STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS CORPORATION,

Plaintiff-Appellant,

v

AUTOMOTIVE SERVICES, INC., and JAMES MATTISON,

Defendants-Appellees,

and

PONTIAC HISTORIC SERVICES,

Defendant.

UNPUBLISHED
August 7, 2008

No. 275702
Oakland Circuit Court
LC No. 2004-059382-PD

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

This action arises from defendants' possession of various historical materials produced by plaintiff. In October 1990, plaintiff's Pontiac division, represented by Edward Lechtzin, entered into a contract with defendants that required defendants to respond to Pontiac car enthusiasts' requests for information and to provide each with a package of materials regarding the queried car.[1] Plaintiff granted defendants the exclusive right to provide this service and agreed to provide defendants with office space, office equipment, and access to files containing vehicle identification number (VIN) information. Plaintiff also agreed to pay for the package's mailing cost and added defendants to their public relations department's mailing list.

[1] Defendant James Mattison established defendant Automotive Services, Inc., for the sole purpose of providing this service.

According to the contract, plaintiff was also to:

6. Provide a secure area to store the microfilm information as well as the following material which will be supplied by Pontiac Public Relations Department and others:

a. Pontiac new car brochures[.]

b. Pontiac old car photos and press kits.

c. Pontiac historical biographical information for various model years.

The materials referred to in paragraphs 6(b) and (c) were originally located in the vault, a windowless room in the basement of Pontiac's administration building, where defendants' office was located. Over time, defendants added to the materials, filling in gaps in the information. They obtained some materials from plaintiff and some from outside sources.

When Pontiac's administration building was vacated, defendants were temporarily moved to another Pontiac-owned location before settling into a space that was leased by plaintiff at Shows and Shoots for approximately $1800.00 per month. Ownership of the Pontiac materials later became an issue when plaintiff established the Heritage Center, which was designed to hold all of plaintiff's North American historical materials. Plaintiff claimed ownership of the materials in defendants' possession. Defendants claimed that they owned the materials and refused to allow plaintiff to take the two-dimensional materials.[2] Plaintiff subsequently brought this action to recover possession of the disputed materials, asserting claims for claim and delivery, common-law conversion, and statutory conversion, MCL 600.2919a. Following a bench trial, the trial court dismissed all claims.

II. Defendant's Motion for Involuntary Dismissal

At the close of plaintiff's proofs, defendants moved for involuntary dismissal of plaintiff's claims. The trial court granted the motion in part, finding that plaintiff failed to carry its burden of identifying the records it sought with specificity, except for a few items. It dismissed plaintiff's claims with respect to all materials in defendants' possession, except "microfilm/microfiche, original Pontiac corporate photographs, copies of any speeches, the concept car materials, MVMA[3] records, and the Pontiac Buggy records." The trial court also stated that plaintiff failed to establish its claim for monetary damages.

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[2] Defendants did not prohibit plaintiff from removing "the 3D stuff that was in an unlocked cage area" of Shows and Shoots. While plaintiff believes on appeal that additional three-dimensional materials remain in the possession of defendants, plaintiff has not provided any citation to the record to support its belief. We will not search the record for factual support for plaintiff's claim. See *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

[3] Motor Vehicle Manufacturer's Association

A. Standard of Review

In a bench trial, a defendant may move for involuntary dismissal at the close of the plaintiff's proofs "on the ground that on the facts and the law the plaintiff has shown no right to relief." MCR 2.504(B)(2). In reviewing a motion for involuntary dismissal, we review the trial court's legal rulings de novo and its factual findings for clear error. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). A finding of fact is clearly erroneous when we are left with a definite and firm conviction that a mistake has been made. *Id.*

B. Specificity of Materials Sought

Plaintiff argues that the trial court erred in finding that it failed to sufficiently identify the materials that it sought. We agree.

