

STATE OF MICHIGAN
COURT OF APPEALS

JM DEVELOPMENTS, INC.,

Plaintiff-Appellant,

v

HARTLAND TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED

October 16, 2003

No. 240677

Livingston Circuit Court

LC No. 00-017715-CK

Before: Donofrio, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Plaintiff commenced this action alleging that defendant violated the terms of a consent judgment that resolved a prior lawsuit between the parties. Following a bench trial, the court entered a judgment of no cause of action in favor of defendant. Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court erred in concluding that plaintiff, rather than defendant, breached its obligations under the consent judgment. We review a trial court’s findings of fact for clear error. *Amb’s v Kalamazoo Co Rd Comm’n*, 255 Mich App 637, 651-652; 662 NW2d 424 (2003). A trial court’s conclusions of law are reviewed de novo. *Id.*

“A consent judgment is the product of an agreement between the parties.” *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990). An agreement to settle a pending lawsuit is a contract to be governed by the legal principles applicable to the construction and interpretation of contracts. *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). In contract law, a “condition precedent” is “a condition that must be met by one party before the other party is obligated to perform” *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 411; 646 NW2d 170 (2002). One party’s failure to satisfy a condition precedent prevents that party from bringing a cause of action based on the other party’s failure to perform. *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 420; 533 NW2d 838 (1995).

The consent judgment required plaintiff to prepare acceptable construction plans for a public sewer that would extend from its property to M-59. The plans were subject to review and approval. Defendant was not required to submit an application to the Michigan Department of Environmental Quality (DEQ) for permission to use the system until after its engineer approved the plaintiff’s plans. Because plaintiff failed to prepare and submit its construction plans,

defendant was not obligated to apply for the permit. Plaintiff, by its failure to perform the condition, excused defendant's performance. Plaintiff misconstrues the trial court's decision as one founded on plaintiff's breach of the consent agreement. But the trial court never addressed the issue in this posture and did not award defendant damages. It merely found that plaintiff could not rely on defendant's failure to apply for a permit as grounds for claiming breach of contract.

Plaintiff's other claims of breach of contract likewise fail. Defendant did not breach by failing to timely supply sewer taps because plaintiff never met the precondition of demanding them or paying for them. For the same reason, defendant did not permit anything "to interfere with the prompt delivery of the sewer taps to Plaintiff in accordance with the foregoing provisions" of the consent judgment. Plaintiff also fails to demonstrate any breach of "the obligation of Defendant to assure timely delivery of the sewer taps" given defendant's insistence that it would remedy its problems with the DEQ. Therefore, we find no clear error in the trial court's determination that defendant did not breach the consent judgment.

Plaintiff essentially argues that defendant's temporary failure to comply with DEQ requirements excused plaintiff from expending time and resources to create a construction plan, continue construction, and then demand and pay for taps, all with the knowledge that defendant could not provide legally useable taps. Therefore, plaintiff essentially argues a combination of two legal concepts – the law does not require the performance of a futile act, *Modern Globe, Inc v Lake Drive Corp*, 340 Mich 663, 669; 66 NW2d 92 (1954), and a party may anticipatorily breach before performance is due. *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992). Before a court may find that a party's actions amount to an anticipatory breach, it must first find that the party voluntarily took affirmative action that made performance either "actually or apparently impossible." *Paul, supra* at 494, quoting 2 Restatement Contracts, 2d, § 250, pp 273-274.

Assuming arguendo that defendant's temporary problems with the DEQ resulted from defendant's voluntary affirmative action, the trial court correctly found that the problems did not render defendant's performance apparently impossible. Well before defendant could expect plaintiff to demand performance, defendant's and plaintiff's agents met and discussed defendant's environmental compliance problems. At that time, defendant's agents explained how they planned to correct the issues and did not anticipate any interference from the DEQ. In the end, defendant and the DEQ resolved their issues six months after the meeting, despite the delay caused by plaintiff's ultimate refusal to submit the contractually anticipated construction plan. A month before the resolution, however, plaintiff sold the developmentally stalled property for an estimated \$1 million more than its actual value, making it impossible to determine whether defendant could have provided the taps on demand. Defendant subsequently provided the taps to plaintiff's successor in title. Because defendant's actions did not create any apparent impossibility of performance, anticipatory breach does not apply. Similarly, nothing in this record indicates that plaintiff would have uselessly expended its money by continuing construction operations such as reducing its construction plans to writing and submitting them as the consent judgment anticipated. To the contrary, the evidence suggested that notwithstanding the DEQ's stalwart posturing in its dealings with defendant and grim premonitory letter to plaintiff, the DEQ issued at least one use permit to another development during defendant's

period of noncompliance. Therefore, the trial court did not clearly err when it failed to find factual support for plaintiff's legal theories.

Plaintiff also argues that the trial court erroneously ruled that it was effectively barred from recovering because it had mitigated its damages. Plaintiff fails to explain or rationalize its position, especially in light of defendant's lack of breach, and also fails to cite any authority in support of its argument. Accordingly, we consider the issue abandoned. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Finally, plaintiff argues that the trial judge failed to timely disclose information that would have disqualified him from hearing the case. The record indicates that plaintiff did not merely fail to object or fail to move for disqualification when the trial judge revealed that he lived in defendant township, but rather, plaintiff expressed satisfaction and accepted that the judge's residence in the township would have no impact on its decision. Plaintiff, therefore, extinguished any error by waiving this issue. *Roberts v Mecosta General Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002).

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O'Connell