

STATE OF MICHIGAN
COURT OF APPEALS

BSI LAND COMPANY,

Plaintiff-Appellee,

v

MILLPOINTE WEST LTD.,

Defendant-Appellant.

And

TRANSNATION TITLE INSURANCE
COMPANY,

Defendant.

UNPUBLISHED

June 18, 1999

No. 209698

Washtenaw Circuit Court

LC No. 97-008839 CK

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right an order granting summary disposition in favor of plaintiff and directing the payment to plaintiff of an escrow deposit on a real property purchase. We reverse.

Defendant, purchaser, deposited \$50,000 in escrow pursuant to the parties' purchase agreement ("agreement") for the purchase of real property in Scio Township from plaintiff, seller. After the parties failed to close the transaction, both parties claimed entitlement to the deposit. The trial court granted plaintiff's motion for summary disposition, in which the court found that defendant did not timely terminate the agreement to obtain a return of the deposit under the terms of the agreement and that plaintiff was therefore entitled to retain the deposit.

I

Defendant first claims that the clear and unambiguous language of the agreement mandates that summary disposition be granted for defendant under MCR 2.116(I)(2), or, at least, that plaintiff be denied summary disposition. We agree that plaintiff was not entitled to summary disposition in its favor.

This Court reviews summary disposition decisions de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) may be granted when, except with regard to damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Contracts which are unambiguous are not open to construction and must be enforced as written. *Cottrill v Michigan Hospital Service*, 359 Mich 472, 476; 102 NW2d 179 (1960); *Industrial Steel Stamping, Inc v Erie State Bank*, 167 Mich App 687, 692; 423 NW2d 317 (1988). No provision of the parties' contract states that defendant forfeits its \$50,000 deposit for failure to terminate the agreement within the 120-day inspection period. Further, because the language of the agreement is unambiguous in providing for forfeiture of the \$50,000 deposit upon defendant's failure to timely cure a default, there is no need to apply the rules of contract construction. The contract must be enforced as written.

Under the express language of ¶¶ 2.1 and 6.3, defendant was entitled to a return of the \$50,000 deposit if it timely terminated the agreement:

2.1 Purchase Price . . . Upon the execution of this Agreement by both Seller and Purchaser, Purchaser shall deposit with [Transnation], in trust, however, subject to the terms and conditions of this Agreement, the sum of [\$50,000], to be held as a good faith deposit ("Initial Deposit"). On the Closing Date, the Initial Deposit . . . shall be credited to the Purchase Price. So long as Purchaser has not breached any of his obligations under this Agreement, if this Agreement is timely terminated by Purchaser by no later than the expiration of the Inspection Period, the Initial Deposit . . . shall be returned to Purchaser,

* * *

6.3 Termination after Inspection. Purchaser shall have the option (and may do so for any or no reason) to notify Seller in writing at any time during the Inspection Period and, if applicable, Extended Inspection Period(s) that Purchaser is dissatisfied with the results of his investigation of contingencies affecting the Property or Purchaser's plans for its development and has elected to terminate this Agreement. If such notification occurs at any time during the [120 day] Inspection Period, the Seller promptly shall refund to Purchaser the Initial Deposit [of \$50,000], and this Agreement shall terminate. If Purchaser elects to extend the Inspection Period in accordance with the provision of Paragraph 6.2, and subsequently terminates this Agreement during the Extended Inspection Period(s), then Seller shall be entitled to retain the Initial Deposit [of \$50,000] and this Agreement shall terminate.

The trial court found that defendant did not terminate the agreement pursuant to ¶¶ 2.1 and 6.3. This finding is not clearly erroneous. See MCR 2.613(C). Defendant provided an affidavit stating that defendant was unable to complete the initial inspection because of plaintiff's breaches. Defendant provided no evidence of written termination of the agreement other than the Scio Township letter to defendant, which, according to the letter, was requested by, and "carbon copied" to, plaintiff's counsel. This letter did not meet the requirements of ¶ 6.3 regarding notice of termination, nor did it constitute notice of default under the agreement's default provision, ¶ 11.2, which requires that defendant deliver "to [plaintiff] written notice specifying in detail the nature of the claimed default."

Because defendant did not terminate the agreement during the inspection period, the parties were mutually obligated, pursuant to ¶ 10.0, to close on the property within thirty days of the expiration of the inspection period, and both parties were in default due to the failure to close.

Under the agreement, the appropriate remedy for default for either party is expressly addressed under ¶ 11.0:

11.1 Purchaser Default. If Purchaser defaults hereunder and such default is not cured within [15 days] after Seller delivers to Purchaser written notice specifying in detail the nature of the claimed default, Seller, at its option, may declare a forfeiture hereunder and retain the Initial Deposit and any additional funds deposited by Purchaser as liquidated damages or Seller may elect to bring an action against Purchaser for its actual (but not consequential) damages sustained as the result of Purchaser's default, including reasonable costs and attorneys' fees, whereupon this Agreement shall terminate

11.2 Seller Default. If Seller defaults hereunder and such default is not cured within [15 days] after Purchaser delivers to Seller written notice specifying in detail the nature of the claimed default, Purchaser, at his option, may elect to enforce the terms hereof or may demand return of the Initial Deposit and any additional funds deposited by Purchaser in full termination of this Agreement.

Paragraph 11.1 expressly states that plaintiff may declare a forfeiture and retain the deposit as a remedy for defendant's failure to cure a default within fifteen days. Likewise, defendant may declare a default by plaintiff and demand return of the initial deposit for plaintiff's failure to cure the default. Thus, under the clear language of the contract, neither party is entitled to the deposit, having failed to declare a default and to seek the specified remedy for default following the opposing party's failure to cure. Summary disposition was improper for either party.

Even if this Court were to agree with the trial court that the contract is ambiguous, and therefore subject to construction, this conclusion would not result in a forfeiture of defendant's deposit. Generally, forfeitures for breach of contract are not favored by the courts, in law or in equity. *Smith v Independent Order of Foresters*, 245 Mich 128, 134; 222 NW 166 (1928); *Leighton v Leighton*, 10 Mich App 424, 433; 159 NW2d 750 (1968). Forfeitures must be contracted for in clear and

unequivocal language, and will not be created by implication. *Smith supra* at 128; *Leighton, supra* at 433-434; 6A Michigan Law & Practice, Contracts, § 293, p 301.

Plaintiff had a means of obtaining forfeiture of the deposit by declaring a default under ¶ 11.1, which plaintiff did not pursue. “A construction entailing a forfeiture will not be given a contract unless no other construction is reasonably possible, and since stipulations for forfeiture are not favored, they will be strictly construed.” 6A Michigan Law and Practice, Contracts, § 187, p 215. The contractual provision for forfeiture, agreed upon by the parties, must be strictly construed. No other mechanism of forfeiture may be created by implication.

The trial court erred in implying a forfeiture of defendant’s \$50,000 deposit and granting summary disposition in favor of plaintiff. However, the court was correct in denying summary disposition for defendant.

II.

Next, defendant claims that the trial court erred in granting summary disposition because reasonable minds could differ as to whether plaintiff had breached the purchase agreement with respect to the availability of on-site sewer and water access and because discovery was incomplete on this issue. We agree.

The parties’ agreement contains potentially conflicting provisions regarding sewer and water availability. First, ¶ 6.0, Inspection; Permits/Approvals; As-Is Sale, states:

6.1 Inspection Period. Purchaser shall have one hundred twenty (120) days from the Effective Date of this Agreement (“Inspection Period”) to investigate all circumstances which in Purchaser’s judgment are material to Purchaser’s determination that the Property is suitable for Purchaser’s intended use, including, without limitation:

* * *

F. the availability of sanitary sewer, storm sewer, public water, gas main, electrical service and other utilities, in quantity and at a cost (initially and for on-going access and usage) acceptable to Purchaser;

However, ¶ 7.0, Seller’s Representations And Warranties, provides:

Seller specifically represents and warrants to Purchaser that:

* * *

H. Scio Township (City of Ann Arbor system) sewer and water utilities are *presently available* at the site upon payment of standard tap fees. [Emphasis added].

Pursuant to the contract provisions, defendant, as purchaser, had 120 days to investigate the availability of sewer and water utilities, but plaintiff, as seller, specifically represented that the sewer and water utilities were “presently available.” Thus, an ambiguity is inherent as to whether defendant retained any duty to investigate the availability of the utilities, or whether defendant could rely on plaintiff’s express representation to that effect. If a contract is susceptible to two or more reasonable interpretations, it is ambiguous. *D’Avanzo v Wise & Marsac*, PC, 223 Mich App 314, 319; 565 NW2d 915 (1997). Where a contract is ambiguous, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate. *Id.*

In support of its contention that plaintiff had breached the purchase agreement, defendant submitted a letter from Scio Township and an affidavit, which stated that plaintiff misrepresented the availability of sewer and water. Defendant argues that further discovery may have uncovered facts which could establish that plaintiff failed to perform its obligation to have the utilities “presently available.” Summary disposition may be premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996).

Based on our review of the Scio Township letter, we conclude that a material question of fact existed whether sewer and water utilities were “presently available” at the site.¹ Although the construction of contract terms is generally a question of law for the court, where the meaning of a contract is obscure and construction depends on extrinsic facts, it is a matter to be submitted to the trier of fact. *D’Avanzo, supra*. Summary disposition was premature and therefore improper in this case.

III

Next, defendant claims that summary disposition was improper because reasonable minds could differ as to whether plaintiff satisfied conditions necessary for recovery of the deposit. Again, we agree.

As we have noted, under ¶ 11.1 the contract provides specific remedies to plaintiff in the event of defendant’s default. Pursuant to ¶ 11.1, plaintiff must provide notice of default and an opportunity for defendant to cure within fifteen days, before plaintiff is entitled to retain the deposit. Plaintiff concedes on appeal that it has not alleged a default by defendant. Rather, plaintiff argues that defendant’s failure to terminate the agreement was a failure of a condition precedent to make the contract binding between the parties.

The courts generally do not construe contract provisions as conditions precedent in the absence of express language, particularly where such construction results in an injustice. 6A Michigan Law & Practice, Contracts, § 232, p 259. Regardless, this argument raises an issue of contract construction dependent on the intent of the parties. *Id.* Summary disposition is rarely appropriate where there are issues of motive and intent. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 361; 320 NW2d 836 (1982); *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). The trial court erred in granting summary

disposition where reasonable minds could differ as to whether defendant was entitled to notice of default and an opportunity to cure before forfeiture of its deposit.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald

¹ The trial court apparently concluded that any alleged breach was irrelevant because defendant could have terminated the agreement and obtained a refund of its deposit. However, we note that defendant had the option under ¶ 11.2 of enforcing the terms of the agreement.