

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD NOWITZKE TRUST and KRISTINE
M. GILLEGERTEN, TRUSTEE,

UNPUBLISHED
August 5, 2008

Plaintiffs/Counter-Defendants-
Appellees,

v

RONALD DEYOUNG,

Defendant/Counter-Plaintiff-
Appellant.

No. 269597
Cheboygan Circuit Court
LC No. 04-007391-CH

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant/counter-plaintiff appeals as of right from the judgment for plaintiffs/counter-defendants following a bench trial. Plaintiffs filed suit to quiet title in property, asking the court to set aside an agreement entered in 1996 between Edward Nowitzke and defendant whereby Nowitzke provided defendant a sixty day period in which he could elect to purchase the Nowitzke's Burt Lake property at the price of \$150,000, in the event that Nowitzke died or received a written offer to purchase the property from a bona fide third-party. This agreement did not provide an escalation clause that would account for any appreciation in value of this property. Defendant counter-claimed for declaratory judgment concerning the validity of the above mentioned agreement. The trial court presided over a bench trial and concluded that the option agreement was void for insufficient consideration. On appeal, the litigants argue a single issue—whether the trial court erred in finding the consideration insufficient. We reverse the trial court's conclusion that the consideration was legally insufficient and remand for entry of judgment in favor of defendant on his counter-claim.

I. Facts and Proceedings

In 1965, Nowitzke purchased by land contract property fronting Burt Lake in Indian River, Michigan. The purchase price under the land contract was \$25,000. Nowitzke used the property for recreation. Over the years, he developed a friendship with his next-door neighbors, defendant and his wife Barb DeYoung. In June 1996, the DeYongs and Nowitzke discussed the sale of Nowitzke's property to the DeYongs at a future point in time. Ultimately, the DeYongs' attorney drafted a contract, which in consideration of the payment of \$1 to Nowitzke, provided defendant an exclusive option to purchase the property. Under the terms of the

contract, defendant was entitled to a sixty day period in which to elect to purchase the property in the event (1) that Nowitzke died, (2) Nowitzke sold the property, or (3) upon receipt of a written offer from a bonafide third-party purchaser, for the fixed price of for \$150,000. The parties executed the document on October 5, 1996.

On October 19, 2001, Nowitzke placed the property in the Edward Nowitzke Trust. On August 16, 2002, defendant recorded an affidavit of interest concerning the property consistent with the contract. In 2004, plaintiffs filed this action to quiet title in the property. Plaintiffs claimed that the contract was unenforceable and that defendant improperly recorded an affidavit of interest against the property.

Following a bench trial, the trial court issued an opinion and order. The trial court concluded that the \$1 paid for the option contract was inadequate consideration, and that the contract was unenforceable. The court noted that the property had appreciated significantly during the years since the contract was executed and that it was currently assessed at \$370,000. The court rejected defendant's testimony that he did not consider that the property would continue to appreciate after the contract was executed. The court also found that Nowitzke relied on defendant, his long-time friend, to treat him fairly. The court concluded that defendant intentionally omitted an escalator clause to financially benefit himself to the detriment of Nowitzke. In doing so, the court reasoned:

In the present case, the \$150,000 purchase price was established by Mr. DeYoung with no input from Mr. Nowitzke. This contract did not come about through negotiations but instead under the guise of friendship. Mr. Nowitzke relied on that friendship and believed that his neighbor would treat his 76 year old friend in a reasonable and fair fashion, which, unfortunately, was not the case.

The argument is essentially that for \$1.00, Mr. DeYoung would have the option to receive all the future appreciation of Mr. Nowitzke's lake front property. At that time, this was property that was known to be appreciating at a very significant rate. If it appreciated only 10% per year and the option was exercised after only one year, then Mr. DeYoung would receive \$15,000 value for this \$1.00 investment. Nine years later he would receive \$220,000 value for his \$1.00 investment. By the date of this judgment, his windfall could very well exceed one quart[er] of a million dollars for his \$1.00 investment. On the other hand, this generated absolutely no other benefit to Mr. Nowitzke except for \$1.00.

It seems impossible for anyone of common sense not to be offended and shocked by the inequality of the contract. It was and is so grossly unfair that it shocks the conscience and therefore must be set aside.

The trial court entered a judgment vesting title in the property in favor of the trust and an order rescinding the option contract was later entered.

II. Standard of Review

Interpretation of a contract is a question of law reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Equitable actions, including actions to rescind

a contract, are reviewed de novo, but the factual findings of the trial court are given great weight and reviewed for clear error. MCR 2.613(C); see *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31-32; 331 NW2d 203 (1982). Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Sinicropi v Mazurek*, ___ Mich ___; ___NW2d ___ (Docket No. 281726, issued July 1, 2008).

