

STATE OF MICHIGAN
COURT OF APPEALS

OAK RIDGE GOLF, INC., and MCKAY GOLF &
COUNTRY CLUB PROPERTIES, INC.,

UNPUBLISHED
November 8, 2002

Plaintiffs/Counterdefendants-
Appellees,

v

CANDLESTONE INN CORPORATION, INC.,

No. 227192
Ionia Circuit Court
LC No. 98-018943-CK

Defendant/Counterplaintiff-
Appellant.

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

In this breach of contract action, defendant appeals as of right from a \$225,000 verdict for plaintiff entered following a jury trial on the question of damages. Defendant challenges the trial court's order granting plaintiffs' motions for summary disposition pursuant to MCR 2.116(C)(10) on the threshold issue of whether defendant breached the contracts. We affirm.

Defendant retained plaintiff McKay Golf & Country Club Properties ("McKay") to promote the sale of Candlestone Inn Golf & Resort ("Candlestone"). Plaintiff Oak Ridge Golf, Inc. ("Oak Ridge") submitted to defendant an "Offer Agreement in Principle." This was not accepted by defendant within the time frame provided in the offer. However, defendant submitted an addendum that exempted certain lots of land from the sale and ratified the offer agreement. The addendum was executed by the parties. Defendant refused to sell the property to plaintiffs who then brought suit for breach of contract. The trial court granted plaintiffs' motions for summary disposition. The issue of damages to plaintiff Oak Ridge was tried before a jury.

We review the trial court's summary disposition ruling de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). Under MCR 2.116(C)(10), summary disposition of all or part of a claim may be granted when, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In evaluating a motion under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

“The burden is on plaintiffs to show the existence of the contract sought to be enforced, and no presumption will be indulged in favor of the execution of a contract since, regardless of the equities in a case, the courts cannot make a contract for the parties when none exists.” *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). A valid contract for the sale of land “must generally be in writing and must set forth the terms of the agreement with sufficient certainty and definiteness, specifying the identities of the parties and their mutual assent, the property which is the subject of the contract, the price of such property, and the consideration.” *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999) (citing 77 Am Jur 2d, Vendor and Purchaser, § 5, p 121).

In this case, plaintiffs submitted to defendant an offer agreement in principle. This offer identified the parties, the property, and the price to be paid for this property. Defendant signed an acceptance of this offer, but not within the time frame provided in the offer. However, on the same day that the acceptance was signed, defendant submitted to plaintiffs an addendum, which differed from the offer, in that the addendum exempted certain property from the sale. The addendum stated, in part, “as an addendum to offer and to ratify the Agreement in Principle, the Buyer agrees to exempt the commercial lots” The addendum was accepted by plaintiffs, evidenced by their signature.

Defendant contends that there is a genuine issue of fact regarding whether the parties intended the Addendum, which expressly ratified the offer agreement, to be a final, binding agreement. We disagree.

Mutual assent is also referred to as “meeting of the minds.” *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). In determining whether there was a mutual assent to a contract, a court must apply an objective test, which looks to the express words of the parties and their visible acts, including all writings, oral statements, and other conduct by which the parties manifested their intent. *Rood v General Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993).

In an effort to show that the parties did not intend the offer agreement and addendum to be a binding contract, defendant submitted the affidavit of Robert Dykema and the deposition testimony of Cecil McKay in which they each stated that to be the case. However, the affidavit and deposition testimony expressed only the subjective states of mind of these individuals. As stated above, a court must apply an objective test. *Rood, supra*, 444 Mich 119. Under such a test, the language of the addendum and the offer agreement in principle indicate that the parties intended these documents to be a binding contract.

We conclude that the trial court did not err in granting summary disposition to plaintiff Oak Ridge on the issue of breach of contract, because the parties entered into a binding contract that was breached by defendant.

Defendant also contends that the trial court erred in granting summary disposition to plaintiff McKay on its claim for real estate commissions. We disagree.

Defendant argues that, according to a November 27, 1996, letter from plaintiff McKay to defendant's representative, Dykema, McKay's commission was not payable until a "sale was consummated." Plaintiffs argue that the parties entered into a listing agreement on December 9, 1996, which provided that McKay would receive an eight percent commission when McKay produced a ready, willing and able buyer.

"[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) (citations omitted). Whether contract language is ambiguous is a question of law that we review de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

In this case, the language of the listing agreement is clear and unambiguous—that McKay would receive an eight percent commission if McKay produced a buyer ready, willing and able to buy the property at a price and terms acceptable to defendant. Therefore, we conclude that evidence of the November 27, 1996, letter is not allowed to vary the terms of the listing agreement.

In order for a real estate broker to recover a commission where there is an express written contract, the broker must show performance thereof. *Hawkins v Smithson*, 181 Mich App 649, 652; 449 NW2d 676 (1989). As evidenced by the addendum and the offer agreement, McKay produced a ready, willing and able buyer on terms acceptable to defendant.

"[A] real estate broker who furnishes a buyer for property, ready, willing and able to complete the purchase on the owner's terms, is entitled to his agreed compensation if the owner wrongfully refuses to complete the sale." *Advance Realty Co v Spanos*, 348 Mich 464, 468-469; 83 NW2d 342 (1957). However, if the refusal is within the owner's legal rights, and not a bad faith attempt to avoid payment of commission, then the broker is not entitled to the commission. *Schostak v First Liquidating Corp*, 320 Mich 406, 417; 31 NW2d 673 (1948), overruled on other grounds in *Seelye v Broad*, 379 Mich 289, 291-292; 150 NW2d 785 (1967).

In this case, defendant's refusal to complete the sale was not within its legal rights. Therefore, the trial court did not err in granting plaintiff McKay summary disposition on its breach of commission agreement claim.

Defendant also contends that the trial court erred in allowing evidence of damages for future lost profits and profits from the future sale of the golf course. We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

The appropriate measure of damages for breach of contract is that which would place the injured party in as good a position as it would have been in had the promised performance been rendered. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989). Lost profits, if they arise from the breach of contract and are properly proved, are an appropriate element of damages. *Id.*

Defendant argues that plaintiff Oak Ridge's claim for lost profits was not properly pleaded in the complaint. "In Michigan, it is merely required that the injury sought to be proved must be the natural result of the injury complained of in the pleadings." *Van Pembroke v Zero Mfg Co*, 146 Mich App 87, 107; 380 NW2d 60 (1985). "If such injury can be traced to the act complained of and is such as would naturally flow from the alleged injury, it need not be specifically averred." *Id.*

We conclude that lost profits are a damage that naturally flowed from defendant's breach of contract. Therefore, it was properly plead in the complaint.

Defendant next argues that there was no foundation for CPA Dan Warmels' or Cecil McKay's testimony as to future profit projections. We disagree. Defendant failed to object to Warmels' testimony regarding future lost profits. Objection to evidence must be timely, and must specify the reason for the objection to preserve the issue. *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987). This Court need not review issues raised for the first time on appeal, but may do so to prevent manifest injustice. *Herald Co, Inc v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). This Court concludes that manifest injustice will not occur if we do not address this issue.

Defendant did object to Cecil McKay's testimony. After reviewing Cecil McKay's testimony, we find that the trial court did not abuse its discretion in allowing Cecil McKay to testify. "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). We conclude that the trial court's decision to allow Cecil McKay's testimony does not meet that test.

Defendant also asserts that there was no evidence that Warmels' projection of profits for fifteen years derived from a recognized, scientific, technical, or other specialized knowledge and that the trial court erred in allowing proof of lost profits from a future sale of the golf course to a third party because Candlestone had no inkling that such a transaction would occur. Again, defendant did not object and fails to assert that manifest injustice will occur if appellate review of this issue was denied. *Napier v Jacobs*, 429 Mich 222, 233-234; 414 NW2d 862 (1987). More than the fact of the loss of the money judgment is needed to show manifest injustice. *Id.*, 234. Therefore, defendant's argument was not preserved, and we conclude that manifest injustice will not occur if we do not address this issue.

Defendant next argues that the trial court erred in allowing a double recovery of damages. We disagree. In *Jim-Bob, Inc, supra*, 99, we found that while the testimony regarding the value of the plaintiff's business was, in part, indirectly based upon profits, we did not believe that an award of damages for both loss of business and loss of profits gave the plaintiff a double recovery. After reviewing the testimony of Warmels and Cary Campbell, we see an analogous situation in the present case. Therefore, the trial court did not err in allowing the jury to consider the testimony of both Campbell and Warmels and the verdict did not result in an improper double recovery.

Finally, defendant argues that the trial court erred in admitting hearsay documents prepared by Cecil McKay. A bald assertion without supporting authority precludes appellate

examination of the issues. *Impullitti v Impullitti*, 163 Mich App 507, 512 ; 415 NW2d 261 (1987). Because defendant failed to provide supporting authority, we decline to address this argument.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof