

STATE OF MICHIGAN
COURT OF APPEALS

GREG HAULER AND
MARY SUSAN HAULER,

UNPUBLISHED
August 19, 2003

Plaintiffs-Appellees,

v

No. 240753
Muskegon Circuit Court
LC No. 00-40233-CH

PARKLAND DEVELOPMENT OF WEST
MICHIGAN, INC., d/b/a
PARKLAND INVESTMENTS, INC., a Michigan
Corporation,

Defendant-Appellant.

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from an order, following a bench trial granting plaintiffs rescission of a contract for the purchase of a boat slip. We affirm.

I. Facts and Proceedings

This breach of contract suit arose out of an April 18, 1998, purchase agreement between plaintiffs and defendant for boat slip 106 at Ellenwood Landing for \$58,000. At the time of the purchase, plaintiffs made it clear to defendant that they desired a different slip, and as an inducement for plaintiffs to purchase the slip, the parties agreed to the following language as part of the agreement: "Seller is willing to trade any new available phase III 40' foot slip for slip 106 after the new slips are constructed, at no cost to Buyer."

At the June 3, 1998, closing, plaintiffs reiterated their desire to trade slips. In the summer of 1998, plaintiffs informed defendant numerous times that they wanted slip C-25, which was yet to be constructed. Defendant denied that plaintiffs requested slip C-25. Phase III was substantially completed in the fall of 1999. On September 16, 1999, defendant, acting as broker,

sold slip C-25 to someone else, thereby making it impossible for plaintiffs' trade for C-25 to be completed.¹

Thereafter, plaintiffs filed this suit for breach of contract, requesting rescission of the contract for the slip. After a one-day bench trial, the trial court found for plaintiffs, primarily based upon plaintiffs' testimony. The trial court rescinded the contract, and ordered defendant to return the \$58,000 sale price for the slip, less the reasonable rental value for the time plaintiffs possessed the slip in exchange for return of the slip. Defendant now appeals the trial court's decision.

II. Analysis

Defendant contends that the court's factual findings in granting rescission were clearly erroneous. We disagree for, as shown below, resolution of this case turned upon the credibility determinations made by the trial court.

"Equitable actions, including actions to rescind a contract, are reviewed de novo, but the factual findings of the trial court are reviewed for clear error." *Alibri v Detroit/Wayne County Stadium Authority*, 254 Mich App 545, 555; 658 NW2d 167 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). In reviewing such findings, however, this Court must give due regard to the trial court's special ability to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Brooks v Rose*, 191 Mich App 565, 570; 478 NW2d 731 (1991).

Plaintiffs claim they requested a trade for slip C-25 numerous times and were ignored. Defendant claims no such requests were made, and that the request for C-23 in the certified letter was the first firm request made by plaintiffs. The trial court concluded that plaintiffs' testimony, particularly that of Mary Hauler, was credible regarding plaintiffs' persistent requests for a trade for slip C-25 while it was still available. This was the key finding of the case, because without it, plaintiffs had no evidence that they exercised their option under the contract, and with it, defendant had no justification for failing to facilitate the trade, and for selling slip C-25 to a third-party.

The only corroboration for either party's testimony was that of defendant's former employee and plaintiffs' friend, Brian Schmidbauer, who testified that he was present when Mary Hauler went to defendant's office and presented a note to Don Jablonski, defendant's employee at the time, to give to Jonathan Rooks, a broker. According to Mary Hauler's testimony, which the court accepted, the note said that plaintiffs wanted slip C-25. This gave

¹ In March 2000, plaintiffs sent a certified letter to defendant requesting slip C-23 in trade for slip 106. Defendant began to make the necessary arrangements to facilitate the trade, but before the deal closed, plaintiffs decided that C-23 was not what they wanted, as it was only their choice between the "lesser of two evils." Plaintiffs contend that slip C-25 was the only slip they truly wanted all along.

rise to a discussion regarding the peculiar numbering system used for slips on C dock, which Schmidbauer remembered. When questioned, Jablonski testified that he did not remember receiving the note from plaintiff, but did not dispute the fact that the event could have happened. The trial court gave significant weight to Schmidbauer's corroboration, or at least Jablonski's inability to dispute Mary Hauler's testimony. In light of this testimony, which the trial court was free to accept as more credible, we cannot conclude that the court's factual findings were clearly erroneous. Therefore, we affirm the trial court's findings of fact.