III. Analysis

Defendant argues that the trial court improperly refused to enforce the contract. Defendant focuses on the trial court's conclusion that the option contract lacked consideration and argues the trial court improperly reviewed the fairness of the \$1 option contract in terms of its present day value instead of its value at the time it was executed. We agree. In *General Motors Corp v Dept of Treasury*, 466 Mich 231, 634 NW2d 734 239 (2002), our Supreme Court reiterated that "courts do not generally inquire into the adequacy of consideration to support a contract." It has been said "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Id.* at 239, quoting *Whitney v Stearns*, 16 Me 394 (1839). Our Supreme Court quoted from Professor Williston to reinforce this point:

It is an elementary and oft quoted principle that the law will not inquire into the adequacy of consideration so long as the consideration is otherwise valid to support a promise. By this is meant that so long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant so that anything which fulfills the requirement of consideration will support a promise, regardless of the comparative value of the consideration and of the thing promised. The rule is almost as old as the doctrine of consideration itself. [*General Motors Corp, supra*, at 241 n 13, quoting 3 Williston, *Contracts* (4th ed), § 7:21, pp 383-386.] "Mere inadequacy of consideration, unless it be so gross as to shock the conscience of the court, is not ground for rescission." *Rose v Lurvey*, 40 Mich App 230, 234-236 (1972), quoting *Hake v Youngs*, 254 Mich 545, 550, 236 NW 858, 859 (1931). Thus, "[e]quity will . . . grant relief where the inadequacy of consideration is particularly glaring." *Rose, supra*.

Here, the trial court erred in concluding insufficient consideration supported the option contract. When viewed in the context of the execution of this agreement, the consideration of \$1 is not so grossly inadequate as to shock the conscience of the court. All indications suggest that the \$150,000 was a fair market price for the property at the time the parties executed it. Generally, claims of inadequate consideration are reviewed "at the time th[e] option was given," considering what "'would be a fair market price and all that could have been obtained in the open market for this property' in the condition it then was as to title and otherwise." *George v Schuman*, 202 Mich 241, 257-258; 168 NW 486 (1918) (internal citation omitted). Nowitzke had the power to force the option by placing his property for sale and obtaining an offer to purchase from a bona fide purchaser. There is no question that had Nowitzke elected to sell the property shortly after execution of the option, the option agreement would be valid and enforceable. This valid agreement is not rendered invalid merely because Nowitzke, a signatory to the contract, chose to permit time to pass.

While we give deference to the factual findings of the trial court, we also note that many of the trial court's factual findings are legally irrelevant to the question of consideration. For

example, the court found as a matter of fact that Nowitzke did not read the option agreement and, instead, relied on his friendship with defendant concluding defendant would treat him in a reasonable and fair manner. Whether a party reads his contract before signing it has no impact on the consideration supporting the contract. Further, in *Moffit v Sederlund*, 145 Mich App 1, 9; 378 NW2d 491 (1985), this Court indicated that,

[g]enerally, a failure to read a written contract document does not require rescission of the contract unless other facts indicate fraud, artifice, or deception. See, for example, *Vandendries v General Motors Corp*, 130 Mich App 195, 200; 343 NW2d 4 (1983). Failure to read a contract document provides a ground for rescission only where the failure was not induced by carelessness alone, but instead was induced by some stratagem, trick, or artifice by the parties seeking to enforce the contract. *Otto Baedeker & Associates, Inc v Hamtramck State Bank*, 257 Mich 435, 441; 241 NW 249 (1932).

Here, the trial court made no findings that support the conclusion that defendant fraudulently induced him into executing the option agreement. While the trial court indicated Nowitzke relied on his friendship with defendant, there was no finding by the trial court or evidence presented at trial that defendant suggested Nowitzke need not read the contract or not seek the advice of counsel prior to signing it. In the absence of such findings, we hold that Nowitzke's failure to read his contract was induced by carelessness rather than fraud, deception or artifice, and does not render the contract invalid.

The trial court also found unbelievable defendant's testimony that at the time the contract was executed, he never considered that the property might appreciate during the term of the agreement. The trial court also found that the \$150,000 purchase price was unilaterally placed in the contract by defendant's counsel at defendant's direction. Again, these factors do not affect the adequacy of the consideration in this matter. And while the trial court's findings suggest that defendant presented Nowitzke with a contract drafted by defendant's counsel, which was beneficial to defendant, the trial court's conclusions of law do not support a finding of rescission based on defendant's conduct through the execution of this contract. Further, plaintiffs on appeal have presented us with no legal theory to support the conclusion that defendant's conduct makes the contract at issue subject to rescission. The trial court and the litigants focused almost exclusively on the question whether the consideration paid to Nowitzke was legally sufficient. On this point we conclude the trial court erred in assessing the sufficiency of the consideration.

Reversed and remanded for entry of judgment in favor of defendant on his counter-claim. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra