

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CALVIN C. ROCK and JOYCE A. ROCK,

Plaintiffs/Counter-Defendants/Appellants,

v

JOSEPH PAGOTO and DOROTHY J. PAGOTO,

Defendants/Counter-Plaintiffs/Appellees.

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UNPUBLISHED

June 7, 1996

No. 167666

LC No. 92-207141-CK

Before: Jansen, P.J., and Hoekstra and D. Langford-Morris,\* JJ.

PER CURIAM.

Plaintiffs Calvin and Joyce Rock appeal as of right from a jury verdict of no cause of action in favor of defendants Joseph and Dorothy Pagoto. We affirm.

This case arises out of a default on a land contract. On December 31, 1986, the parties entered into a land contract for the sale and purchase of approximately six acres of land located in the City of Fraser. The purchase price was \$180,000. Defendants made a down payment of \$60,000, and the balance was to be paid in monthly installments of \$1,200. Defendants made regular monthly payments through April 1, 1991. The land contract referred to an escrow agreement. Plaintiffs filed suit on March 12, 1992, seeking money damages in the amount of \$99,924.60, the balance remaining on the land contract, plus interest and costs. On April 2, 1992, defendant filed a counterclaim seeking rescission of their contract with plaintiffs. The key issue in this case was whether the conditions in the escrow agreement were fulfilled or waived.

Plaintiffs' claim for money damages went to a jury trial. The jury returned a verdict in favor of defendants. However, defendants' counterclaim went before the trial judge in a bench trial because it was an equitable claim. The trial court ruled in favor of plaintiffs, and denied defendants' request for rescission of the contract. The trial court acknowledged the inconsistent verdicts, but stated that it saw the facts differently than the jury. The trial court also ruled that the land contract is valid and

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\* Circuit judge, sitting on the Court of Appeals by assignment.

enforceable, but that the jury found that plaintiffs are not entitled to recover the amount due under the land contract. The trial court later denied plaintiffs' motion for judgment notwithstanding the verdict (JNOV), or for a new trial.

On appeal, plaintiffs raise three issues. They claim that the trial court erred when it permitted the jury to resolve legal and factual issues in plaintiffs' action when an equitable action involving the same transaction was decided by the trial court, that the trial court erred in denying their motion for JNOV, and that the trial court erred in denying their motion for mistrial based on allegedly improper comments made by defense counsel at trial.

Plaintiffs first argue that the trial court erred when it permitted the jury to resolve legal and factual issues regarding their claim where an equitable action for rescission involving the same transaction was resolved by the trial court. Plaintiffs contend that because of the decision to bifurcate the trial, the parties were left with inconsistent verdicts.

First, we note that even in the absence of a demand for a jury trial (which normally waives a trial by jury, MCR 2.508(D)(1)), a trial court in its discretion may order a jury trial of any or all issues as to which a jury demand might have been made of right. MCR 2.509(B). Thus, there is no automatic error even where plaintiffs did not file a demand for a jury trial in this case. Further, defendants did file a jury demand, in their counterclaim, dated March 28, 1992.

We find no error on the part of the trial court to bifurcate this case. Plaintiffs filed a claim for money damages under a land contract. Plaintiffs' claim was heard by a jury, which held in defendants' favor. Plaintiffs' claim for money damages, alleging breach of the land contract, was properly submitted to a jury. Const 1963, art 1, § 14; *Dutka v Sinai Hospital of Detroit*, 143 Mich App 170, 173; 371 NW2d 901 (1985). Defendants' counterclaim, on the other hand, was an equitable claim, and was properly decided by the court. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 154-155; 486 NW2d 326 (1992). Where a party seeks both equitable relief and legal relief, it is entitled to have a jury hear the damage claim. *Dutka, supra*, p 173.

This Court has held that where equitable issues and jury submissible issues coexist, the proper procedure is to hold trial before a jury and follow presentation of evidence with two separate factual determinations: court factfinding on the equitable claims and jury factfinding on the claims of damages. *Smith v Univ of Detroit*, 145 Mich App 468, 479; 378 NW2d 511 (1985). This is precisely what occurred in this case. Plaintiffs, who brought a claim for damages under a contract, were entitled to a jury trial. Defendants, who brought a purely equitable action, were entitled to have their case determined by a court. Further, the two separate factfinders made their own independent factual determinations in this case. In *Smith*, this Court quoted extensively from 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), 1984 pocket part, p 149, which acknowledged that bifurcating the trial may well result in the possibility of contradictory findings. However, in order to preserve the constitutional right to a different mode of trial, this consequence must be accepted. See *Smith, supra*, pp 478-479.

Accordingly, the trial court did not err in permitting the jury to decide plaintiffs' claim for damages, while the court decided defendants' equitable claim for rescission. The fact of inconsistent factfinding does not nullify this procedure.

Plaintiffs next argue that the trial court erred in denying their motion for JNOV because there was no evidence allowing a verdict of no cause of action in defendants' favor. The standard of review for a JNOV requires review of the evidence and all legitimate inferences drawn in a light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for JNOV be granted. *Id.*, p 558.

In this case, the jury had to decide whether the land contract was in effect and, if so, whether the conditions of the escrow agreement had been fulfilled or waived. Because the jury found for defendants, the jury apparently found that the conditions of the escrow agreement were not met. Defendants presented evidence which, if accepted by the jury, was sufficient to support a verdict of no cause of action.

Termination of the escrow agreement and release of the sale of proceeds were conditioned upon the happening of three events: (1) the written directive of both parties; (2) completion of the rezoning and variance process and obtaining of all necessary permits; and (3) obtaining of financing necessary for the completion of the project. Plaintiffs conceded at trial that a written directive was never issued by either party. Further, there was conflicting testimony regarding whether the condition was waived. Thus, reasonable minds could differ regarding whether the written directive condition was waived. There was also a dispute regarding whether a proper financing had been obtained. Defendants testified that they had been unable to obtain financing, and Calvin Rock testified that Joseph Pagoto told him that financing had been obtained. This presented a credibility issue, and factual determination, for the jury to resolve.

The evidence presented in this case did not mandate a finding in favor of plaintiffs. There were credibility and factual determinations for the jury to resolve. The key issue in this case was whether the conditions in the escrow agreement were fulfilled or waived. There was evidence presented supporting both parties' positions. Accordingly, the trial court did not err in denying plaintiffs' motion for JNOV.

Last, plaintiffs argue that they are entitled to a new trial because the trial court should have granted their motion for mistrial where defense counsel improperly argued that plaintiffs had an alternative remedy. The trial court's decision to grant or deny a mistrial is reviewed for an abuse of discretion. *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992). We find no abuse of discretion.

Plaintiffs moved for a mistrial based on the fact that, in front of the jury, defendants' counsel questioned Calvin Rock about a forfeiture notice which he sent to defendants before the commencement of this litigation. Defense counsel brought out the fact that there were other remedies available to

plaintiffs (a foreclosure action), rather than their request for money damages in this case. We cannot say that the trial court's decision to deny the motion for mistrial was an abuse of discretion resulting in a miscarriage of justice. *Id.*

There is no indication in the lower court record that defense counsel was attempting to inflame or prejudice the jury. Further, the forfeiture notice was admitted as an exhibit at trial and both parties questioned witnesses about the notice. We cannot agree with plaintiffs' conclusory statement that the jury's no cause of action finding was prompted by the fact that defense counsel stated that plaintiffs had an alternate remedy. Rather, we find that the trial court did not abuse its discretion in denying the motion for mistrial.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Denise Langford-Morris