STATE OF MICHIGAN

COURT OF APPEALS

KRW ASSOCIATES,

Plaintiff/Counterdefendant-Appellant,

v

CABO, INC.,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
February 24, 1998

No. 200179
Emmet Circuit Court
LC No. 94-002995-CH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action on its claim that a written document, drafted jointly by agents of both parties, constituted a valid real estate purchase contract or, alternatively, an enforceable "contract to contract." Plaintiff had requested that the trial court order defendant to specifically perform the terms of that contract. The trial court, however, found that the conduct of the parties subsequent to the execution of the written document evidenced that neither party considered itself bound by the document and that the language of the document itself supported the view that the document was not a binding contract nor a "contract to contract." We affirm.

Plaintiff first argues that the trial court erred when it failed to find the requisite elements in the written document to form an enforceable "contract to contract" under the statute of frauds. However, the trial court decision did not find the writing unenforceable under the statute of frauds. In fact, without specifically mentioning the statute of frauds, the trial court found that the writing *did* indeed have the requisite elements to comport with the statute. See *Kojaian v Ernst*, 177 Mich App 727, 730; 442 NW2d 286 (1989); *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 836 (1982); *Tucson v Farrington*, 396 Mich 169; 240 NW2d 464 (1976). Specifically, the trial court found that the document was signed by the parties. As a result, the parties to the transaction were identified. Moreover, the court noted that the writing clearly depicted the "selling price [of] $290,000.00," fulfilling the requirement that the document set forth the consideration to be paid. Additionally, the court found that the property was sufficiently described. In clause one of the writing, the property was described as "RR property right of way from Division Street Petosky MI north-westerly to the west RFB side of state highway 119 right of way." Moreover, extrinsic evidence in the

form of testimony from the parties and surveys of the area specified the exact parcel. Finally, the court found that the payment terms were included. Clause six of the writing indicated the parties intended to enter into a credit sale transaction, thus further requiring the writing to set forth credit terms. *Tucson, supra* at 174. The inclusion of a down payment amount, a frequency of payment term, and a stated interest rate satisfied the specificity requirement because an entire payment schedule could be compiled from this information. Thus, the agreement satisfied the requisite elements under the statute of frauds to be enforced as a valid contract for the sale of property.

Nonetheless, the trial court found that the writing did not have sufficient "essential and material terms" to constitute a "contract to contract." We do not disagree with this finding. A contract to make a subsequent contract may be enforced as any other contract. *Opdyke, supra* at 359, citing 1 Corbin, Contracts, § 29, p 84. A contract to make a contract, however, can fail for indefiniteness if the trier of fact finds that it does not include an essential term to be incorporated into the final contract. *Id*. Similarly, if the agreement is conditioned on the happening of a future event that, through no fault of the parties, never occurs, liability does not attach. In order for a "contract to contract" to be enforceable, it must specify all of its material and essential terms, leaving nothing to be agreed upon as the result of future negotiation. *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 819; 428 NW2d 784 (1988). Although the trial court found that the "basic terms" of a real estate purchase agreement were included in the writing, it also found that a number of significant terms were not addressed and were subsequently disputed by the parties' attorneys in their subsequent respective drafts of the formal agreement.

The first discrepancy identified by the court related to the method of conveyance, namely whether the seller would provide a quit claim or a warranty deed and title insurance. The warranties made on title could potentially have considerable effect on the liability of defendant and were therefore a material term. However, clause five of the writing explicitly extended a limited five year title warranty and an obligation to reimburse plaintiff in the event of an adverse claim. The substance of this clause provided for a limited warranty deed. Although the lawyers did not properly memorialize the clause in their respective drafts, the parties did agree on it. Thus, the trial court erred, in our judgment, in its finding that the parties did not agree to this material term.

The second discrepancy related to the earnest money deposit and liquidated damages clause. Plaintiff's version of the agreement provided for a $5,000 earnest money deposit that would, upon plaintiff's breach, represent defendant's liquidated damages, thereby precluding additional damages. Defendant's version of the agreement provided for a $10,000 earnest money deposit and also allowed for the retention of plaintiff's deposit in the event of its breach. However, it did not characterize the deposit as liquidated damages. Neither the disparity in the amount of the deposit nor the characterization of the deposit were essential or material terms because the court could still have enforced the earlier writing as written while ignoring these conflicts without substantially affecting the equity of the bargain. See 17A Am Jur 2d, Contracts, § 36, p 65.

