

STATE OF MICHIGAN
COURT OF APPEALS

HENRY T. MANUEL, NOREEN E. MANUEL,
WILLIAM T. MANUEL, and ADA MANUEL,

UNPUBLISHED
November 1, 1996

Plaintiffs-Appellees,

v

No. 181574
LC No. 94-470382-CP

ATLAS MORTGAGE CORPORATION,

Defendant,

and

SPOT REALTY, INC., and EMPLOYEE PENSION
TRUST,

Defendants-Appellants.

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Defendants Spot Realty, Inc., and Employee Pension Trust appeal as of right from a December 1, 1994, order regarding their motion for clarification of a consent judgment. We affirm the judgment as modified.

A consent judgment is a product of a voluntary agreement. *Klawiter v Reurink*, 196 Mich App 263, 266; 492 NW2d 801 (1992). An agreement to settle a lawsuit is subject to the legal principles generally applied to contracts. *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993). When made in open court, the agreement is binding on the parties. MCR 2.507(H); *Michigan Bell Telephone Co v Sfat*, 177 Mich App 506, 515; 442 NW2d 720 (1989). Although mistake, fraud, or unconscionable advantage are grounds for relief from a consent judgment, *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989), we decline defendants' request to invoke equity on appeal because they did not move for relief from judgment in the trial court. Instead, we limit our review to the proper construction of the consent judgment and the

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

narrow declaration of rights made by the trial court on whether defendants' lack of marketable title excused the tender of the pay off in accordance with the consent judgment.

The disputed language in the consent judgment, being clear and unambiguous, is construed as a matter of law, *Beason v Beason*, 435 Mich 791, 798-799 n 3; 460 NW2d 207 (1990), and is reviewed de novo, *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

We agree with defendants' claim that paragraph 15 of the consent judgment must be construed as requiring an unconditional tender in "cash, cashier's check, bank check, or other cash equivalent on or before October 1, 1994." To the extent that the trial court construed the tender requirement as a conditional obligation, that construction was incorrect. The fact that a third-party lender may have placed conditions on the disbursement was a risk assumed by plaintiffs William and Ada Manuel [hereafter referred to as the "senior Manuels"]. Because the senior Manuels' obligation to tender was not conditioned on their ability to obtain financing or any requirements thereof, their performance cannot be excused based on the theory that they were prevented from making tender due to the lender's requirements. See *Flynn v Korneffel*, 451 Mich 186, 206; 547 NW2d 249 (1996) (discussing payment with respect to an equity of redemption); *Duiven v Brakesman*, 356 Mich 1; 95 NW2d 868 (1959) (tender requires offer of what tenderee is entitled, without qualification or condition); *Vergote v K Mart Corp (After Remand)*, 158 Mich App 96; 404 NW2d 711 (1987) (performance not excused under contract when party assumes risks associated with performance).

We do not agree, though, with defendants' argument that a lack of tender entitles them to the benefit of the provision in paragraph 15 of the consent judgment that "Plaintiffs shall be declared to have no interest of any kind, legal or equitable." The senior Manuels' tender was not a condition precedent to all obligations owed by defendants under the consent judgment. A condition precedent is merely a fact or event that the parties intend must take place before there is a right to perform. A condition precedent is distinguishable from a promise in that it creates no right or duty in and of itself, but is merely a limiting or modifying factor. *Reed, supra* at 447. Paragraph 12 of the consent judgment obligated defendants to deposit the requisite warranty deed conveying "the entire marketable right, title, and interest" with an escrow agent. Payment and written notice were the conditions precedent for the escrow agent to immediately issue the warranty deed to the senior Manuels' designee.

The senior Manuels had a right, under the clear and unambiguous language of paragraph 12, to insist that the escrow agent have the requisite deed (with marketable title) on deposit before tendering payment to defendants. A marketable title is one of such character as to assure quiet and peaceful enjoyment of the property and is free from encumbrances. *Stover v Whiting*, 157 Mich App 462, 468; 403 NW2d 575 (1987); see MCL 565.151; MSA 26.571.

In light of defendants' admission that they did not have the requisite marketable title (and thus could not have executed and delivered the requisite warranty deed to the escrow agent), the senior Manuels' performance was excused. See *Shrier v French*, 67 Mich App 623; 242 NW2d 454 (1976). Defendants may not take advantage of their own lack of performance in order to invoke the

provision in paragraph 15. *Dohanyos v Prudential Ins Co*, 952 F2d 947 (CA 6, 1992). Hence, the trial court reached the correct result in excusing the senior Manuels' performance. Whether the consent judgment should be judicially enforced, what the terms of enforcement should be, and whether any basis for relief from the consent judgment should be granted to defendants are matters beyond the scope of defendants' motion for clarification of the consent judgment presented to the trial court and this appeal. However, we hold that defendants were not entitled to a declaration under paragraph 15 of the consent judgment that the right, title, or interest in the subject property was lost due to the lack of tender.

The trial court's order regarding the motion for clarification of consent judgment is affirmed as modified consistent with our interpretation of the consent judgment in this opinion. Plaintiffs may file a bill of costs pursuant to MCR 7.219. However, their request for attorney fees is denied. MCR 7.216(C).

/s/ Myron H. Wahls

/s/ Mark J. Cavanagh

/s/ John F. Kowalski