Notably, the trial court did not set forth the law upon which it relied in determining that plaintiff had the burden of identifying each and every document or item it claimed original possession of in order to survive involuntary dismissal. More notably, it does not appear that there was ever a dispute that when defendant entered into the contract with plaintiff, there was a multitude of materials in plaintiff's possession that defendants would be utilizing in their business. This can be gleaned not only from the testimony at trial, but also from the parties' contract, as the contract required plaintiff to supply defendant with Pontiac new car brochures, Pontiac old car photos and press kits, and Pontiac historical biographical information for various model years. To supply defendants with such materials, plaintiff must necessarily first possess the materials. Given the lack of dispute over whether plaintiff originally possessed materials prior to its contract, it was unnecessary to determine which materials were originally in plaintiff's possession until the trial court first determined whether plaintiff, through its contract (or otherwise) transferred ownership of any materials in its possession to defendants. That, after all, was the primary dispute, with plaintiff asserting it was entitled to all of the materials in defendants' possession and defendants asserting ownership over the same materials by virtue of the parties' contract.

Moreover, plaintiff set forth sufficient evidence to establish that there were a multitude of specific items in the vault prior to the contract with defendants. Plaintiff's employee, Edward Lechtzin, testified that prior to defendant's involvement, he had been in the vault and personally observed pictures of the Oakland cars, other early manufacturing photos of various Pontiac models, press materials, car brochures, plaques, and trophies. John Sawruck, another of plaintiff's employees, testified that he also had been in the vault prior to defendant's involvement and saw materials related to the Pontiac Buggy Company, including a leather bound book detailing Pontiac Buggy Company's stables, horses, and maps; file drawers containing concept car information dating back to 1939; press kits and photographs (some in green, cloth-covered albums); specifications for model years, and; MVMA documents dating back to at least the 1970's or 1980's. Sawruck testified that he personally placed concept car materials dating from 1939 forward into one file. Plaintiff, then, demonstrated a general sense of the items it had prior to its contract with defendants.

That each and every item plaintiff claimed ownership interest in was not identified with specificity is not surprising given the sheer volume of items involved and the fact that prior to defendant's involvement, materials were taken to the vault by several departments in the building

and stored in a rather haphazard manner. Reginald Harris who, along with Edward Lechtzin, discussed the contract arrangement with defendants prior to the contract being signed, testified that in the year prior to defendant's contract he was in the vault once a week. Harris described the vault as cluttered, with only a modest sense of organization. Harris further testified that one of defendant's tasks was to organize the materials. Lechtzin also testified that defendants organized the materials in the vault and that defendants' office was in the vault. Given the testimony, arguably the only person able to identify with sufficient specificity the items located in the vault prior to the contract was defendant Mattison. To allow a party in such a position, and who apparently organized the materials to use his possible knowledge of specific materials and plaintiff's lack thereof as a basis for involuntary dismissal leads to an inequitable result.

Additionally, the trial court based its decision, in part, on its conclusion that items other than original photographs stamped with the corporate identity "could have been added to the collection by defendant." With respect to the press kits, the trial court indicated that while testimony established that many press kits were in the vault prior to execution of the contract, "as it is impossible to determine which press kits were in the collection prior to Defendant's involvement and which press kits were added to the collection by Defendant, the motion for involuntary dismissal is granted as to all press kits." Harris, however, testified that he would be able to identify some of the documents that were in the vault pre-contract, if he went through them one-by-one. Based upon the evidence presented by plaintiff's witnesses, then, not only were some of the items which formed the basis of the lawsuit specifically identified, it was not necessarily impossible to determine which items were in the vault prior to defendants' involvement with plaintiff. Again, defendants being in the best position to determine what items were in the vault when they first established their business, it would be unconscionable to allow these same persons/entities to hold their possible knowledge over plaintiff and use this knowledge as the basis for involuntary dismissal.

Accordingly, the trial court erred in granting defendants' motion for involuntary dismissal.

C. Damages

Plaintiff also argues that the trial court erred in granting defendants' motion with respect to plaintiff's claim of monetary damages because the testimony established that the materials were valuable. Plaintiff claimed damages for the time it was deprived of possession of the materials. However, plaintiff presented no evidence at trial to enable the trial court to ascertain the value of this deprivation. Plaintiff had the burden of proving its damages with "reasonable certainty." *Hofman v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). Damages based on speculation or conjecture are not recoverable. *Id.* The trial court did not clearly err in finding that plaintiff failed to present sufficient proof of monetary damages.

III. Plaintiff's Remaining Claims

With regard to the materials that survived the involuntary dismissal motion, the trial court found that defendants owned them because plaintiff either intended for defendants to own them (the vault materials) or plaintiff abandoned them (the microfilm). We review the trial court's findings of fact at a bench trial for clear error. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

A. Vault Materials

The trial court found that the evidence established a lack of intent by plaintiff to retain ownership of the vault materials. It found that Lechtzin, who had the apparent authority to award the vault materials to defendants pursuant to the parties' contract, gave them to defendants.

This matter involves, as its basic core, a contract. Subject to debate was whether the contract contemplated that all materials in plaintiff's possession prior to the contract and materials potentially added by defendants after execution of the contract were to belong to defendants. This Court reviews de novo issues of contract interpretation. *Archambo v Lawyers Title Ins Corp,* 466 Mich 402, 408; 646 NW2d 170 (2002).

The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). When the language of a contract is unambiguous, it is construed and enforced as written. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). A contract is ambiguous "when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). The meaning of an ambiguous contract is a question of fact that must be decided by the jury. *Id*. at 469.

Plaintiff argues that the trial court's finding that the use of the term "supplied" in the contract indicates a lack of intent by plaintiff to retain ownership of the documents is clearly erroneous because the dictionary does not equate "supply" with "give." We agree.

The trial court compared the contract at issue to a March 1991 memo authored by Lechtzin to determine the meaning of the word "supplied" as it was used in the parties' contract and to find that use of the word "supplied" in the parties' contract was indicative of plaintiff's lack of intent to retain ownership of the materials.[4] However, under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997). Parol evidence is not admissible to vary a contract that is clear and unambiguous. *Id*, 722. The first place to look, then, in determining the parties' intent is at the specific contract itself.

The contractual language governing the materials states that plaintiff is to:

6. Provide a secure area to store the microfilm information as well as the following material which will be supplied by Pontiac Public Relations Department and others:
   a. Pontiac new car brochures[.]
   b. Pontiac old car photos and press kits.

[4] The March 1991 memo referred to a project involving a Pontiac-area museum wholly unrelated to defendants or the matter at hand for which Lechtzin suggested that "we may want to donate – but retain ownership should the project go belly up – some of our vehicles."

c. Pontiac historical biographical information for various model years.

"Supply" is defined as "to make available for use; provide." The American Heritage Dictionary (2006). "Provide" is defined as "to furnish; supply" and "To make available; afford." *Id.* These definitions do not directly speak to ownership and, in plain reading, indicate that supply means to make available for use. Considering that "supply" and "provide" are, by definition, nearly interchangeable, application of the plain meaning "to make available" in the contract at issue is internally consistent.

The contract states that plaintiff is to "provide [defendants] office space and appropriate office equipment, specifically a microfilm reader, as well as access to files during normal working hours. . ." The above provision indicates that defendants are to be provided only access to files rather than ownership of file contents. Were the materials intended to be given to defendants, there would be no need for the contract to provide access to defendants during working hours—the materials would be defendants to do with as they wished.

In addition, use of the term "provide" as it relates to office space and equipment is clearly intended to indicate that the office space and equipment would be made available only for defendants' use. Indeed, defendants do not appear to assert that as they were "provided" (i.e. "supplied") with office space and equipment, they are now the rightful owners of such items pursuant to the contract.

The language of the contract being unambiguous, it is to be applied as written and serves as no basis to award defendants the vault materials. The documents that were in plaintiff's possession at the time it entered into the contract with defendants were clearly intended to remain in plaintiff's possession and under its ownership. The contract being unambiguous, it is also unnecessary to look outside the four corners of the document (i.e. extrinsic evidence) to determine the meaning of its provisions. See, *Klapp, supra*, at 469-471.

The trial court, however, considered only extrinsic evidence in rendering its decision. Specifically, the trial court found that Lechtzin's statement, "Here are the documents you can have," as testified to by defendant Mattison, reflected a transfer of ownership and that the only witness to offer truthful testimony regarding ownership of the materials was defendant Mattison. However, defendant Mattison also testified that there was no verbal or written agreement between the parties other than the 1990 contract. While we give regard to the trial court's opportunity "to judge the credibility of the witnesses who appeared before it" (MCR 2.613(C); *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998)), absent an ambiguity, the written contract is the instrument that rules in this matter. Credibility does not enter into the equation unless an ambiguity in the written contract necessitates consideration of extrinsic evidence. That is not the case here.

Moreover, when further questioned on Lechtzin's statement and asked what Lechtzin specifically told him, Mattison testified that Lechtzin specifically stated, "Here's your office and these are your materials." Interestingly, while Mattison testified that he interpreted the statement to mean he owned the materials, there is no similar testimony with respect to Mattison owning the office, though both were referred to in the same statement as "his." Given the context of the statement and the existence of a written contract, to find the statement above served as a transfer of ownership of a multitude of unspecified materials is clearly erroneous.

The trial court also stated that Reginald Harris's testimony indicated that "protection of the documents was not the goal of the agreement, thus evidencing an intent to relinquish ownership." Harris introduced Lechtzin to Mattison and participated in the contract negotiations. Harris testified that preservation was not "the primary goal" of the contract. Although he did state that plaintiff did not have a formal retention policy, Harris did not testify that preservation was or was not "a" goal of the parties' contract. Harris's testimony, then, was not particularly helpful in determining the specific question of ownership and, again, given the specific contractual language (as drafted by defendant), Harris's testimony was not necessary for resolution of this matter.

Were the consideration of extrinsic evidence necessary to determine the parties' contractual intent, it would seem that the most indicative testimony would be that ownership of the documents was never discussed prior to or at the contract's execution, as unequivocally testified to by both parties. A transfer of ownership having admittedly never been discussed, it is difficult to see how such a transfer could be an element of the parties' contract. According to both parties, ownership only became an issue and thus subject to debate when plaintiff informed defendants of its intent to move all of the materials to the Heritage Center and the future of defendants' business at the center was discussed. Based upon all of the above, plaintiff established its claim and delivery and conversion causes of action concerning the vault materials.

Finally, we cannot forget that circuit courts are courts of equity. Const. 1963, art. 6, § 13; *City of Marshall v Consumers Power Co*, 206 Mich App 666, 680; 523 NW2d 483 (1994). The vault appears to have contained, prior to defendants' involvement, many original and unique items (records from the Pontiac Buggy Company, original photographs, copies of speeches, etc.) concerning a company that has significant involvement in the history of the automotive industry. Plaintiff elected to keep these items, albeit in a disorganized, careless manner for many, many years. Had these items no present or future value whatsoever to plaintiff, it would doubtless have simply disposed of them, as they admittedly did with other items. To find that plaintiff relinquished ownership of these items is inconsistent with the specific contractual language and leads to a completely inequitable result under these unique circumstances.

It being determined that plaintiff retained ownership of the materials in the vault, we reverse the trial court's award of such materials to defendants. The trial court having found Mattison to be the only credible witness, the items that Mattison testified were in the vault upon his arrival (file books of photos, some press kits, some production information, some color trim guides, and information concerning cars from the 1930's and 1940's, among other things) and those items he may be able to otherwise identify as having been present when the parties' contract began (or that the parties can agree were present) shall be awarded to plaintiff.[5]

C. Microfilm

Lastly, plaintiff argues that the trial court erred in finding that it abandoned the microfilm. To establish abandonment of property, there must have been an intent to relinquish

[5] Both parties acknowledge that Mattison added a variety of items to the already existing materials throughout the years.

the property and there must have been external acts that put that intention into effect. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 717-718; 583 NW2d 232 (1998). Melvin Webb, a former employee of plaintiff, testified that the microfilm was set out to be discarded. Mattison testified that he actually saw some of the microfilm in the dumpster. Webb also testified that if material was to be discarded, it meant that plaintiff did not want the material anymore. In light of this testimony, the trial court did not clearly err in finding that plaintiff abandoned the microfilm.

Reversed in part and remanded to the trial court to take additional testimony as to what items, if any, in addition to those already identified by Mattison, were located in the vault prior to the parties' contract and for any other necessary proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey