

STATE OF MICHIGAN
COURT OF APPEALS

JOEY EDWARDS and KATHY EDWARDS,

Plaintiffs/Counter Defendants/
Appellees,

v

CONCORD DEVELOPMENT CORPORATION,
INC.,

Defendant/Counter Plaintiff/
Cross Plaintiff/Appellant,¹

and

TIFFANY'S CONSTRUCTION COMPANY, INC.,

Defendant/Counter Plaintiff/
Cross Plaintiff/Appellant,

and

FLEET FINANCE, INC,

Defendant/Counter Plaintiff/
Cross Defendant/Appellee,

and

HASTINGS MUTUAL INSURANCE
COMPANY,

Defendant/Cross Defendant/
Appellee.

UNPUBLISHED
September 17, 1996

No. 174487
LC No. 91-010724

Before: Doctoroff, C.J. and Hood and Bandstra, JJ.

PER CURIAM.

Defendant Concord Development Corporation (Concord) appeals as of right from the trial court's judgment of no cause of action in favor of plaintiffs and the orders granting summary disposition in favor of defendants Hastings Mutual Insurance Company (Hastings) and Fleet Finance, Inc. We affirm.

After plaintiffs' home was severely damaged by fire, they entered into a fire repair agreement with Concord, in which Concord agreed to repair plaintiffs' home, in return for plaintiffs' assignment of insurance proceeds from their insurer, Hastings. Although Hastings paid plaintiff the actual cash value of the repairs on their home, plaintiffs' mortgage company, Fleet Finance, withheld a portion of the proceeds from Concord and applied it to plaintiffs' mortgage by order of the trial court. Because Concord did not complete the repairs on plaintiffs' home, plaintiffs brought an action against Concord for breach of contract. Plaintiffs also joined their insurance company (Hastings), their mortgage company (Fleet Finance), and Colonel Lee, an employee of Concord.² The trial court found that Concord breached the fire repair agreement by not completing work on plaintiffs' home and awarded damages to plaintiffs in the amount of \$14,389.22, setting off plaintiffs' total damages by the value of work that was performed by Concord. The court granted summary disposition to Hastings and Fleet Finance pursuant to MCR 2.116(C)(10).

Concord first argues that the trial court erred in granting Hastings' motion for summary disposition because the assignment between plaintiffs and Concord was valid. We review grants or denials of motions for summary disposition de novo. *Lytle v Malady*, 209 Mich App 179, 183-184; 530 NW2d 135 (1995). Concord claims that Hastings was bound to include its name on the insurance draft that it issued to plaintiffs because the assignment of insurance proceeds from plaintiffs to Concord was legally valid and binding. That provision stated in pertinent part that plaintiffs "hereby give unto the CONCORD DEVELOPMENT CORPORATION, INC., all the necessary authority to have this fire loss adjusted and assigns to them the proceeds as payment in full for repairs." Hastings argues that the assignment was invalid and it was not bound by it because the contract it had with plaintiffs stated in relevant part that "[a]ssignment of this policy will not be valid unless we give our written consent" and Hastings did not give its written consent. However, Concord avers that non-assignment clauses are invalid and that even if they were valid, Hastings consented by virtue of its conduct in negotiating with its representative, Colonel Lee.

This Court has held that, as a general rule, contractual restrictions against assignability are strictly construed. *Stenke v Masland Development*, 152 Mich App 562, 575; 394 NW2d 418 (1986). However there is no prohibition against requiring consent to effectuate an assignment. *Hy King Associates v Versatech Mfg Industries*, 826 F Supp 231, 238-239; (ED Mich, 1993); *Kaczmarck v La Perriere*, 337 Mich 500, 504-506; 60 NW2d 327 (1953). The general presumption then is that a contractual right may be assigned, *Auto Electric & Service Corp v Rockwell Int'l Corp*, 111 Mich App 292, 300-301; 314 NW2d 562 (1981), but conversely that

assignment may also be precluded by agreement: "A contractual right can be assigned unless . . . assignment is validly precluded by contract." Restatement Contracts 2d, § 317(2).

Although plaintiff cites *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), to support its contention that non-assignment clauses are invalid, that case is distinguishable from the present case. In *Roger Williams*, the insurance company was attempting to avoid payment of its contract, whereas here, Hastings did not attempt to avoid its obligation under the contract; rather Hastings paid the full amount owed under the contract to plaintiffs. Thus, the provision requiring Hastings' written consent to assignment by plaintiffs was valid and, since Hastings did not give its written consent to plaintiffs' assignment of insurance proceeds to Concord, that assignment was not binding on Hastings.

Concord also argues that Hastings effectively consented to the assignment by virtue of negotiating the settlement amount with Lee. We disagree. We note that it does not appear that plaintiffs or Concord ever requested the consent of Hastings to the assignment. Concord claimed that it sent a copy of the fire repair agreement to Hastings and that Hastings was therefore on notice of the assignment when it dealt with Lee.

In *Hy King Associates, supra*, 826 F Supp 231, King agreed to be the exclusive sales representative of the defendant. King retired and transferred the stock in his corporation to Cozzi, who then acted as sales representative for the defendant for a brief period. The defendant claimed there was no valid assignment because it did not give its written consent as required by its contract with King. The court held that the defendant did not consent to the assignment because it did not recognize Cozzi as its sales representative, even though the defendant was enthusiastic about King bringing Cozzi into the business. *Id.* at 238.

Similarly, in the instant case, Hastings did not give its written or oral consent to the assignment. Rather, it dealt with Lee as a representative of plaintiffs for purposes of negotiating a settlement, but it continued to deal with plaintiffs at the same time. Edward Whalen, the insurance adjuster assigned to plaintiffs' claim, testified that he did not consider the assignment to be valid, and he dealt with Lee only as an agent of plaintiffs. We agree with the reasoning of *Hy King*, that such limited dealing with the purported assignee does not alone equate to consent.

Hastings contends that, even if the assignment to Concord was valid, Concord does not have any cause of action against it. An insured must actually repair, rebuild, or replace the property before the insurer becomes liable to pay the difference between actual cash value and replacement cost. *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181, 183; 490 NW2d 864 (1992). In this case, Concord did not complete the repairs on plaintiffs' home. Whalen testified that Hastings paid to plaintiffs \$58,000 for the actual cash value of their home. Since there was no testimony that the actual cash value of plaintiffs home was more than \$58,000 or that Hastings owed plaintiffs more money for the repairs, Hastings fulfilled its obligation to plaintiffs. Since an assignee receives only those rights which the assignor possessed, Concord would not have any claim against Hastings for additional money over what was paid for the actual cash value. *Damerou v CL Rieckhoff Co*, 155 Mich App 307, 313;

399 NW2d 502 (1986). Therefore, the granting of Hastings' motion for summary disposition pursuant to MCR 2.116(C)(10) was proper because there was no genuine issue of material fact regarding liability under the assignment clause of the fire repair agreement.

Concord further argues that Hastings acted with malice through its agent Whalen by ignoring the agreement between plaintiffs and Concord, while at the same time acknowledging that Concord, through Lee, represented plaintiffs in negotiating the settlement of their claim. Therefore, Concord asserts, Hastings should have been found liable for tortious interference with a contractual relationship.

The elements of tortious interference with a contractual relationship are (1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant. . . .

“One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.”

. . . [A] defendant is not liable for tortious interference of a contract where he is motivated by legitimate personal or business interests. [*Wood v Herndon & Herndon Investigations, Inc*, 186 Mich App 495, 499-500; 465 NW2d 5 (1990).]

Hastings did not approve the assignment of insurance proceeds from plaintiffs to Concord. Therefore Hastings was not required to make any payments to Concord. Hastings took no action to interfere with the contract between plaintiffs and Concord. The reason that Concord was not paid from the insurance proceeds was that Fleet Finance intervened and held the proceeds in escrow. If Fleet Finance had not intervened, then plaintiffs would have been able to pay Concord with those proceeds. Thus, although Hastings did not include Concord's name on the insurance draft, they did not instigate a breach without legal justification and did not perform a wrongful act or a lawful act with malice for the purpose of invading the contractual rights of plaintiffs or Concord. Hastings only ignored the assignment which it was justified in doing for legitimate business reasons.³ Accordingly, the trial court properly granted Hastings' motion for summary disposition because there was no genuine issue of material fact as to whether Hastings tortiously interfered with the contract between plaintiffs and Concord.

Concord next argues that the court's finding that Concord breached its contract with plaintiffs was clearly erroneous. We review findings of fact in a bench trial under a clearly erroneous standard, MCR 2.613(C), *Hoffman v ACIA*, 211 Mich App 55, 98, 101; 535 NW2d 529 (1995). A breach of contract is the failure to perform when performance is due. *Woody v Tamer*, 158 Mich App 764, 771; 405 NW2d 213 (1987). Plaintiffs argue that Concord breached the fire repair agreement by failing to complete the repairs on their home. Concord argues that plaintiffs were the ones that failed to perform under the fire repair agreement by not paying Concord for the work it performed on their home. On appeal, neither party disputes the existence of a contract.

The trial court weighed the credibility of the witnesses and determined that the testimony of plaintiffs and Whalen was more credible than the testimony of Colonel Lee. Whalen testified that in his twenty-eight years as an insurance adjuster, he has never paid a contractor before work has begun. Lee testified that even though he was not paid up front, he proceeded to work on plaintiffs' house and continued to do so even after his requests for payment were not honored. However, at some point, Concord ceased work on the house and the repairs were never finished. Whalen testified that a contractor is paid after the work is completed and that a contractor funds the repairs until that time. Thus, the court's finding that Concord breached its contract by not completing the work despite not being paid was not clearly erroneous.

Concord claims that the court considered the evidence of plaintiffs' understanding of the terms of the contract in violation of the parol evidence rule. Where a contract is clear and unambiguous, parol evidence of negotiations cannot be admitted to vary the contract. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 544; 362 NW2d 823 (1984). The parol evidence rule also bars admission of prior or contemporaneous agreements that contradict or vary the written contract. *Id.* Prerequisite to application of the parol evidence rule is a finding that the parties intended the writing to be a complete expression of their agreement. *Id.* Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question. *Id.* Parol evidence is also admissible to explain the terms of the contract and has application only after the terms of the agreement have been challenged. *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 171-172; 458 NW2d 56 (1990).

The contract between plaintiffs and Concord stated that "endorsement of the fire draft to the Concord Development Corporation, Inc., will be payment in full for all services rendered." The contract also contained a "draw down schedule" providing for payment installments of one-third up front, one-third after a third of the work is completed, eighteen percent after ninety percent of the work is completed, and the balance upon final completion. These two provisions are contradictory on their face. The former provision indicates that whatever money is paid by the insurance company in one check will be payment in full for the repairs. However, the latter provision requires payment installments. The parol evidence rule only bars extrinsic evidence if a contract is clear and unambiguous. *Central Transport, supra*. This contract was not clear and unambiguous because the two provisions contradict each other.

Furthermore, extrinsic evidence may be admitted to explain the terms of a contract. *Stefanac, supra*. Thus, plaintiffs' testimony as to their understanding of the contract was admissible to explain its terms. Both plaintiffs and Lee testified that Lee told them that the repairs would be paid for with the insurance proceeds in the form of a draft by the insurance company in the names of both plaintiffs and Concord. That evidence does not contradict the written contract. Plaintiffs further testified that Lee told them that the draw down schedule provisions did not apply to them. Accordingly, plaintiffs' testimony as to their understanding of the contract was proper to explain the terms of the contract.⁴ Accordingly, because we are not left with a definite and firm conviction that a mistake was made, the trial court's finding that Concord breached its contract with plaintiffs and its award of \$14,390 in damages was not clearly erroneous.

Next, Concord argues that the trial court erred in granting Fleet Finance's motion for summary disposition because Fleet Finance tortiously interfered with the contract between plaintiffs and Concord. However, the trial court correctly found that the elements of tortious interference were not met. First, although there was a contract between plaintiffs and Concord, Concord did not suffer a breach at the hands of plaintiffs. Furthermore, even if there was a breach, Fleet Finance did not instigate a breach without legal justification. The mortgage contract between Fleet Finance and plaintiffs provided that Fleet Finance was entitled to payment of the mortgage balance if their security interest in the home was impaired. The fire destroying plaintiffs' home caused such an impairment. However, instead of instantly applying the insurance funds to the mortgage balance, Fleet Finance negotiated with plaintiffs and entered into an escrow/loan construction agreement. The agreement would allow payment of the insurance funds toward repair of the home if certain conditions were met. Because there was no testimony that those conditions were met,⁵ Fleet Finance was not obligated to make payments to Concord from the escrow fund. Since there was no indication that Fleet Finance had any motivation other than protecting its security interest in plaintiffs' home, and it adhered to the terms of its mortgage agreement with plaintiffs, there was no per se wrongful act on the part of Fleet Finance. Fleet Finance appeared to be motivated solely by the legitimate business interest of protecting its investment. Accordingly, there was no genuine issue of material fact that Fleet Finance tortiously interfered in the contract between plaintiffs and Concord, and the trial court properly granted summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Richard A. Bandstra

¹ Although Concord is not listed as appellant, it is in fact the appellant.

² The trial court entered a judgment of no cause of action in Lee's favor, and no appeal was taken from that order.

³ Moreover, as will be discussed below, the court properly held that plaintiffs did not breach their contract with Concord, therefore, the second element required for tortious interference with a contract has not been met.

⁴ Concord does not explain in its brief why the court's award of damages was erroneous, other than addressing the issue in its question presented. However, the court's award of \$14,390 to plaintiffs was not clearly erroneous because the court appeared to use reasonable calculations, based on the figures submitted into evidence by the parties, to arrive at that figure.

⁵ Fleet Finance's counsel, during the hearing on its motion for summary disposition stated that Concord did not comply with the terms and conditions of the escrow agreement.