

STATE OF MICHIGAN
COURT OF APPEALS

HUNTER SQUARE OFFICE BUILDING, LLC,

Plaintiff-Appellant,

V

PARAGON UNDERWRITERS, INC, KENNETH
LIPSON & ALEX LIPSON,

Defendants-Appellees.

UNPUBLISHED

May 20, 2003

No. 235115

Oakland Circuit Court

LC No. 98-003837-CK

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

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) of its claim for breach of contract (count 1) based on defendant's alleged exercise of an option to extend the party's lease agreement for five years. Plaintiff also appeals the trial court's pretrial evidentiary rulings that rendered untenable its promissory estoppel claim (count 4). All other claims in plaintiff's six-count complaint were either dismissed before trial, resolved at trial or settled, and have not been appealed. We affirm.

I SUMMARY OF MATERIAL FACTS

Plaintiff was the landlord lessor and defendant the tenant lessee of a building subject to a 65-month commercial lease commencing October 1, 1992 and ending February 28, 1998. Paragraph 40.1 of the lease granted defendant an option to extend the lease for an additional five-year period if exercised by written notice to the landlord at least 120 days before the expiration of the lease. The lease also provided a method of selecting an appraiser or appraisers to determine the fair market value of the premises to establish a base rental rate for the lease extension if the parties could not agree on a rental rate through negotiation. Paragraph 28 of the lease provided: "All notices, approvals and demands permitted or required to be given under this Lease shall be in writing and deemed duly served or given if personally delivered or sent by certified or registered U.S. mail"

It is undisputed that on July 25, 1997, as the lease was nearing its end, defendant's president, Kenneth Lipson, mailed by ordinary first-class mail to plaintiff's agent, Ted Minasian, the following letter:

This letter is to inform you of our intent to exercise our option to extend the lease term.

Would you please give me a call so that we can schedule an appointment to sit down and discuss the terms and conditions.

The parties met on September 8, 1997 to discuss terms of a lease extension. During discovery plaintiff produced Minasian's handwritten notes that described an alleged conversation with defendant's attorney, Barry Lipson (Kenneth's brother), as follows:

I said I was unsure if he exercised his option because his brother said he "intends" to exercise. He said he definitely exercised his option.

Subsequently, Minasian mailed to Kenneth Lipson a letter dated September 9, 1997, captioned "Lease Renewal," in which the first two paragraphs read:

It was a pleasure meeting with you and your brother Barry yesterday. I was happy to hear it is your intention to remain as a tenant.

During our meeting I expressed my uncertainty as to whether your July 25 letter indicated your "intent" to exercise your option to extend the lease term or if you actually did exercise your option. Barry confirmed that you definitely had exercised your option.

Barry Lipson responded to Minasian's September 9, 1997 letter by writing to Minasian on October 8, 1997, in part, as follows:

I am in receipt of a letter that was forwarded to my brother dated September 9, 1997. Upon reviewing the same, there is some misunderstanding as to my recollection at the meeting which took place at Ken's office.

First, at no time did I confirm the July 25th letter intended to be an outright exercise of the options to renew. . . . At the present time Ken has indicated he has found your offer for a new lease to be unacceptable. Based upon Ken's commencement date, which was October 1, 1992, the lease term would expire on February 28, 1998. Upon my review of the lease, Ken must then furnish you with written notice to exercise the option not later than October 31, 1997. Thus, unless we get written confirmation to the contrary, we will work under the assumption we are now in total agreement as to when notice must be received by you.

Inasmuch as the offer we have received is unacceptable, we would further appreciate if you could rethink your position and provide us with an alternative offer that you would find acceptable in the immediate future. Absent receiving an additional offer, if Ken intends to exercise we will provide you notice on or before October 31, 1997 and accordingly we would then have to rely upon section 40.3 of the rider and thereafter utilize the appraisal mechanism provided therein.

Minasian acknowledged receipt of Barry Lipson's October 8, 1997 letter by writing a letter dated October 13, 1997, addressed to Kenneth Lipson, which provided:

I recently received a letter from your brother, Barry, dated October 8, 1997. I have enclosed a copy of that letter. As per the last sentence of paragraph two of your brother's letter, please be advised we are not in total agreement as to when notice must be received.

Kenneth Lipson responded to Minasian's October 13, 1997 letter on the same day it was received, October 15, 1997, by faxing a copy back to him with the handwritten notation, "What is the date you feel notice must be received by your office."

No further written communication occurred between the parties before October 31, 1997. Defendant signed a lease for other premises on or about November 9, 1997. Minasian wrote to Kenneth Lipson on November 11, 1997 the following:

Paul Choukourian from my office informed me that he spoke to you this morning and you indicated your intent to sign a lease at a different location. I was shocked and surprised to hear this.

Based on your letter dated July 25, 1997 and subsequent meetings, the Landlord accepted Paragon Underwriters notification to exercise its option to extend its present Lease.

In the event that Paragon Underwriters does not continue its tenancy past February 28, 1998, the Landlord intends to hold tenant liable for any and all damages incurred by Landlord.

It is undisputed that defendant vacated the leased premises in early February 1998.

II BREACH OF CONTRACT

A. Standard of Review

This Court reviews de novo a trial court's grant or denial of summary disposition. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). The interpretation of a contract is also a question of law reviewed de novo on appeal. *Perry v Sied*, 461 Mich 680, 681 n 1; 611 NW2d 516 (2000); *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). Moreover, equitable actions are reviewed de novo, but the factual findings of the trial court are reviewed for clear error. MCR 2.613(C); *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982); *Little v Kin*, 249 Mich App 502, 507; 644 NW2d 375 (2002).

A party's claim to summary disposition based on MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), and has the initial burden

of supporting its position with documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists, MCR 2.116(G)(4); *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 547; 619 NW2d 66 (2000), and upon failure to do so, summary disposition is properly granted, *Smith, supra*, 455 n 2.

B. Analysis

First, the trial court correctly determined that the plain language of ¶ 28 of the parties' lease agreement, which provided that all notices permitted or required under the lease be either personally delivered or delivered by certified or registered mail, controlled the manner of deliver of the written notice required by ¶ 40.1 for defendant to exercise its option to extend the lease. It is settled that a contract must be read as a whole, *Perry, supra*, 689 n 10; *McKusick, supra*, 332, and must be enforced in accordance with its plain terms without reading ambiguities where none exist, *id*.

Second, the trial court correctly applied the law, which requires that an option be exercised in strict compliance with its terms, or it is lost. *Bowkus v Lange*, 196 Mich App 455, 459-460; 494 NW2d 461 (1992), rev'd on other grounds 441 Mich 930; 494 NW2d 461 (1993).

An option is but an offer, strict compliance with the terms of which is required; acceptance must be in compliance with the terms proposed by the option both as to the exact thing offered and within the time specified; otherwise the right is lost. [*LeBaron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 313; 29 NW2d 704 (1947), quoting *Bailey v Grover*, 237 Mich 548, 554-555; 213 NW 137 (1927), citing *Olson v Sash*, 217 Mich 604, 606:187 NW 346 (1922).]

Our Supreme Court has held that substantial compliance is insufficient to exercise an option; rather "exact compliance with the terms of the option agreement" is necessary. *Beecher v Morse*, 286 Mich 513, 516; 282 NW 226 (1938). See also, *Bergman v Dykhouse*, 316 Mich 315; 25 NW2d 210 (1946) (the optionee was not entitled to either specific performance or damages where he did not exercise the option in accordance with its terms), and *Beller v Robinson* 50 Mich 264; 15 NW 448 (1883) (oral exercise of an option for a three-year lease extension was ineffective, even though the tenant held over for two years, where written notice of acceptance was required). Although an oral acceptance of an option is sufficient where not otherwise specified, *Hunt v State Highway Comm'r*, 350 Mich 309, 318; 86 NW2d 345 (1957); *Kern v Pawlega*, 5 Mich App 384, 388-389; 146 NW2d 689 (1966), acceptance must be reasonably certain and not subject to misunderstanding, *Boden v Trumpour*, 344 Mich 133, 136; 73 NW2d 462 (1955); *Kern, supra*.

A fundamental tenet of all contracts is that there be mutual assent or a meeting of the minds on all essential terms of a contract. *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992); 17A Am Jur 2d, Contracts § 26, p 53. Here, because an option is but an offer, *LeBaron Homes, Inc, supra*, there could be no contract without the

option holder manifesting its acceptance, *Kamalath, supra*, 549; 17A Am Jur 2d, Contracts §§ 50, 72, pp 81, 96. “Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” 1 Restatement Contracts, 2d, § 50(1), p 128. “If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract.” 1 Restatement Contracts, 2d, § 60, p 147.

In this case, the parties plainly agreed how to manifest acceptance: by writing personally delivered or by certified or registered mail. Plaintiff may not create mutual assent by unilateral waiver of strict compliance of the parties’ agreed manner of manifesting acceptance. The certainty of knowing what actions would exercise the option benefited both parties. Otherwise, by “waiving” strict compliance of the manner and mode of exercising the option, plaintiff could convert defendant’s mere request to negotiate the terms of an extended five-year lease into an undesired lease extension.

In the case at bar, the parties disputed whether defendant’s July 25, 1997 letter exercised defendant’s option to extend its lease. Defendant contended the letter was only an invitation to negotiate terms for an extended lease. Plaintiff argued that by the July 25 letter defendant exercised its option, and that defendant’s counsel later orally confirmed the option had been exercised. However, it was undisputed that defendant did not personally deliver the July 25 letter, nor did defendant deliver it by certified or registered mail. Thus, the trial court did not err by applying the strict compliance doctrine to the undisputed facts and concluding that defendant was entitled to judgment as a matter of law. MCR 2.116(G)(4); *Smith, supra*, 455 n 2.

We also reject plaintiff’s argument that the doctrine of equitable estoppel should be applied to prevent defendant from asserting that the requirements of the parties’ contract establishing the manner of manifesting acceptance of its option. Equitable estoppel may preclude a party from asserting a particular fact where:

(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. [Citations omitted.] [*Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002), quoting *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999).]

Here, plaintiff argues that defendant should be precluded from denying it exercised its option because its July 25 letter was not delivered as required by the parties’ contract. In essence, plaintiff uses the doctrine of equitable estoppel to affirmatively establish its contract claim. Equitable estoppel, however, may not be used to affirmatively establish a cause of action. *Id.*; *Charter Twp of Harrison v Calisi*, 121 Mich App 777, 787; 329 NW2d 488 (1982). It is also necessary to analyze what representation or admissions, or express or tacit, that plaintiff claims to have justifiably rely upon. Plaintiff’s contention that defendant’s July 25 letter was a promise to exercise its option that plaintiff justifiably relied upon to its detriment is a claim of promissory estoppel discussed *infra*. Plaintiff’s claim that defendant did not timely point out the deficiency

of its July 25 letter as a mode of exercising its option fails to establish justifiable reliance and also fails to establish any prejudice.

Defendant argues equitable estoppel could not apply because both parties were not mutually bound. See e.g., *Baker v Johnson*, 21 Mich 319, 346 (1870) (“There can be no estoppel in favor of those who are not themselves estopped.”), and *Chope v Lorman*, 20 Mich 327, 334 (1870) (estoppel must be mutual). More accurately, defendant could not by its unilateral conduct modify the required mode of exercising its option. Indeed, as plaintiff recognizes, because it granted the option, it could insist on strict compliance with the required manner and mode of exercise, despite any conduct by defendant to the contrary. Only plaintiff could waive strict compliance of the requirement of exercising the option, but no contract (extended lease) could be formed without defendant intending to exercise its option. Thus, only the mutual conduct of both parties can establish deviation from the mode and manner of exercising the option set forth in the lease. “If the parties mutually adopt a mode of performing their contract differing from its strict terms, . . . or if they mutually relax its terms by adopting a loose mode of executing it, neither party can go back upon the past and insist upon a breach because it was not fulfilled according to its letter.” *Goldblum v Ford Local No 50*, 319 Mich 30, 37; 29 NW2d 310 (1947).

Moreover, as the grantor of the option, plaintiff could insist on strict compliance with its terms despite any actions defendant may have taken. Thus, plaintiff could not have justifiably relied on any conduct by defendant to affect the mode of performance required to exercise the option. Nor was plaintiff prejudiced by defendant’s failure to assert strict compliance with the lease requirements to exercise the option. Within the time period for exercising its option, defendant explicitly notified plaintiff that its July 25 letter was not intended to exercise its option. Plaintiff was placed in no worse position because defendant did not assert earlier the additional basis for its position that it had not exercised its option. *Smit v State Farm Mutual Automobile Ins Co*, 207 Mich App 674, 684; 525 NW2d 528 (1994).

Finally, we reject plaintiff’s argument that it was entitled to general equitable relief. Plaintiff relies upon *Market Development Corp v Village Green Properties, Ltd*, unpublished opinion per curiam of the Court of Appeals, decided September 12, 2000 (Docket No. 208856) for the proposition that “Michigan has long recognized that equity can and should intervene to prevent an unreasonable forfeiture or harsh result.” *Id.* slip op at 6. There are three problems with plaintiff’s argument. First, *Market Development*, *supra*, is an unpublished opinion that lacks binding precedence under the rule of stare decisis. MCR 7.215(C)(1). Second, “[o]ption contracts do not come within the equitable rule against forfeiture, inasmuch as failure to comply strictly with the conditions of the option deprives no party of any right and abrogates no contract.” 17A Am Jur 2d, Contracts, § 73, p 97. Third, no forfeiture or harsh result occurred here. Rather, the undisputed facts established that plaintiff was aware by October 13, 1997, the date plaintiff’s agent acknowledged receipt of defendant’s October 8, 1997 letter, that defendant contended it had not exercised its option to renew its lease in its July 25 letter. Thus, 17 days before the bargained-for deadline for defendant to exercise its option (October 31, 1997), plaintiff was on notice that defendant claimed it had not exercised its option to renew its lease. Clearly, plaintiff had the full four months provided for in the lease to locate new tenant(s).

In summary, defendant was entitled to judgment as matter of law because the undisputed facts established that its mode of delivering its July 25 letter had not strictly complied with the manner of delivery required for all notices under the parties' lease agreement. Further, plaintiff could not unilaterally amend the parties' contract and create an exercise of the option where none was intended. Defendant was not equitably estopped from asserting the parties' contract as a defense to plaintiff's claim. Finally, neither a forfeiture nor a harsh result that justifies plaintiff's claim to general equitable relief ensues from enforcing the plain terms of the parties' contract.

III PROMISSORY ESTOPPEL - - EVIDENTIARY RULINGS

A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed on appeal for a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998); *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). An abuse of discretion is found only if an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or that the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett, supra*. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Pena v Ingham Co Road Comm'r*, ___ Mich App ___; ___ NW2d ___ (No. 231482, rel'd 2/11/03) slip op p 2. An evidentiary error will not merit reversal unless a substantial right of a party is affected, MRE 103(a); *Ellsworth, supra*, and it affirmatively appears that failing to grant relief is inconsistent with substantial justice, MCR 2.613(A); MCL 769.26; *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

B. Analysis

The trial court did not abuse its discretion by limiting evidence of reliance damages plaintiff incurred based on defendant's alleged promise to renew its lease. Moreover, the trial court's evidentiary rulings were not inconsistent with substantial justice. MCR 2.613(A); MCL 769.26.

The elements of promissory estoppel are:

(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. [*Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).]

See also, *Booker v Detroit*, 251 Mich App 167, 174; 650 NW2d 680 (2002), *Crown Technology Park, supra*, 548-549 and SJI2d 130.01

Plaintiff's fundamental error on this issue is confusing usual breach of contract damages with reasonable reliance damages available when promissory estoppel is alleged. Our Supreme Court in *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 6; 516 NW2d 43 (1994),

quoting *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401; 295 NW2d 50 (1980), stated the rule concerning damages for breach of contract.

The damages recoverable for breach of contract are those that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made. Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it. [*Id.* at 414-415; citation omitted.]

In contrast, damages for a claim based on promissory estoppel are limited to damages incurred in reliance. SJI2d 130.01(d). In *Joerger, supra*, 173-174, this Court opined concerning damages recoverable on a promissory estoppel claim the following:

The guiding principle in determining an appropriate measure of damages is to ensure that the promisee is compensated for the loss suffered to the extent of the promisee's reliance. Damages awarded in promissory estoppel actions may include an award of lost profits, and out-of-pocket expenses incurred in preparation for performance or in the performing of the work that was induced by the promisor. [*Id.*; citations omitted.]

To recover damages in a promissory estoppel case, the plaintiff's reliance on the alleged promise must be reasonable. *State Bank of Standish v Curry*, 442 Mich 76, 84; 500 NW2d 104 (1993); *Booker, supra*, 176. Furthermore, the doctrine of promissory estoppel must be cautiously applied, *id.* at 174, and damages may be limited as justice requires, *Standish, supra*, 83; *Joerger, supra*, 173. Although lost profits may be recovered in an appropriate case when incurred in reasonable reliance on a promise, lost profits may not be based on guess, speculation or conjecture. *The Vogue v Shopping Centers, Inc (After Remand)*, 402 Mich 546, 551; 266 NW2d 148 (1978). As this Court explained:

In order to recover prospective profits, a plaintiff must establish proof of lost profits with a reasonable degree of certainty. Where the proof is available, prospective profits may be recovered, when proved, as other damages. Nevertheless, as in all cases, the jury should not be allowed to speculate or guess [with regard to] the amount of loss of profits. [*Joerger, supra*, 175-176; citations and internal punctuation omitted.]

Applying the principles of promissory estoppel to the instant case, it is clear that the trial court did not abuse its discretion by limiting plaintiff's evidence of reliance damages. Plaintiff claimed to have relied on the promise in defendant's July 25, 1997 letter that defendant intended to extend its existing lease. The existing lease would expire on February 28, 1998, and defendant had until October 31, 1997 to exercise an option for a five-year extension. Plaintiff's agent was unsure whether the July 25 letter actually exercised the option and purported to obtain an oral confirmation that defendant had exercised its option to extend the lease from defendant's counsel at a September 8, 1997 meeting. Plaintiff's agent mailed a letter of confirmation and proposed terms for the extended lease to defendant on September 9, 1997. In a letter dated October 8, 1997, defendant's counsel denied it had exercised its option to renew, requested new terms and

advised that defendant would notify plaintiff by the option expiration date of October 31, 1997 whether it would exercise the renewal option. Plaintiff's agent acknowledged receipt of defendant's October 8 letter in a letter dated October 13, 1997. It is undisputed that defendant took no action to exercise the renewal option before October 31, 1997, and that plaintiff learned on or about November 11, 1997 that defendant had leased other premises.

Because plaintiff alleged it believed that the lease would be extended, any expenses that plaintiff may have incurred inconsistent with the lease would not have been in reasonable reliance on the alleged promise. Further, because plaintiff learned before the expiration of the time in which defendant could exercise the option that the defendant disputed that the July 25 letter exercised the option, plaintiff was in no worse position than if defendant had never mailed the July 25 letter. In other words, based on defendant's letter of October 8, 1997, it would not have been reasonable for plaintiff to delay its search for new tenant(s) beyond October 31, 1997. In fact, plaintiff was in no worse position than if defendant had never attempted to negotiate terms of an extended lease. Nevertheless, the trial court ruled that plaintiff would be permitted an opportunity to present evidence of reliance damages, including lost profits, incurred up to the date plaintiff learned that defendant leased other premises. Because plaintiff may only be "compensated for the loss suffered to the extent of the [its] reliance," *Joerger, supra*, 173, and plaintiff's reliance must be reasonable, *Booker, supra*, 176, the trial court did not abuse its discretion by limiting plaintiff's evidence of reliance damages.

Moreover, claims for damages based on delay in seeking new tenants would, at best, be speculative. *The Vogue, supra*, 551; *Joerger, supra*, 175-176. In that the doctrine of promissory estoppel must be cautiously applied, *id.* at 174, and because damages may be limited as justice requires, *Standish, supra*, 83; *Joerger, supra*, 173, no abuse of discretion can be found in the trial court's ruling limiting evidence of reliance damages.

IV CONCLUSION

Defendant was entitled to judgment as matter of law on plaintiff's contract claim because the undisputed facts established that it did not deliver the July 25, 1997 letter in strict compliance with the manner required of all notices under the parties' lease agreement. Further, defendant was not equitably estopped from asserting the parties' agreement as a defense to plaintiff's claim. Finally, enforcing the plain terms of the parties' contract fostered neither an unreasonable forfeiture nor a harsh result that would justify plaintiff's claim to general equitable relief.

The trial court did not abuse its discretion by limiting evidence of reliance damages plaintiff incurred based on defendant's alleged promise to renew its lease. Moreover, the trial court's evidentiary ruling does warrant reversal because it was not inconsistent with substantial justice. MCR 2.613(A); MCL 769.26.

No other issues are properly before the Court, MCR 7.212(C)(5), (G); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284

(1999); *Check Reporting Services, Inc v Michigan Nat'l Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991), and we affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra