STATE OF MICHIGAN

COURT OF APPEALS

SUNSHINE HOMES, INC.,

Plaintiff-Appellee,

v

DONALD R. NIEMAN,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 198989
Macomb Circuit Court
LC No. 95-002402-FH

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

In this breach of contract action, defendant appeals as of right from a circuit court order denying his motion to set aside the default and entry of judgment for plaintiff. We affirm.

Plaintiff and defendant entered into a land sale contract on December 30, 1994, under which defendant agreed to sell plaintiff twenty-five acres of his fifty-acre property located at 41700 Romeo Plank Road in Clinton Township. Pursuant to the agreement, the exact description of the land (i.e. the precise twenty-five acres) was to be subsequently determined by survey. After the survey had been completed, a legal description of the north twenty-five acres of the parcel was provided and plaintiff placed an earnest money deposit into escrow. Soon thereafter, defendant refused to proceed with the transaction and would not transfer title to plaintiff.

Plaintiff filed this action on May 24, 1995, seeking specific performance of the purchase agreement. On July 6, 1995, a default was entered against defendant for failure to respond to the complaint in a timely fashion. Before the default judgment was entered, defendant filed a motion to set aside the default alleging that he never received personal service of the complaint and summons and, in any event, he had a meritorious defense to enforcement of the contract.

The trial court conducted an evidentiary hearing to determine the validity of the default. After examining the evidence and listening to testimony from various witnesses involved in this matter, the court denied defendant's motion to set aside the default and entered judgment in favor of plaintiff.

On February 14, 1997, defendant filed a motion for peremptory reversal of the trial court's order. This Court denied defendant's motion because it was "not persuaded that manifest error exist[ed] that warrant[ed] peremptory relief without argument or formal submission."

On appeal, defendant first argues that the real estate purchase agreement for the sale of twenty-five acres of defendant's property violates the statute of frauds because the property description was not sufficiently definite or concise. Defendant claims that because the agreement did not specify which twenty-five acres was to be sold, the entire agreement must fail for lack of definiteness in violation of the statute of frauds. We disagree.

The interpretation and application of the statute of frauds is a question of law that this Court reviews de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). The Michigan Statute of Frauds provides in pertinent part:

> Every contract . . . for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in wiring, and signed by the party by whom the . . . sale is to be made, or by some person thereunto by him lawfully authorized in writing . . . . [MCL 566.108; MSA 26.908].[1]

In order to comply with the statute of frauds, the written document must be certain and definite as to all of the essential terms of the agreement so that no essential term must be supplied by parole. *In re Skotzke Estate*, 216 Mich App 247; 548 NW2d 695 (1996); *McFadden v Imus*, 192 Mich App 629; 481 NW2d 812 (1992). Moreover, the Supreme Court in *Wozniak v Kuszinski*, 352 Mich 431, 436; 90 NW2d 456 (1958), quoted 49 Am Jur, Statute of Frauds, § 348, p 657, for the essential elements in the description of land:

> A description is sufficient if when read in the light of the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when negotiations took place and the writing was made, it identifies the property. [See also *Stanton v Dachille*, 186 Mich App 247, 259; 463 NW2d 479 (1990); *Domas v Rossi*, 52 Mich App 311, 314; 217 NW2d 75 (1974).]

We find that the trial court properly concluded that in light of the plain meaning of the agreement, considered in conjunction with the evidence presented at the evidentiary hearing, the description of the property contained in the agreement was sufficiently concise and detailed to satisfy the statute of frauds. We note that there was substantial testimony from witnesses involved in this matter that throughout the entire negotiation process, the parties always contemplated the sale of the north twenty-five acres of the land. Additionally, there was evidence that defendant had sentimental attachment to the southern parcel and was not interested in selling it. Finally, there was evidence that defendant negotiated for the sale of his property with other individuals during the same time he entered into the agreement with plaintiff, and all the other prospective purchasers believed that defendant only intended to sell the north twenty-five acres of his property.

Therefore, because the written agreement and additional evidence shows an understanding between the parties of the location, size, and description of the property, the fact that the agreement was subject to reasonable modification after the survey was completed does not destroy the validity of the contract. See *In re Skotzke, supra* at 247. Accordingly, we find that the description of the property in the agreement was sufficient to satisfy the statute of frauds.

Defendant next argues that the trial court's decision to allow plaintiff to admit parole evidence to clarify which portion of defendant's property he intended to purchase was error requiring reversal. We disagree.

The use of parole evidence at trial is a question of law that this Court reviews de novo. *Zander, supra* at 444. It is well settled under Michigan law that where a contract is clear and unambiguous, parole evidence cannot be admitted to vary the agreement. *In re Skotzke, supra* at 251. However, extrinsic evidence may be admitted to supplement the terms of an agreement, although it may not be used to contradict the writing. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 836 (1982); *Zander, supra* at 443-444. Furthermore, where a contract contains technical or complex terms, parole evidence is permitted to define and explain the meaning of those terms or phrases. *SSC Associated Limited Partnership v General Retirement System of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995).

In order to apply the parole evidence rule, the court must find that the parties intended the writing to be a complete expression of their agreement. *In re Skotzke, supra* at 252. Thus, "[p]arole evidence is admissible to establish the full agreement of the parties where the document purporting to express their intent is incomplete." *Id.* (citing *Green Field Construction Co, Inc v Detroit*, 66 Mich App 177, 185; 238 NW2d 570 [1975]).

In the instant case, we find it evident that the parties intended to leave the property description in the agreement incomplete pending the completion of the survey. Thus, the parties directly contemplated, and agreed upon, the admission of parole evidence to clarify which twenty-five acres of the land was to be conveyed *after* the sale was consummated. Indeed, the agreement itself stated that the plaintiff would purchase twenty-five acres of defendant's property *to be determined after the survey*. Thus, we find that both the survey and the testimony elicited at the hearing to explain the survey, were properly admitted at the hearing. Accordingly, the trial court did not err in admitting the use of parole evidence for this purpose.

Next, defendant argues that the trial court incorrectly interpreted the effect of a provision in the contract regarding the retention of the earnest money deposit. We disagree.

The appropriate interpretation of terms contained in a contract is a legal issue that this Court reviews de novo. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996); *SSC, supra* at 452. Where there is a dispute over the terms of a contract, the court must ascertain the intent of the parties and enforce the agreement according to that intent. *SSC, supra* at 452. The language in a contract is to be construed according to its plain meaning, avoiding technical or constrained constructions. *Id.*

The contested provisions in the agreement provide in pertinent part:

> 4. DEPOSIT. The purchaser is authorized to make this offer and the deposit of 410,000 shall be held by Greco Company . . . and applied on the purchase price if the sale is consummated. If the offer is not accepted within 72 hours after the time hereof, the deposit shall be returned to the Purchaser. After acceptance of this offer, deposit shall become a non-refundable deposit, and in the event purchaser shall not desire to close for any reason seller shall be entitled to retain the full deposit; except, however, if both parties do not accept the survey to be performed pursuant to 17a.
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> 17. ADDITIONAL COMMENTS:
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> A. Purchaser shall obtain, within 120 days, at its sole cost and expense, a survey of the premises to be purchased which shall not disclose any encroachments, easements, or rights of way unacceptable to purchaser.

Defendant contends that these provisions permit him to declare the contract null and void if he does not agree with the results of the survey. Plaintiff, on the other hand, insists that the challenged clause is not an "escape clause" and only explains the parties' rights pertaining to the deposit that was placed in escrow.

We agree with the trial court that the language at issue simply defines the parties' rights to the deposit in the event that the transaction is not consummated. Thus, although defendant would be entitled to retain the deposit if he found the survey accurate, but it was unacceptable to the purchaser, this clause does not authorize defendant to void the transaction if he rejected the survey. On the other hand, if both defendant and plaintiff found the survey unacceptable, plaintiff would be entitled to a refund of the deposit. To interpret this clause in any other manner would effectively render the contract itself meaningless and permit defendant to walk away from the agreement he willingly entered into at any given moment. Accordingly, the trial court's interpretation of the deposit clause was not clearly erroneous and does not warrant reversal.

Fourth, defendant argues that the trial court abused its discretion in denying his motion to set aside the default and entering judgment in favor of plaintiff. We disagree.

The decision whether to set aside a default is within the sound discretion of the trial court. *Park v American Casualty Ins*, 219 Mich App 62, 66; 555 NW2d 720 (1996). Because public policy encourages setting aside defaults in favor of meritorious determinations, this Court will only review a trial court's decision not to set aside a default for an abuse of discretion. *Id.*

A motion to set aside a default will generally only be granted if the defaulted party shows good cause and files an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1); *Park, supra* at 66-67. Good cause sufficient to warrant setting aside a default includes: (1) a substantial defect or irregularity in the proceeding on which the default was based and that prejudices defendant; (2) a reasonable excuse for failure to comply with requirements which created the default; or (3) some other reason showing that manifest injustice would result if the default was allowed to stand. *Id.* at 67;

Gavulic v Boyer, 195 Mich App 20, 24-25; 489 NW2d 124 (1992). Even in the absence of a reasonable excuse for the conduct that created the default, "the showing of a meritorious defense and factual issues for trial may, under certain circumstances, fulfill the good cause requirement by way of constituting a reason evidencing that manifest injustice would result from permitting a default to stand." *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 47; 445 NW2d 186 (1989).

Defendant claims that he was never personally served the summons and complaint pertaining to this matter. Because we are persuaded that the trial court's conclusion that defendant was, in fact, personally served was reasonably supported by the witnesses' testimony and other evidence produced at trial, we decline to disturb that finding here. Accordingly, we find that defendant has not presented a reasonable excuse for failure to file a timely answer to plaintiff's complaint sufficient to satisfy good cause.

Defendant also contends that regardless of whether this Court finds that he was personally served with process, the statute of frauds is a meritorious defense precluding the enforcement of the contract. Essentially, defendant reiterates his argument that the description of the property was incomplete and lacked sufficient detail to satisfy the statute of frauds.

We have already determined that the property description in the purchase agreement was sufficiently concise and detailed and that any imperfection in the language was contemplated by the parties. This decision is explicitly supported by the language of the contract itself which states that the exact description of the property will be subsequently determined by survey. Therefore, we find that defendant has not provided a meritorious defense to the enforceability of the contract warranting reversal. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to set aside the default.

Finally, defendant urges this Court to grant peremptory reversal of the trial court's decision because of the alleged manifest error that occurred. After defendant filed his claim of appeal, he filed a motion for peremptory reversal simultaneously with his brief on appeal. This Court found the motion meritless and denied the motion. Absent a motion for rehearing or reconsideration, this Court does not ordinarily review decisions made by other panels of the Court of Appeals. Accordingly, further review of this issue is unnecessary in light of this Court's resolution of the issue.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Peter D. O'Connell

[1] Although the parties relied on MCL 566.106; MSA 26.906, which is authoritative in that it correctly notes that any agreements purporting to transfer an interest in real estate must be in writing, we believe

that MCL 566.108; MSA 26.908 is the more appropriate section because it governs contracts for the sale of real estate. Therefore, we rely on that section in making our ruling.