In light of the trial court's findings of fact, we reject defendant's argument that the trial court erred in granting plaintiffs a rescission of the contract. Rescission is an equitable remedy, and is, therefore, reviewed de novo by this Court. *Alibri, supra*. Rescission is an appropriate remedy for a non-breaching party when another party materially breaches a contract, *Omnicom of Michigan v Gianetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997); *PAL Investment Group, Inc v Staff-Builders, Inc*, 118 F Supp 2d 781, 786 (ED Mich, 2000), or where the contract would not have been made if default in that particular had been expected or contemplated. *Rosenthal v Triangle Development Co*, 261 Mich 462, 463; 246 NW 182 (1933).

It is clear in this case that, in light of the trial court's findings, plaintiffs would not have made the agreement with defendant to purchase slip 106 if they expected that defendant would default on the trade. The trial testimony supported plaintiffs' position that the exchange language was specifically added to the contract as an "additional term" because it was important to plaintiffs to be able to trade slips. The trial court also found that because defendant failed to exchange slips when requested to by plaintiffs, that defendant breached the contract. As such, rescission was appropriate.²

Defendant further argues that rescission was not proper because plaintiffs could not put defendant in the position they were in at the execution of the contract. Defendant relies on *Grabendike v Adix*, 335 Mich 128; 55 NW2d 761 (1952). In *Grabendike*, the plaintiffs were speculating on the land, looking to strike it rich if the land had oil. The plaintiffs' very purpose for rescinding was because once it was determined there was no oil on the land, it was worth substantially less than when it was thought there could be oil. *Id.* at 142. Here, plaintiffs were not making a speculative investment, but rather simply wanted their slip of choice for their boat. The evidence did not show that plaintiffs requested rescission because the property value decreased, but rather because after repeated attempts, they did not get the benefit of their bargain, a trade for slip C-25. The value of the slips may have decreased coincidentally, but it was defendant who caused the delay during which the value decreased.

Defendant also argues that there were conditions precedent to the trade that plaintiffs failed to fulfill, thereby excusing defendant's nonperformance. "A condition precedent is a fact or event which the parties intend to exist or take place before there is a right to performance." *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953). Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the

² Defendant argues there was no time element in the contract for its performance. However, the contract itself indicated the trade would occur "after the new slips [were] constructed"

parties, and is to be ascertained from a fair and reasonable construction of the language used in light of the surrounding circumstances when the contract was executed. *Id.* Michigan courts are disinclined to find conditions precedent unless they are “plainly expressed” in the language of the contract. *MacDonald v Perry*, 342 Mich 578, 586; 70 NW2d 721 (1955); *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993).

There are no provisions in the contract that create a condition precedent. Further, there was no evidence produced by defendant to show that the parties intended any such condition when they executed the contract. If the parties intended a condition precedent for the trade of the slips, it should have been clearly stated in the written contract. Therefore, we hold that no condition precedent exists, and that the trial court properly found defendant liable under the contract.

Defendant next contends that the certified letter requesting slip C-23 acted as a novation to the agreement. A novation is a modification to a contract, which requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all the parties to substitution based on sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one. *In re Dissolution of F Yeager Bridge and Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986). Defendant’s argument fails here for lack of consent or sufficient consideration. The original agreement was an exchange for any available slip. Plaintiffs originally chose slip C-25, but after defendant sold C-25, plaintiffs chose C-23 as a “lesser of two evils,” concerned that if they didn’t choose an alternative slip, they might be stuck with slip 106. Thus, plaintiffs did not change their minds and decide that C-23 was what they really wanted; instead, they sent the letter only after defendant breached the original contract so as to preclude plaintiffs from their true choice. This is not consent based on consideration and, thus, it is not a novation.

Defendant also contends that equitable estoppel should preclude plaintiffs’ recovery. Equitable estoppel may arise when: (1) a party, by representation, 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. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999). Defendant argues that it acted in reliance upon plaintiffs’ letter requesting slip C-23 and, because it was prejudiced, plaintiffs should be estopped from recovery. However, there is no indication that defendant was prejudiced by plaintiffs’ letter requesting C-23. In its brief on appeal, defendant claims that it had to give up exclusive rights as broker of the slips as consideration for LJR Waterfront Properties Corporation, defendant’s predecessor of the Phase III properties, allowing the exchange. However, Rooks’ trial testimony indicated that the contract language regarding the exchange for C-23 and language regarding the forfeiture of exclusive listing rights are in the same agreement merely as a matter of convenience for LJR and defendant, and not because the forfeiture of listing rights served as consideration. Thus, defendant was not prejudiced, and its equitable estoppel defense fails.³

³ Even if defendant was prejudiced, its equitable estoppel defense would fail for lack of clean
(continued...)

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

(...continued)

hands. Willfully ignoring plaintiffs' requests to trade for slip C-25 and then selling the slip to a third-party are not equitable actions. Defendant did this before any of plaintiffs' actions, which are the grounds for its equitable estoppel defense.