The remaining discrepancies deemed material dealt with an environmental condition precedent, an indemnity clause and an extension of closing clause. Plaintiff's draft provided for: (1) an optional ninety day extension until closing to comply with environmental conditions; (2) a general indemnity

clause that would have required defendant to indemnify plaintiff from and against all losses derived from the contract; and (3) a condition precedent that allowed plaintiff to determine whether the property was considered a regulated "wetland" or located on a floodplain. The first two of these clauses were not essential or material as the trial court could have enforced the terms of the writing and ignored these disputed terms without affecting the balance of equities between the parties. See 17A Am Jur 2d, Contracts, § 36, p 65. The wetland condition precedent, however, represents an unaddressed material term. This clause, if unenforced by the trial court, could potentially have a marked effect on the balance of equities between the parties. The parcel in dispute runs along Little Traverse Bay. Floodplain and wetland regulations could substantially affect plaintiff's sole purpose for seeking to purchase this property, namely further commercial development. The court's adoption of a condition precedent to this real estate sales contract, which the parties disputed and for which they had no prior negotiations, would have constituted the drafting of material contractual language by the trial court. Therefore, the trial court was correct in not attempting to redraft the agreement to include this environmental clause.

Plaintiff next argues that the trial court's finding that the parties did not intend the writing to be an enforceable contract was clearly erroneous. We disagree. In order to form a valid contract, there must be a meeting of the minds on all the material terms. *West Bloomfield Hospital v Certificate of Need Bd (On Remand)*, 223 Mich App 507, 519; 567 NW2d 1 (1997). The burden is on the plaintiff to show the existence of the contract sought to be enforced by a preponderance of the evidence. *Kamalnath v Mercy Memorial Hospital*, 194 Mich App 543, 549; 487 NW2d 499 (1992). Regardless of the equities in a case, there is no presumption in favor of the execution of a contract because contractual liability is consensual and the court therefore cannot make a contract for the parties when none exists. *Id*. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Heritage*, *supra* at 818. Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract, nor does the mere expression of intention create a binding contract. *Id*. More importantly, if either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract. Restatement of Contracts, 2d, §27, comment b; *Angelo DiPonio Equipment Co v Highway Dep't*, 107 Mich App 756, 761; 309 NW2d 566 (1981).

The trial court found as follows:

> Based on the language of Exhibit #6 [the writing], and as reinforced by the conduct of the parties after July 8, 1994, the Court concludes that Mr. Koffman knew or had reason to know that Mr. Burns regarded their assignment as incomplete. The differences between the Gillis draft and the Bauer draft further establish that issues material to both sides were unresolved. A meeting of the minds was not shown by a preponderance of the credible evidence.

The writing did have a number of indications that the parties (or at least defendant's agent) did not intend to create a binding real estate purchase contract or even a "contract to contract." First, the title of the document was not "contract" or "agreement" or "contract to contract" but, rather, "sale

conditions." The language "these are general conditions only -- subject to legal modification by seller and purchaser's counsel" indicated an intention to conduct further negotiations. Also, defendant's agent requested and subsequently struck language stating that "consideration is accepted of $1.00," explaining that he did not wish to create a binding agreement.

Plaintiff also presented evidence, however, to support its position that both parties intended and objectively manifested an intention to enter into a binding agreement or at least a "contract to contract." Plaintiff's agent testified that it was his understanding that the jointly drafted writing was an offer that he accepted by signing the document. This belief was reinforced by the language of the writing that stated "this offer is made for 30 days." Also, plaintiff's agent recalled that subsequent to the parties signing of the writing, he turned and shook the hands of defendant's agents, saying "we have a deal," at which time at least one of defendant's agent appeared to give an affirmative response. Defendant's agent testified that his understanding was that the writing was an indicator of common ground to be used by the parties attorneys when attempting to draft a final agreement. However, he also testified that it was his intention to give plaintiff thirty days to accept these "general conditions." The trial court resolved this conflict in testimony in favor of defendant and found that:

> [T]his written language, agreed to by both parties, to be more credible evidence of the intent of the parties, than Mr. Koffman's self-serving claim that Mr. and Mrs. Burns verbally agreed "we have a deal."

In light of the written evidence referred to by the trial court, it could not be said that its finding that the parties did not intend to be bound by the writing was clearly erroneous. MCR 2.613(C); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995). Moreover, plaintiff's agent either knew or had reason to know that defendant's agent regarded the writing as nonbinding and incomplete when he requested that the consideration clause be deleted and added the "subject to legal modification" clause. Contractual relations are voluntary and the court should not bind a party to a contract when it manifested an intention not to be bound. *Angelo DiPonio Equipment Co*, *supra* at 761. Upon examination of the jointly drafted writing, testimony from the parties' agents, and the conduct of the agents, we conclude that the trial court's holding that plaintiff failed to show that the parties mutually assented to be bound by the writing was not clearly erroneous.

Affirmed.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman