

STATE OF MICHIGAN
COURT OF APPEALS

COLLEEN H. KNOX, a/k/a COLLEEN
HOEKSTRA KNOX,

UNPUBLISHED
March 18, 2014

Plaintiff/Counter-Defendant-
Appellee,

v

JULIA BRISKIN, WILLIE TYNAN, and MARA
UNDERWOOD-BRISKIN, a/k/a MARA Z.
UNDERWOOD,

No. 315003
Calhoun Circuit Court
LC No. 2011-000975-CZ

Defendants/Counter-Plaintiffs-
Appellants.

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment entered in favor of plaintiff after the trial court directed a verdict in favor of plaintiff in this action arising from the breach of a land contract for the sale of commercial property. The trial court also directed a verdict in favor of plaintiff on defendants' counter-claim for breach of fiduciary duty, fraud/misrepresentation, innocent misrepresentation, silent misrepresentation, unjust enrichment, and rescission of contract. We affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff Colleen Knox owned a horse farm in Battle Creek that she used primarily to teach others how to ride horses. She also used the property to board horses and breed and sell horses. After operating the farm for approximately two years, plaintiff left the United States to reside in England with her husband. While she and her husband decided whether they would reside in England or the United States, she leased the property for approximately eight months to another person who used the property for the same business purposes. Sometime in 2007 plaintiff decided to sell the property. A real estate agent performed a comparable market

analysis and determined the value of the property to be between \$400,000 and \$450,000, and possibly more if plaintiff would be willing to wait for the right offer.

In August 2008 defendant Tynan's agent/sponsor¹ contacted plaintiff and extended an offer on behalf of Tynan and his fiancé, defendant Julia Briskin, to purchase the property for \$360,000. Defendants intended to use the property primarily to breed and sell horses on commission and for defendant Tynan's jumping activities. On August 30, 2008, plaintiff and defendants executed a sales agreement in which defendants agreed to purchase plaintiff's property in Battle Creek for \$360,000 cash to be paid at closing contingent upon defendants' ability to obtain lender financing. Defendants were unable to obtain lender financing because the property had no residence on it and because Tynan lacked United States citizenship. Briskin, upon the advice of Tynan's agent, suggested to plaintiff that the parties finance the sale pursuant to a land contract. The land contract executed by the parties on September 29, 2008, provided for a sale price of \$360,000 with defendants to pay \$30,000 down with the remaining \$330,000 balance accruing interest at a rate of six percent per annum for which defendants would make 24 equal monthly payments of \$2,000 and a final balloon payment of the remaining outstanding balance on December 10, 2010. Plaintiff agreed to the terms of the land contract after Briskin's mother, defendant Mara Underwood-Briskin,² signed a personal guaranty for "prompt and complete payment of all amounts due under this Land Contract." Defendants intended to pay the monthly amounts due under the land contract from income generated from the business, and hoped to be able to obtain lender financing for the balloon payment after establishing a two-year stream of income from their business.

Defendants performed all of their monthly obligations under the land contract, but were unable to obtain lender financing to make the balloon payment in December 2010. Defendants, who were in Florida at that time for competitions, engaged in e-mail communications with plaintiff in an attempt to have her accept a lower purchase price for the property.³ The negotiations failed, and in March 2011 plaintiff filed the present suit for breach of contract. Plaintiff assumed at that time that defendants intended to return to the property in April after the winter competitions in Florida. However, defendants' relationship ended and they never returned to the property after December 2010.

In the fall of 2011, a neighboring property owner contacted plaintiff and offered to purchase the property for \$175,000 cash. After consulting with her attorney and learning that she could sell the property to mitigate her damages,⁴ plaintiff attempted but failed to negotiate a

¹ Defendant Tynan is a high level horse "jumper" who competes in equestrian events at horse shows.

² Defendant Underwood-Briskin is an anesthesiologist in Pennsylvania.

³ Defendants contended that they had obtained an appraisal from Independent Bank indicating that the property was worth "\$290,000 at best" at that time.

⁴ In their answer to plaintiff's complaint, defendants raised the affirmative defense of failure to mitigate damages.

higher price. After advising defendants of the offer and receiving no objection to the sale of the property, plaintiff accepted the offer. According to her calculations, the remaining balloon payment was \$314,069.16. She offset this amount by the \$175,000 that she received when she sold the property. She then added contractual 6% interest and 5% penalty fees from January 2012 to September 2012 to arrive at a total damages calculation of \$178,093.89.

Briskin testified at trial that the purchase of the property seemed “like a good business venture.” She knew that plaintiff had been operating a successful farm, and it seemed reasonable to her that she could make a living running her own business. Plaintiff provided generalized information regarding her own business, and defendant never asked for any records from plaintiff regarding her business. Plaintiff provided a “business plan” to Briskin that outlined the vendors she used to purchase supplies, the prices she paid for supplies, and the rates she charged for varying services. Briskin acknowledged that plaintiff was honest with the information she provided in the business plan. She also acknowledged that beginning in 2009 there was a “remarkable decline in the equestrian business,” and that it was “not a huge shock that a bank would not finance a 19-year old and a guy from another country in an economy starting to crash.” She testified that:

We were exhausting every possible way in order to obtain that sum, even in light of having an appraisal that dictate that the land was no longer worth anywhere close to what we owed on it, even in light of that pack, we still tried to obtain the sum that was owed to her in completion, but when it became clear that that was just not going to happen, that wasn't a possibility, that's when we began asking for concession for her to lower the amount of principal owed, for us to work out some sort of deal that extended the time beyond two years and three months, which is an extremely short period of time to be able to pay \$360,000 and obviously my age does not absolve me from entering into an agreement, and being ignorant and young and stupid doesn't make it okay that this happened. It's irrelevant because I still did everything within my power to fulfill that contract, to pay the entire sum.

* * *

Like I said before, we made every attempt to get the financing to pay off the full amount but reasonably, in the real world, when you look at a property and you are told that it's unequivocally not worth this amount, and that this is the reality that homes are no longer – that people are being evicted, homes are being foreclosed on, people are like – our entire country is basically crumbling, that was the state of things, so yes, I think that in light of that, people who are in a position to make concessions, who have a lot of money, should, and I did everything in my power, everything that I could possibly do to offer what I could towards this contract to fulfill my part of it.

When asked whether she wanted plaintiff to accept less than the contract price that she was entitled to because defendants could not get financing, Briskin replied:

It's fair to say that, yes, we desired that she would accept less money than stated in the contract in light of the new circumstances which included not being able to get financing after approaching numerous banks after exhausting every possible thing that we could think of.

Following the close of proofs, the trial court granted a directed verdict in favor of plaintiff on defendants' counterclaim. The court stated:

I've heard the testimony of the witnesses, and there are just two witnesses here, and I recognize that on the counter-claims, again I'm looking at this testimony in the light most favorable to the non-moving party. The fact of the matter is after listening to the testimony of the Defendant, Julia Briskin, in particular is – I am not convinced that there's any evidence to support a claim of fraud, whether it's fraudulent by false representation, innocent misrepresentation, or silent fraud, her testimony as a matter of fact, could support a finding just to the contrary, that the Plaintiff did share information regarding the expenses involved, what the hay costs, and bedding costs, and that sort of thing, boarding fees, the general fees, and her experiences on that end in terms of general costs and expenses and revenue for boarding and breeding her horses. The testimony of the Defendant, however, is that those statements weren't relied upon and resulted in the ultimate breach of the contract here and the failure to pay the rent as required under the terms of the contract. Her own testimony, the defense testimony, is that what happened was, after the sale back in 2008, there was a reduced demand for horse breeding and horse boarding that was not foreseeable by anyone, and that was the problem. I'm almost quoting the Defendant's testimony on that score. That does not provide a basis for any fraudulent misrepresentation claim, silent misrepresentation, or innocent misrepresentation claim.

The economy tanked is that the testimony is, and that's what's caused the Defendants to ultimately fail to live up to the terms of the agreement, and ultimately to make the balloon payment as required under the terms of the agreement almost two years later.

As far as the breach of fiduciary duty claim, there is no testimony, there is no evidence in this record that one could conclude that there was some type of a special relationship between these parties that would create a fiduciary duty between the parties here. These were adults, young adults, yes, but adults who entered into an arm's length transaction that both parties had the opportunity to consult with and in fact did consult with attorneys during the course of their negotiations and prior to the entry of the land contract, so again there is no evidence to support a breach of fiduciary duty plan. These other claims, the rescission claims based on the fraudulent misrepresentation between the – allegedly made by the Plaintiff to the Defendant, the rescission claim, there are no facts in my view, even looking in light most favorable to the Counter-Plaintiff in this case to justify it, nor is there evidence to support the unjust enrichment claim from what's been presented.

The trial court also granted plaintiff's motion for directed verdict of plaintiff's complaint:

I've already found that there's no evidence to suggest anything other than the fact that it was arm's length transaction between these parties, entered into this contract. There's no dispute that the Defendants breached the terms of the contract. There's no question about that. It happened. As I said before, it might have been because the economy tanking between '08 and December of 2010, but it is what it is. The breach occurred and that's not really in dispute. The burden is on the Defendant here to show that the Plaintiff failed to mitigate damages. I'll say again like I already have said before at a motion hearing a month ago before the trial that the burden was on the Defendant. If they are going to assert that this ultimate sale of this property of \$175,000 was too low, or unreasonable, or could have been more or should have been more than what it was, the burden was on and always has been on the Defendant to provide evidence here at trial to support their claim that that was an unreasonable amount to sell the property [for]. As I have said before, there's no question about it that in order to do that it would take the testimony of an expert to come in here to provide expert testimony to the value of the property at that point in time, and if there was testimony to that effect, and said it was really worth 290 or \$300,000 and they sold it for 175, then there is a material issue of dispute for the jurors to make a determination.

The evidence that's before the jury, and in particular Exhibit 7 doesn't support, cannot support a finding by a juror that there was in fact an appraisal and that the appraised value was whatever it was \$270,000, \$290,000. There's no way the opposing party can cross-examine an e-mail obtained from the Defendant to the Plaintiff where she says that we obtained an appraisal and it was for "x" amount of dollars. There's a reason why the contents of this e-mail cannot be used as substantive evidence to support the Defendants' claims here that the Plaintiff failed to mitigate her damages. Without that evidence, that claim and that defense fails as well. . . . I will grant the directed verdict as to the Plaintiff's claim for damages in this case based on the evidence that was presented through the testimony of the plaintiff since there is no evidence upon which a trier of fact could rely to conclude that that number – that amount of damages based upon the language of the contract, should have been mitigated – could have been mitigated by the Plaintiff. . . . The judgment will enter for the damages as testified to by the Plaintiff during the course of her direct examination here today.

I

Defendants first argue that plaintiff's cause of action for breach of contract is barred because plaintiff chose the remedy of "self-help repossession forfeiture." We disagree.

Plaintiff had an election of remedies upon default under the land contract. Paragraph 16 of the land contract set forth plaintiff's options in the event of default. It stated that upon default,

The vendor may: (a) bring an action at law against the purchaser for the balance of the agreed purchase price, or for any and all past due sums due and owing on

said land contract; (b) foreclose this contract by action in the circuit court; (c) terminate or forfeit this land contract by summary proceedings in the district court in the manner and with the remedies and effect now provided by Act 120, Michigan Public Acts, 1972 (MCL 600.5701 et seq) or any future amendment thereto.

Plaintiff chose option (a) of the land contract and brought the present action for breach of contract.

The election of remedies doctrine provides that one is precluded from pursuing two inconsistent remedies that are available to him. *Riverview Co-op, Inc v First Nat'l Bank & Trust Co of Michigan*, 417 Mich 307, 311-312; 443 NW2d 451 (1983). Thus, this doctrine prevents a party from being awarded a double recovery. *Id.* In land contract jurisprudence, an election of remedies may occur when the vendor is able to peacefully recover the possession of the land when the land is vacant. *Rothenberg v Follman*, 19 Mich App 383, 388; 172 NW2d 845 (1969).

Our review of the record convinces us that plaintiff's action in selling the property was not an election of the remedy of forfeiture via a self-help repossession as defendants suggest. Foremost, plaintiff never sent a notice of forfeiture to defendants. Without this notice, no forfeiture via a self-help repossession can be found. *Rothenberg, supra* at 388. Further, defendants had asserted a defense claiming that plaintiff failed to mitigate damages. The general rule relative to mitigation of damages is well-stated in *Rich v Daily Creamery Co*, 296 Mich 270, 282; 296 NW 253 (1941):

There is no question but that it is a well-established rule that in case of a breach of contract the injured party must make every reasonable effort to minimize the damages suffered and that it would be the duty of the court upon request so to charge the jury.

There is no dispute that defendants never returned to the property after December 2010. Because defendants had already vacated and abandoned the property,⁵ plaintiff mitigated her damages by selling the property in December 2011 after informing defendants of the offer to purchase, thereby reducing the amount owed by defendants under the land contract. Plaintiff did not obtain a double recovery. Rather, plaintiff obtained the amount due and owing on the contract at the time of the default pursuant to the terms of the contract. The trial court did not err when it concluded that plaintiff's selling of the property did not amount to self-help repossession that

⁵ "Abandonment by the purchaser is shown . . . where he positively . . . and absolutely refuses to perform the conditions of the contract, such as a failure to make payments due, accompanied by other circumstances, . . . or where by his conduct he clearly shows an intention to abandon the contract. . . ." *Collins v Collins*, 348 Mich 320, 327; 83 NW2d 213 (1957), quoting *Dundas v Foster*, 281 Mich 117; 214 NW 731 (1937). Defendants' acts and conduct are so decisive and unambiguous as to justify such a finding as a matter of law. Although here is a dispute regarding when plaintiff learned that defendants had vacated and abandoned the property, such a dispute is not relevant to this particular issue.

constituted an election of remedy that barred plaintiff's breach of contract action for the deficiency.

II

Defendants argue that the trial court erred by directing a verdict in favor of plaintiff with regard to plaintiff's breach of contract claim because plaintiff failed to meet her burden of establishing the market value of the property at the time of defendants' default. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). When reviewing such a decision, "this Court views the evidence and all legitimate inferences drawn from the evidence in the light most favorable to the nonmoving party." *Id.*

There is no dispute that the parties had a contract and that defendants breached the contract. The only disputed element of plaintiff's cause of action was damages. "In an action for breach of a contract to purchase real property, the plaintiff may recover general damages placing the plaintiff in the same position or condition he or she would have been in had the contract been duly performed." 34 Causes of Action 2d 431, § 28. Contrary to defendants' assertion, this case does not involve a breach of contract for the sale of real property where the proper measure of damages is the difference between the contract price and the market price of the land on the date of the breach. See, e.g., *MacRitchie v Plumb*, 70 Mich App 242, 245-247; 245 NW2d 582 (1976).⁶ This case involves a default on an existing land contract and the proper measure of damages to place plaintiff in the same position or condition she would have been in had the contract been duly performed is the amount due and owing under the terms of the land contract.

⁶ In *MacRitchie*, 70 Mich App 242, the plaintiff brought an action against the defendants alleging that defendants had breached an agreement of sale for the purchase of real property from the plaintiff's decedent. On May 9, 1973, the defendants had executed an offer to purchase the plaintiff's decedent's residence and the plaintiff's decedent had accepted the offer on May 13, 1973. The agreement showed that defendants made a deposit of \$100 and that they were to pay an additional \$4,900 as a down payment on a land contract with interest at 7% per annum. The agreement further provided that the sale was to be closed within 30 days after all documents were ready and that the change in occupancy would be given to the vendee immediately after closing. A land contract was prepared and signed by the defendants on May 15, 1973. On June 8, 1973, the defendants informed the real estate broker that they did not intend to proceed with the purchase of the home. The plaintiff brought an action against the defendants for breach of the agreement of sale for the purchase of real property. This Court held that under those circumstances, the measure of damages is the difference between the contract price and the market value of the land, with the loss measured by the market price value as of the breach date, not by the price obtained on resale at a later date. *Id.* at 246-247.

III

Defendants argue that the trial court erred by directing a verdict in favor of plaintiff because defendants failed to meet their burden to show, by appropriate evidence, that plaintiff had failed to reasonably mitigate her damages resulting from defendants' breach of contract. We disagree.

The trial court had entered an order in response to plaintiff's motion in limine requiring defendants to present expert testimony to establish the value of the property at the pertinent times to support defendants' position that the property could have been sold at some point between December 2010 and December 2011 for a price higher than what it sold for in December 2011. Despite this order, defendants presented absolutely no testimony and no documentary evidence regarding the value of the property. The defendant has the burden to prove that the plaintiff failed to take reasonable steps to mitigate his or her damages. *M & V Barocas v THC, Inc*, 216 Mich App 447, 449-450; 549 NW2d 86 (1996). The defendant must plead failure to mitigate and support its claims with proofs at trial. *Lawrence v Will Darreh & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994). Although defendants disclosed witnesses that they might have called at trial for the purpose of establishing the value of the property, defendants did not call those witnesses at trial or depose them before trial. Defendants' mere assertion in an e-mail to plaintiff that an unknown appraiser had appraised the property at approximately \$290,000 did not amount to substantive evidence of the value of the property.

IV

Defendants argue that the trial court awarded excessive damages to plaintiff. We disagree. The amount due and owing under the land contract as of the date of default was \$314,069.16. After giving defendants credit for the \$175,000 received by plaintiff from the sale of the property in mitigation of damages, the amount due at the time of trial, including interest and penalties, was \$178,093.89. The trial court properly entered a judgment in favor of plaintiff in this amount.

V

Defendants maintain that defendant Briskin-Underwood's guaranty was not supported by adequate consideration and, therefore, the guaranty was not enforceable. We disagree.

Resolution of this issue requires this Court to interpret the contractual provisions at issue. Although a guaranty contract "is a special kind of contract," *Bandit Industries, Inc, v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001), general rules of contract construction apply in interpreting guaranty contracts, *First Nat'l Bank of Ypsilanti v Redford Chevrolet Co*, 270 Mich 116, 121; 258 NW 221 (1935). The primary goal of contract interpretation is to honor the intent of the parties. *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). If the contract language is clear and unambiguous, then its meaning is a question of law for the court to decide. *Id.*

In this case, there is no question that Briskin-Underwood individually signed a personal guaranty guaranteeing "the Purchaser's prompt and complete payment of all amounts due under

this Land Contract.” The guaranty provides in relevant part that “The undersigned acknowledges that Vendor would not enter into this Land Contract without this Guaranty, and the undersigned acknowledges her love and affection for Julia Briskin are adequate consideration for this Guaranty.”

The question presented is whether legal consideration was given for the guaranty. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Consideration is a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. See, e.g., *Dep’t of Natural Resources v Bd of Trustees of Westminster Church of Detroit*, 114 Mich App 99, 104; 318 NW2d 830 (1982).

Defendant Briskin-Underwood asserted in her motion for summary disposition under MCR 2.116(C)(8) that there “was no consideration to her that she gave or she received on this guarantee.” The trial court denied the motion:

To me, the very language here suggests that the consideration here in fact is more than love and affection for Julia. The other consideration here is that the guarantor is willing to enter into this guarantee arrangement because by not doing so the vendor wouldn’t sell to her daughter to begin with. . . . So I think the language of this guarantee in-and-of itself is adequate and therefore I believe the motion should be denied.

Here, the guaranty was offered as inducement to sell the property to Briskin-Underwood’s daughter and her fiancé on a land contract. The land contract was executed one day after the personal guaranty was executed. Because plaintiff was under no preexisting duty to sell the property to defendants without the guaranty of Briskin-Underwood, Briskin-Underwood’s guaranty is supported by adequate consideration and is therefore binding. The trial court properly denied Briskin-Underwood’s motion for summary disposition.

Affirmed.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck