S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

WILLIAM J. MCDONOUGH, d/b/a
MCDONOUGH ENTERPRISES,

Plaintiff-Appellee,

v

RUTH C. WANTY,

Defendant-Appellant.

UNPUBLISHED
April 26, 1996

No. 171041
LC No. 91-000515-CK

Before: Neff, P.J., and Saad and Markey, JJ.

PER CURIAM.

This case arises out of a dispute over certain real estate in Charlevoix County. Specifically, on February 2, 1991, plaintiff filled in certain terms on a pre-printed buy/sell agreement, and tendered ten thousand dollars in earnest money to defendant. Defendant signed the pre-printed agreement. Several months later, a third party offered to pay defendant twenty thousand dollars more for the property, and defendant then notified plaintiff that plaintiff's "offer" would not be accepted. Defendant now appeals as of right from the lower court's order awarding specific performance for the sale of the property at issue to plaintiff. We affirm the judgment, but remand for the limited purpose of permitting the lower court to reform the judgment in light of the revelation on appeal by stipulation that defendant is not the sole owner of the property at issue.

I.

The crucial dispute in this case is whether the completed buy-sell agreement, signed by both parties, was merely an *offer* to purchase (as defendant contends), or rather, a *contract* to purchase (as plaintiff contends). The document, a pre-printed "Antrim-Charlevoix Board of Realtors Uniform Buy and Sell Agreement", contains a handwritten property description, the purchase price ($160,000), the down payment amount ($40,000), the payment terms (land contract payable over five years at 9%

interest), as well as certain other conditions (parcels 1 and 2 must pass a PERK test; seller guarantees buyer the first right of refusal on two adjoining parcels; possession within 30 days after closing; occupancy immediately, and $10,000 deposit). Plaintiff's signature and social security number appear on the document, as does the signature of a witness. Defendant's signature appears on the line which states, "[r]eceived from the above named Buyer deposit monies in the form of"-- handwritten beside this appears "check #1277," and plaintiff's signature. Defendant argues on appeal that the lower court erred by considering testimony "outside the four corners" of this document, in reaching a determination about the effect of the document. In other words, according to defendant, the lower court violated the "parol evidence" rule.

Corbin explains the parol evidence rule as follows:

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of the contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. This is in substance what is called the "parol evidence rule,". . . . The use of such a name for this rule has had unfortunate consequences, principally by distracting the attention from the real issues that are involved. There issues may be any one or more of the following: (1) Have the parties made a contract? . . . (3) Did the parties assent to a particular writing as the complete and accurate 'integration: of that contract?
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> In determining these issues, or any one of them , there is no "parol evidence rule" to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. . . . 3 Corbin on Contract, ch 26, sec. 573, pp 357-360.

Michigan law is substantially the same as that expressed in Corbin. In *NAG Enterprises, Inc v All State Industries, Inc,* 407 Mich 407; 285 NW2d 770 (1979), our Supreme Court stated that, "[t]he issue raised . . . is whether evidence extrinsic to a written document, unambiguous on its face, may be used to establish that the document did not represent the entire agreement of the parties." The Court concluded that such extrinsic evidence was properly considered. *Id.* According to *NAG, before the parol evidence rule comes into play*, there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered. *NAG,* 407 Mich at 410; 285 NW2d 770; *In re Skotzke,* ___ Mich App ___; ___ NW2d ___ (Docket No. 168382, issued 4/9/96), sl op, p 3. In other words, the parol evidence rule does not preclude admission of extrinsic evidence, in situations where the writing was a sham, where it was not intended to create legal relations, where it has no efficacy because of fraud, illegality, or mistake, where the parties did not "integrate" their agreement (that is, assent to it as the final embodiment of their understanding), or where the agreement was only "partially integrated" because all its essential elements were not reduced to writing. *NAG,* 407 Mich at 410-411; 285 NW2d 770.

Here, defendant asserts that the document at issue was a mere offer; that there was never a contract to sell the property. This is inconsistent with defendant's argument that the parol evidence rule should preclude consideration of evidence extrinsic to the document, because the parol evidence rule only comes into play after there had been a determination that a contract indeed exists. Therefore, the trial court did not err in admitting evidence extrinsic to the disputed document itself, and did not err in concluding that the document was intended by the parties to evidence an agreement to purchase.

II.

Defendant next asserts that, if this Court affirms the lower court judgment on Issue I, this case should be remanded for further proceedings, in light of defendant's recent discovery that she is not the sole owner of the property at issue. Plaintiff agrees that remand is appropriate, because plaintiff cannot be ordered to convey what she does not own. Therefore, this matter will be remanded for a hearing on the ownership issues, and amendment, if necessary, of the judgment.

Affirmed in part and remanded in part, with directions. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Jane E. Markey