

STATE OF MICHIGAN  
COURT OF APPEALS

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THE BEALE GROUP, INC.,

Plaintiff-Appellant,

v

SAMUEL WEINER and JUDITH WEINER,

Defendants-Appellees.

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UNPUBLISHED

June 16, 2005

No. 253257

Macomb Circuit Court

LC No. 01-003568-CK

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action following a bench trial. We vacate the judgment of no cause of action and remand for enforcement of the settlement agreement entered between the litigants.

I. Facts and Procedure

On March 19, 2001, the parties entered into six exclusive sales agreement contracts whereby plaintiff, a real estate broker, would negotiate the sale of six different properties owned by defendants. The contracts all provided, in pertinent part:

2. Owner agrees to pay Broker a commission of Six (6%) percent of the sale amount. This commission shall be earned and paid for services rendered if, during the Term: (a) All or any portion of the Property is sold (by Broker, Owner, or anyone else); (b) A purchaser is procured (by Broker, Owner, or anyone else) who is ready, willing and able to purchase the Property on the terms above stated, or on any other terms agreeable to Owner; (c) *Owner removes the property from the market.* Such commission shall become due and payable as follows: commission shall be payable in full at the time of closing. [Emphasis added.]

During the term of the contracts, defendants removed the properties from the market. When defendants did not pay the commissions to plaintiff, plaintiff filed suit, seeking payment of the commissions under theories of breach of contract and unjust enrichment.

Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (C)(10), arguing that because defendants did not dispute executing and terminating the contracts, and the liquidated damages provision of the contracts is reasonable and enforceable, plaintiff is entitled

to recover \$228,000 in commissions under the unambiguous terms of the liquidated damages provision of the contracts. In response, defendants argued that the contracts are not binding because there was no meeting of the minds. Defendants argued that they are not sophisticated real estate investors and that they were unaware of the liquidated damages provisions of the contracts because the real estate contracts they had been party to in the past did not contain such provisions. Defendants also argued that the liquidated damages clause is unenforceable because it amounts to a penalty, is unreasonable, and bears no relationship to the possible injury suffered. The trial court denied plaintiff's motion, concluding that there were questions of fact regarding whether there was a meeting of the minds.

On the day set for the bench trial, defendants did not appear in court. At the urging of the trial court, the parties engaged in settlement negotiations. After defendants' counsel conferred with defendants by phone, the parties agreed to a settlement and put the terms of the settlement on the record. The settlement included re-listing the properties for six months and providing plaintiff with a minimum \$30,000 commission even if none of the properties were sold. But when the parties returned to court on a later date to enter a consent judgment consistent with the settlement placed on the record, defendants refused to sign the judgment, indicating that they did not want to sell the properties. The trial court denied plaintiff's motion for entry of the consent judgment, explaining that it would give defendants the "benefit of the doubt" because the court was hesitant to enter the consent judgment without a defendant's signature.

Following a bench trial, the trial court concluded that ¶ 2(c) of the contracts is invalid and unenforceable because it amounts to an impermissible penalty for terminating the contract. The court also concluded that even if ¶ 2(c) is valid, defendants are not obligated to pay the commissions because none of the properties ever sold, and the contract only requires the commissions to be paid upon closing. The court further held that plaintiff was not entitled to lost profits because it failed to demonstrate that it had secured specific purchasers who were willing to buy defendants' properties. The trial court entered judgment of no cause of action in favor of defendants.

## II. Analysis

### A. Summary Disposition

Plaintiff first argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).]

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Id.* at 277. "Similarly, whether contract language is ambiguous is a question of law that we review de novo. Finally, the proper interpretation of a contract is also a question of law that we review de

novo.” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003) (citations omitted).

Plaintiff asserts that the trial court erred in denying its motion for summary disposition because defendants failed to present any evidence, other than their bald assertions, to support their argument that there was not a meeting of the minds regarding the contract. Once plaintiff met its burden of supporting its position with documentary evidence, the burden shifted to defendants to set forth specific facts showing that a genuine issue of disputed fact existed. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). In response to plaintiff’s motion for summary disposition, defendants argued that there was no meeting of the minds, but did not present any documentary evidence in support of this argument.<sup>1</sup>

“Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” [*Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (internal citations omitted).]

Because defendants relied on bald assertions and failed to present any relevant documentary evidence in support of their position, the trial court erred in denying plaintiff’s motion for summary disposition on the ground that there existed a factual dispute regarding whether there was a meeting of the minds.

Although the trial court erred in denying summary disposition on the basis that there existed a question of fact regarding a meeting of the minds, we conclude that summary disposition should have nonetheless been denied because the contracts are ambiguous, thus creating is a question of fact regarding whether plaintiff is entitled to commissions under ¶ 2(c). In determining whether an ambiguity exists in the contract, the contract must be “ ‘construed so as to give effect to every word or phrase as far as practicable.’ ” *Klapp, supra* at 467, quoting *Hunter v Pearl Assurance Co, Ltd*, 292 Mich 543, 545; 291 NW 58 (1940), quoting *Mondou v Lincoln Mut Cas Co*, 283 Mich 353, 358-359; 278 NW 94 (1938). Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp, supra* at 468. A contract is ambiguous when its provisions are capable of conflicting interpretations. *Id.* at 467. “Accordingly, if two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous.” *Id.* If a contract is subject to two interpretations, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate.” *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003).

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<sup>1</sup> The only attachment to defendants’ responsive brief was a copy of a standard real estate listing agreement.

At first glance, it appears that ¶ 2(c) clearly states that defendants must pay plaintiff the sale commissions because they removed the properties from the market during the term of the contract. However, we conclude that ¶ 2(c) of the contracts is rendered ambiguous by other language contained in ¶ 2. The first sentence of ¶ 2 states that the owner must pay the broker a six percent commission of the *sale amount*. When defendants removed the properties from the market, there existed the possibility that the properties might never be sold. Under these circumstances, there would be no “sale amount” other than the asking sale price set forth in the contracts. Further, the last sentence of ¶ 2 states that the commission “shall be payable in full at the time of closing.” If a property is never sold, there is no “time of closing”; i.e. the commission would never become payable.<sup>2</sup> Because the language of ¶ 2(c) appears to be inconsistent with language contained in the remainder of ¶ 2, the contracts are subject to conflicting interpretations. Because ¶ 2 of the contracts is ambiguous, it could not be determined as a matter of law whether subsection (c) was a valid and enforceable liquidated damages clause or an unenforceable penalty provision.<sup>3</sup> Accordingly, although the trial court denied plaintiff’s motion for summary disposition for the wrong reason, we conclude that the court reached the right result in denying plaintiff’s motion. “This Court will not reverse an order of the trial court if the court reached the right result for the wrong reason.” *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

#### B. Enforcement of Settlement Agreement

Next, plaintiff argues that the trial court erred in refusing to enforce the parties’ settlement agreement that was placed on the record. We agree. We review for an abuse of discretion a trial court’s decision on a motion to enter a consent judgment. Cf. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 763; 630 NW2d 646 (2001) (a trial court’s decision on a motion to set aside a consent judgment is reviewed for abuse of discretion).

The settlement agreement was placed on the record in open court on June 26, 2003. MCR 2.507(H) provides:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party’s attorney.

A settlement agreement made in open court is enforceable as a contract and is governed by the legal principles applicable to the construction and interpretation of contracts. *Michigan Mutual Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001).

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<sup>2</sup> We find disingenuous plaintiff’s argument that the word “closing” in ¶ 2 represents the termination of the contract.

<sup>3</sup> Whether a liquidated damages provision is valid and enforceable or invalid as a penalty is a question of law. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998).

Here, defendants' attorney was present, communicated with his client during the settlement negotiations, and acknowledged on the record that the terms placed on the record embodied the agreed upon settlement. But defendants later refused to sign the consent judgment. "A party cannot, after agreeing in open court, refuse to sign a proposed judgment which accurately incorporates the agreement unless there was a mistake, fraud, or unconscionable advantage which would justify setting aside the settlement agreement." *Michigan Bell Telephone Co v Sfat*, 177 Mich App 506, 513; 442 NW2d 720 (1989).<sup>4</sup> Defendants did not provide the trial court with an adequate explanation for their refusal to sign the consent judgment. Defendants did not allege fraud or unconscionable advantage and presented no evidence to the trial court concerning the specific terms they did not understand when the agreement was placed on the record.<sup>5</sup> Defendants' carelessness in agreeing to the settlement, without taking the time to ensure that they fully understood its ramifications, is not the type of mistake that will allow defendants to avoid enforcement of the agreement. See *Michigan Bell, supra* at 513 (a settlement agreement made on the record was binding where the defendant's objections to entry of the consent judgment all related to matters that were, or should have been, within his contemplation at the time he agreed to the settlement). A "change of heart" is an insufficient ground on which to refuse to enforce a settlement agreement. *Groulx v Carlson*, 176 Mich App 484, 492; 440 NW2d 644 (1989). There is no dispute that defendants' attorney had the authority to bind defendants to a settlement agreement—defendants concede this in their appellate brief. Thus, pursuant to MCR 2.507(H), the settlement agreement was binding. Therefore, the trial court abused its discretion in refusing to enforce the settlement agreement.

We find no merit to defendants' argument that plaintiff waived its right to appeal this issue by appearing for trial after accepting the trial court's award of costs and attorney fees regarding the settlement negotiations. The order denying plaintiff's motion for entry of consent judgment and awarding costs makes no mention of plaintiff waiving its right to appeal, and defendants points to no evidence to support this assertion. Furthermore, plaintiff did not need to request an interlocutory appeal in order to retain its right to appeal. Plaintiff was entitled to appeal this issue upon entry of the final order disposing of all claims. MCR 7.202(6)(a)(i); MCR 7.204(A)(1). Accordingly, we vacate the trial court's judgment of no cause of action and remand for entry of a judgment in accordance with the parties' settlement agreement as placed on the

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<sup>4</sup> In *Michigan Bell, supra* at 515, this Court rejected the notion that a litigant is free to revoke a consent judgment between the time it is orally placed on the record and the time the judgment is actually entered by the court.

<sup>5</sup> Defendant Samuel Weiner merely told the trial court, "Now I have a better, clear understanding of what this means."

record on June 26, 2003. Given our resolution of this case, we need not address plaintiff's remaining issues on appeal.

Vacated and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Pat M. Donofrio