not entitled to terminate the agreement.

We affirm the district court's conclusion that the plain and unambiguous language of the agreement requires appellant to pay the final option fee of $750,000 at the phase 1 closing.

II.

Appellant argues that the district court erred in requiring it to pay 30% of the increased purchase price at the phase 1 closing. Appellant contends that the agreement is unambiguous in establishing that a fixed amount of $4.8 million is due at the phase 1 closing. We disagree.

The agreement provides that the "purchase price" for the property is $16.2 million, subject to adjustments. The relevant adjustment provision states that: "if the Phase 1

Closing occurs after March 31, 2003, the Purchase Price shall increase by 3% annually." The parties agree that the $16.2 million purchase price should be increased by 3% compounded annually as simple interest but dispute whether any of that increase is payable at the phase 1 closing.

At issue is whether the language concerning what is due at the Phase 1 closing requires 30% of the adjusted purchase price or the specific amount stated, which is 30% of the unadjusted purchase price. With respect to the amount due at the Phase 1 closing, the agreement provides:

> At the Phase 1 Closing, Purchaser shall pay to Sellers Four Million Eight Hundred Thousand Dollars ($4,800,000) for the first twenty-five percent of the Property purchased (exclusive of the Wetland Property), (said amount being thirty percent of the Purchase Price less the $200,000 paid for the Wetland Property). The First Option Fee and any Annual Option Fees shall be credited to that portion of the Purchase Price to be paid at the Phase 1 closing.

Appellant contends that the specific amount stated controls and that respondents assumed the risk of not receiving the adjusted price for the phase 1 property if appellant chose not to exercise the additional option. The district court concluded that pursuant to this provision, appellant must pay 30% of the adjusted purchase price at the phase 1 closing. We agree.

The agreement states that appellant shall pay $4.8 million at the phase 1 closing and further indicates that the $4.8 million is 30% of the purchase price. But after March 31, 2003, the purchase price increases by 3% annually. Thus, $4.8 million is no longer 30% of the purchase price. We conclude, based on the language of the agreement,

that the district court correctly determined that the agreement requires appellant to pay 30% of the purchase price at the phase 1 closing, including any increase. Had the parties intended a flat payment of $4.8 million, there would be no need for the 30% clause.

Moreover, considering the agreement as a whole, it is appropriate that the phase 1 payment be based on a percentage of the purchase price because payments for phases 2, 3, and 4 are based on a percentage of the purchase price. Finally, appellant's proposed reading of the agreement potentially defeats the purpose of the increase clause. If appellant chooses not to close on phases 2 and 3, appellant would be able to acquire the phase 1 property without paying any part of the undisputed increase in purchase price.

Appellant contends that section 5.e. of the agreement explains that the 3% increase in the $16.2 million purchase price is payable at other closings. We disagree. That section does not expressly discuss the 3% increase but states that for some portions of the property purchased after the phase 1 closing, appellant shall pay 1% of the "Purchase Price" for each 1% of the property purchased. And for other portions, appellant shall pay 0.8% of the purchase price for each 1% of the property purchased. Section 5.e. indirectly references the 3% increase because the "purchase price" includes the 3% increase. But nothing in section 5.e., or elsewhere in the agreement, states that the original purchase price of $16.2 million is due at one time and the 3% increase is due at another.

We conclude that the district court properly determined that the agreement as a whole is unambiguous and requires appellant to pay 30% of the purchase price at the phase 1 closing.

Affirmed.