

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLES STATE BANK, successor in interest to
MADISON NATIONAL BANK,

UNPUBLISHED
August 2, 2002

Plaintiff/Counterdefendant-
Appellee/Cross-Appellant,

V

No. 227121
Oakland Circuit Court
LC No. 99-017405-CZ

CARL G. BECKER and CARL G. BECKER &
ASSOCIATES, P.C.,

Defendants/Counterplaintiffs,

and

KALLABAT ENTERPRISES, INC., a/k/a
KALLABAT ENTERPRISES, INC. OF
MICHIGAN, and MAJID J. KALLABAT,

Defendants/Counterplaintiffs-
Appellants/Cross-Appellees.

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendants/counterplaintiffs Kallabat Enterprises, Inc., a/k/a/ Kallabat Enterprises Inc. of Michigan, and Majid J. Kallabat (hereafter collectively referred to as “Kallabat”) appeal as of right from the Oakland Circuit Court’s grant of summary disposition to plaintiff/counterdefendant Peoples State Bank (“plaintiff”) on its so-called interpleader complaint and on Kallabat’s counterclaim for breach of contract and conversion. Kallabat also appeals the trial court’s denial of Kallabat’s Motion for a New Trial or to Amend Order of January 3, 2000. Plaintiff cross appeals the trial court’s denial of interpleader attorneys fees and costs. We affirm.

I. Facts and Proceedings

This suit involves the interpretation of a settlement agreement entered into by the Kallabat defendants, their attorney, Carl G. Becker, his firm, Carl G. Becker & Associates, P.C., (hereafter collectively referred to as “Becker”), and plaintiff’s predecessor, Madison National

Bank. In 1995, Madison National Bank sued Majid Kallabat and Amerifirst Services, Inc.,¹ who defaulted on loans extended by the bank. Judgment was entered in Madison National Bank's favor on November 8, 1995. As security for repayment of the loans, Majid Kallabat and Amerifirst Services, Inc., had granted Madison National Bank a security interest in two liquor licenses they held, and plaintiff succeeded to this interest.² As a result of the default, plaintiff began proceedings to foreclose on the liquor licenses.

Despite the security interest that had been granted on the loans, plaintiff had difficulty in its collection efforts. Although the exact sequence of events is not clear from the record, the settlement agreement reflects that the liquor licenses had been transferred to Kallabat Enterprises, Inc., and that Becker had filed a UCC financing statement claiming a security interest in the licenses (for unpaid legal fees) prior to the judgment being entered in favor of Madison National Bank. In order to avoid litigation related to the licenses, the parties entered into the subject settlement agreement.

By virtue of the settlement agreement, Becker assigned all rights to the licenses to the bank and agreed to amend the financing statement to reflect the assignment. Additionally, Kallabat transferred ownership of the licenses to the bank. Specifically at issue here are the terms of the agreement relating to plaintiff's sale of the licenses. The parties agreed that the bank would attempt to sell the licenses and that the proceeds from the sale would be divided among the parties, each receiving a particular percentage of the sale proceeds. Paragraph 7 of the agreement stated that within the first six months after execution of the contract, the bank would not sell the licenses for less than \$100,000 without the written consent of all parties to the agreement.

After six months expired, however, the bank did not face the same restrictions under the agreement. As stated in paragraph 8,

KALLABAT, BECKER, and BANK further agree that if no qualified offers are received within six (6) months of the date first above written, BANK and BECKER may accept any purchase offer for the LICENSES that BANK, in its sole discretion, deems reasonable. Upon sale of the LICENSES, BANK will distribute the net proceeds pursuant to the terms of this agreement.

Eventually, more than six months after the execution of the agreement, the bank sold one of the licenses for \$50,000. The bank completed the sale without notifying either Kallabat or Becker of the terms of the sale. In correspondence to plaintiff, Becker and Kallabat claimed that \$50,000 was significantly less than what the license was worth and rejected the distribution terms proposed by the bank, including payment of the bank's fees and costs from the gross sale proceeds. They also argued that pursuant to paragraph 8 of the settlement agreement, quoted

¹ Amerifirst Services, Inc., is not a party to this suit and its precise role in the events underlying this suit is not clear from the record.

² While the record does not specify how plaintiff succeeded to this interest, one motion in the lower court referred to "Madison National Bank, now known as Peoples State Bank." In any event, plaintiff's standing in this action has not been disputed.

above, the bank could not accept the \$50,000 offer without Becker's consent. Becker made a counter proposal to the bank and indicated that unless it was accepted, suit would be filed against the bank.

Just prior to the deadline imposed by Becker, plaintiff filed the instant action and deposited the sale proceeds with the court. It titled its complaint as an interpleader action and requested a declaratory judgment regarding its ability to accept the \$50,000 offer for the license without Becker's approval and its right to payment of its expenses from the sale proceeds. Plaintiff also requested an injunction barring suits by defendants and an order "discharging Plaintiff Bank from any further liability with respect to these Defendants, the Settlement Agreement or the proceeds thereof." Plaintiff contemporaneously filed a motion for an order to show cause why the court should not grant the relief it requested.

Defendants filed a counter-complaint alleging that plaintiff had breached the contract by failing to get Becker's approval prior to the sale of the license and requested damages for plaintiff's failure to sell the license for fair market value. In Count II of their counter-claim, defendants alleged that plaintiff's failure to unconditionally tender the sale proceeds amounted to statutory conversion.

The trial court heard oral arguments on the order to show cause on October 13, 1999 and took the matter under advisement. Subsequently, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) on its claims as well as the claims raised in the counter-complaint. The court took this matter under advisement, as well, and later issued a written opinion granting plaintiff's motion in part. Reviewing the motion pursuant to MCR 2.116(C)(10), the court found that the contract did not permit defendants to control the terms of the sale, even after the expiration of the initial six month period, and that the agreement did not require Becker's consent to the ultimate sale of the license, particularly "in light of the language authorizing 'BANK, in its sole discretion' to accept any purchase offer for the liquor licenses."

Based on its interpretation of the settlement agreement, the court further found that defendant's conversion counter-claim failed and that plaintiff properly deposited the funds in trust pending the resolution of the dispute as to the parties' rights to the proceeds. The court denied the portion of plaintiff's motion, however, requesting fees and costs. The court decided that because the settlement agreement did not include a provision indicating that attorneys fees and costs would be deducted from the gross sale proceeds, plaintiff was not entitled to make this deduction before distributing the proceeds of the sale according to the formula provided in the agreement. Defendants filed a Motion for a New Trial or to Amend Order of January 3, 2000, claiming that the trial court judge lacked jurisdiction to enter the January 3, 2000, order because the case had been assigned to another judge for docket management reasons.³ Plaintiff, in response to defendants' motion, filed a motion claiming that it was entitled to interpleader attorney fees due to its preservation of a common fund. The court granted defendant's motion to alter some of the prior order's provisions, but disagreed with defendant's assessment of the trial court's jurisdiction. The court also denied plaintiff's motion.

³ The title to this motion is somewhat curious, given that a trial was not conducted in this matter.

Kallabat appeals the trial court's grant of summary disposition to plaintiff and its denial of its motion to set aside the January 3, 2000 order. Plaintiff cross-appeals the denial of its request for interpleader attorney fees. The Becker defendants are not parties to this appeal. Upon review of the issues presented, we affirm the trial court's ruling.

II. Standard of Review

We review a trial court's decision on a motion for summary disposition de novo. *Nowell v Titan Ins Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 119013, decided 7/9/02), slip op at 3. Likewise, we review questions of contract interpretation de novo. *Old Kent Bank v Sobczak*, 243 Mich App 57, 61; 620 NW2d 663 (2000). When a motion for summary disposition involves the interpretation of a contract and the material facts are undisputed, summary disposition is appropriate if reasonable minds cannot differ regarding the application of an unambiguous word or phrase. *Old Kent Bank, supra* at 63-64 (citing *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999)).

"A trial court's decision to award attorney fees is reviewed for an abuse of discretion." *Terra Energy, Ltd v Michigan*, 241 Mich App 393, 402-403; 616 NW2d 691 (2000).

III. Analysis

A. Interpretation of the Settlement Agreement

The primary dispute in this action involves how the settlement agreement should be interpreted. A settlement agreement is a contract and is interpreted according to the rules for interpreting contracts. *Mikonczyk v Detroit Newspapers*, 238 Mich App 347, 348; 605 NW2d 360 (1999). "The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Old Kent Bank, supra* at 63. "To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Id.*

Here, the parties do not dispute the material facts, but dispute how the language of the contract applies.⁴ Kallabat asserts that the language of paragraph 8 is ambiguous because the clauses in paragraph 8 are inconsistent.⁵ Kallabat argues that the agreement requires the joint

⁴ Although plaintiff claims that Kallabat admitted that there were no genuine issues of material fact in the proceedings below, our reading of Kallabat's submissions is that while there was no material dispute about what paragraph 8 said, the interpretation of paragraph 8 was always in dispute. Thus, Kallabat has not harbored an "appellate parachute" by claiming that the trial court improperly granted summary disposition.

⁵ Plaintiff further argues that Kallabat is precluded from asserting this argument because the language permitting Becker's approval of any sale made no provision for Kallabat's approval. Plaintiff contends that since Becker is not a party to the appeal, Kallabat has no standing to raise the issue of a violation of Becker's rights. However, Kallabat was a party to the contract and has standing to sue for its breach. Moreover, at the time the contract was executed, Becker was Kallabat's representative. Therefore, we find that plaintiff's standing arguments lack merit.

acceptance of “BANK and BECKER,” but that this requirement is inconsistent with the provision giving the bank the sole discretion to determine the reasonableness of each offer. Plaintiff claims, however, that paragraph 8 merely requires notice to Becker, not his consent, and that although the contract may be confusing, it is not ambiguous.

“A contract is ambiguous if its provisions may reasonably be understood in different ways.” *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). If the contract is ambiguous, this Court may construe the contract in order to determine the parties’ intent. *Old Kent Bank, supra* at 63. “However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation,” the contract is not ambiguous. *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1999).

Based on our reading of the agreement as a whole, we find that the contract is not ambiguous because it can be understood *reasonably* in only one way. Ultimately, we disagree with the readings suggested by all of the parties. Contrary to plaintiff’s argument, paragraph 8 does not by its terms require notice to Becker. The word “notice” is not found in paragraph 8, and the language used does not otherwise suggest notice to Becker. Rather, the bank, once it determined that the offer was reasonable and accepted it, was merely required to “distribute the net proceeds pursuant to the terms of th[e] agreement.” Accordingly, we find that plaintiff has not suggested a reasonable interpretation of the contract.

Likewise, we disagree with Kallabat’s argument. Although Kallabat’s suggested reading of the contract does create an inconsistency because it is nonsensical to give the bank sole discretion regarding the reasonableness of the offer yet require Becker’s consent to the purchase, a reasonable reading of the contract does exist. “In interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction.” *Schroeder v Terra Energy*, 223 Mich App 176, 188; 565 NW2d 887 (1997).

We find that the operative phrase, “BANK and BECKER may accept any purchase offer . . . that the BANK, in its sole discretion, deems reasonable,” creates an agency relationship between Becker and the Bank. The fact that the bank had sole discretion to determine the reasonableness of any offer supports this conclusion, as does the fact that Becker had no security or ownership interest in the licenses once the agreement had been executed. “An agency relationship may arise where there is a manifestation by the principal that the agent may act on the principal’s behalf.” *Stokes v Millen Roofing Co*, 245 Mich App 44, 60-61; 627 NW2d 16 (2001), rev’d on other grounds ___ Mich ___; ___ NW2d ___ (Docket No. 119074, decided 7/23/02). Here, the party with the ultimate decision-making ability, the bank, gave another party, Becker, the authority to act on its behalf by accepting an offer. An offer could not be accepted, however, without the bank’s approval. Thus, in order for Becker to accept an offer, he would first have to notify the bank of the offer and obtain its approval.

Contrary to Kallabat’s claims, the phrase “BANK and BECKER” does not require joint acceptance. The use of the word “and” does not mean that *both must* accept, but indicates that

the bank, as well as Becker, may accept an offer that the bank deems reasonable.⁶ We find that the agency relationship aptly describes the effect of the language used and approved of by the parties, and is the only reasonable interpretation of the contract language. Accordingly, the contract is not ambiguous, and the trial court did not err in granting plaintiff's motion for summary disposition on defendants' breach of contract claim.

In light of our resolution of this issue, we need not address the import of what appeared to be dicta when the trial court made a passing reference to whether paragraph 9 of the settlement agreement barred plaintiff's claim.

B. Count II of the Counter-Claim

Kallabat also appeals the trial court's grant of summary disposition to plaintiff on Count II of the counter-claim, which asserted that plaintiff's refusal to tender certain proceeds to Kallabat after written demand constituted a conversion. Kallabat relies on MCL 600.2919a, which states:

A person damaged as a result of another person's buying, receiving or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of the stolen, embezzled or converted property knew that the property was stolen, embezzled or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

We reject this claim as well. In *Head v Phillips Camper Sales*, 234 Mich App 94; 593 NW2d 595 (1999), this Court said that "[t]he tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" Kallabat has not shown either that plaintiff "wrongfully exerted" domain over the proceeds, or that plaintiff acted in denial of or inconsistent with Kallabat's rights.

Plaintiff and Kallabat had a dispute about distribution of the proceeds, and plaintiff deposited the funds with the court until the court resolved the dispute. This action hardly constitutes a conversion. Consequently, the trial court did not err in granting summary disposition in favor of plaintiff on this count of the counterclaim.

C. Jurisdiction of the Trial Court

Kallabat also asserts that the trial court judge lacked jurisdiction to rule on the summary disposition motions because the case had been reassigned to another judge for case management reasons during the interval between argument of the case and entry of the court's order. We disagree. MCL 600.605 confers jurisdiction upon courts, not individual judges. Kallabat does not argue that the court lost jurisdiction, which would be the pertinent inquiry. Moreover, Kallabat provides no support for its argument that once a case has been reassigned, the original

⁶ The first listed definition of "and" in Random House Webster's College Dictionary (1995) is "with, as well as, in addition to."

judge loses the authority to rule on pending motions. Accordingly, the trial court did not err in failing to grant defendants' motion to set aside the January 3, 2000, order.

D. Award of Interpleader Attorney Fees

In its cross-appeal, plaintiff asserts that the trial court should have awarded it attorney fees and costs for its so-called interpleader action. We disagree. As stated above, our review is for abuse of discretion. *Terra Energy, supra*, at 402-403.

Generally, attorney fees are not awarded unless a statute or court rule expressly provides that they be granted. *Terra Energy, supra* at 397. There are, however, common law exceptions to this general rule, including the exception for attorney fees in interpleader actions. *Id.* at 399. Although plaintiff's complaint was styled as an interpleader action, this was not a true interpleader case, which is generally brought where a party might otherwise be subject to multiple liability. MCR 3.603. Plaintiff argues that it might have faced multiple liability, referring to Amerifirst and Basil Kallabat, but the facts do not support this argument. The record is clear that plaintiff's decision to place the money in trust resulted from its dispute with defendants, not from a fear that it was liable to either Amerifirst or Basil Kallabat. Accordingly, the trial court did not err by failing to award attorney fees to an "interpleader" plaintiff.

Plaintiff also incorrectly argues that the sale proceeds constituted a "common-fund," thereby meriting an award of attorneys fees. "The common-fund exception provides for an award of attorney fees to a party that, alone, has borne the expenses of litigation that created or protected a common fund for the benefit of others as well as itself." *Terra Energy, supra* at 401. This exception, which usually applies to class action cases, exists to spread out the costs that a "prevailing party" incurs in obtaining funds for its own benefit as well as the benefit of others. *Id.* at 402. The present case does not parallel a class action in that respect. Plaintiff merely sold property and, by contract, was required to distribute the proceeds according to an agreed upon formula. The proceeds were not deposited with the court to determine the true owner, see *id.* at 402, but to secure them while the court determined the exact amount to which each party was entitled. Consequently, the trial court did not abuse its discretion in failing to award attorney fees under the "common fund" exception.

Affirmed.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder