

STATE OF MICHIGAN
COURT OF APPEALS

WHITE CHAPEL MEMORIAL ASSOCIATION
PARK PERPETUAL CARE TRUST,

UNPUBLISHED
October 6, 2005

Plaintiff-Appellant/Cross-Appellee,

v

No. 254597
Oakland Circuit Court
LC No. 2003-052017-CZ

RICHARD PERNAL,

Defendant/Cross-Defendant-
Appellee,

and

ST. NICHOLAS GREEK ORTHODOX CHURCH
OF DETROIT,

Intervening Defendant/Cross-Plaintiff-
Appellee/Cross-Appellant.

Before: Hood, P.J., and White and O’Connell, JJ.

PER CURIAM.

Plaintiff White Chapel Memorial Association Park Perpetual Care Trust appeals as of right from the trial court’s order denying its motion for summary disposition and granting defendant St. Nicholas Greek Orthodox Church of Detroit’s motion for summary disposition. We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

This case arises from competing responses by White Chapel and St. Nicholas to an offer by defendant Richard Pernal to sell certain real property. We recently addressed these same transactions from a slightly different perspective in *St. Nicholas Greek Orthodox Church of Detroit v Pernal (St. Nicholas II)*, unpublished per curiam opinion of the Court of Appeals, issued June 9, 2005 (Docket No. 252968). In *St. Nicholas II* we recounted the following facts:

[Pernal], the owner of real property, sent a letter [dated June 3, 2003] to [St. Nicholas] indicating that a parcel of real property adjacent to [Pernal’s] property was offered for sale. The letter provided that the property was offered for “\$825,000 cash/mortgage, ‘as is’, with no conditions, no contingencies related

to zoning and 120 days post closing occupancy for the present tenants.” This offer dated June 3, 2003, expressly provided that it would remain open for a two-week period.

On June 4, 2003, [St. Nicholas] sent [Pernal] a letter indicating that it accepted the “terms of the offer” set forth in [Pernal’s] letter. However, [St. Nicholas’] letter also referenced an attached purchase agreement [which contained additional terms and conditions]. Although the purchase agreement contained the signature of [St. Nicholas’] president, [Pernal] did not sign the agreement.

[Pernal’s June 3, 2003, offer to sell] did not reference other potential purchasers. However, [it] was also directed to White Chapel On June 10, 2003, White Chapel, by letter, offered to pay \$900,000 cash for the premises, with no conditions or contingencies related to zoning and 180 days post closing occupancy rent free. On that same date, [Pernal] sent a letter to both potential purchasers. This letter indicated that “amended offers” had been received. The letter further provided that the offer would remain open for two weeks’ time as provided in the initial offering letter. [*Id.* at slip op, p 1.]

On June 17, 2003, St. Nicholas filed suit against Pernal seeking specific performance of a purported contract for the sale of the property. White Chapel unsuccessfully sought to intervene in that action. St. Nicholas then brought a motion for summary disposition against Pernal, which was granted because the trial court found that St. Nicholas’ response to Pernal’s offer was a valid acceptance. That decision was reversed by this Court in *St. Nicholas II*.¹

Following the denial of its motion to intervene in the action filed by St. Nicholas, but before the trial court granted St. Nicholas’ motion for summary disposition, White Chapel filed the present action against Pernal, alleging that it had accepted Pernal’s offer to sell the property and seeking specific performance of the resulting contract. St. Nicholas was allowed to intervene in this action, and it was reassigned to the same judge that had presided over St. Nicholas’ action against Pernal. Following reassignment, the trial court denied White Chapel’s motion for summary disposition and granted St. Nicholas’ motion, consistent with its (now-reversed) ruling in St. Nicholas’ action against Pernal.

On appeal, White Chapel argues that the trial court erred in granting St. Nicholas’ motion for summary disposition because St. Nicholas’ response to Pernal’s offer to sell was not an acceptance of that offer, but rather, was a counter-offer that was never accepted by Pernal. As noted above, this Court previously resolved this issue against St. Nicholas in *St. Nicholas II*, reversing the trial court’s grant of summary disposition to St. Nicholas in that case on the basis that St. Nicholas’ response to Pernal’s offer constituted a rejection and counter-offer, not an

¹ The trial court’s denial of White Chapel’s motion to intervene was also reversed in *St. Nicholas Greek Orthodox Church of Detroit v Pernal (St. Nicholas I)*, unpublished per curiam opinion of the Court of Appeals, issued June 9, 2005 (Docket No. 252705).

acceptance. Therefore, we adhere to our original ruling and reverse the trial court's grant of summary disposition to St. Nicholas in this case as well.

White Chapel next argues that the trial court erred in denying its motion for summary disposition. We disagree. We review de novo decisions that grant or deny summary disposition motions. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The construction and interpretation of a contract also presents a question of law that we review de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). A valid contract requires mutual assent on all its essential terms. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). Before a contract can be formed, there must be an offer and an unambiguous acceptance in strict conformance with the offer. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). An acceptance "must be absolute and unconditional, and if conditions are attached or if it differs from the offer, the transaction amounts only to a proposal and a counter-proposal." *Marshall Manufacturing Co v Berrien County Package Co*, 269 Mich 337, 339; 257 NW 714 (1934). "A proposal to accept an offer which contains terms varying from that of the offer is a rejection of the offer." *Wayne State University v Building Systems Housing Corp*, 62 Mich App 77, 85; 233 NW2d 195 (1975).

Pernal offered to sell the property for "\$825,000 cash/mortgage, 'as is', with no conditions, no contingencies related to zoning and 120 days post closing occupancy for the present tenants." White Chapel's response proposed to purchase the property for \$900,000, with no conditions, no contingencies related to zoning and 180 days post closing occupancy rent free. Therefore, White Chapel's response was not in strict conformance with the offer as to purchase price and the closing occupancy period. White Chapel asserts that the differences between its response and Pernal's offer "indisputably" benefited Pernal, so they did not suffice to convert the response from an acceptance to a counter-offer. Whether White Chapel's terms were more favorable to Pernal than those set forth in the offer to sell was a question to be answered by Pernal in accepting or rejecting the changed terms. Terms that seem more favorable to the original offeror on their face may not be more favorable from the offeror's perspective, and we will not impose a contract on someone simply because we do not think it was wise for them to reject the contested counter-offer. There is no dispute that White Chapel's response varied from the offer regarding the purchase price and the occupancy date.² While White Chapel is quick to argue that these were not material terms, we see the potential for dispute over these allegedly immaterial terms if we ruled that White Chapel's \$900,000 response constituted a valid acceptance of, and formation of a contract for, the original \$825,000 offer.³ Consequently,

² It bears noting that the only conceivable reason White Chapel offered more money and more time was because it thought it had to outbid a competitor. Therefore, White Chapel's own actions belie any suggestion that it considered the original offer open for flat acceptance or that it intended its counter-offer of \$900,000 to constitute an acceptance of an \$825,000 offer of contract.

³ While real estate experts may harp on location, we are not persuaded that such fundamental concepts as contract price and occupancy fail to qualify as material aspects of a real estate contract. Moreover, if White Chapel's letter promising more money was an acceptance of the original offer, should we hold the parties liable under the contract formed by accepting the terms
(continued...)

White Chapel's response was a counter-offer and not an acceptance of Pernal's offer, and the trial court did not err in denying White Chapel's motion for summary disposition. *Id.*

St. Nicholas' asserts on cross-appeal that White Chapel was precluded from filing the instant lawsuit by principles of res judicata. That assertion has been rendered moot by this Court's disposition in *St. Nicholas II*. However, we note that our decision in *St. Nicholas I* allows White Chapel to become a party in St. Nicholas' original suit, rendering the instant lawsuit superfluous. On remand, the trial court should strongly consider consolidating these cases. MCR 2.505.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen Fort Hood

/s/ Peter D. O'Connell

(...continued)

of the original offer, or should we manufacture a contract that conforms to the terms of White Chapel's "improved" counter-offer? The first proposal lacks fairness, but the second lacks an even more fundamental contractual element—consent. Given the equities of this case and the dearth of case law discussing this rare (if not unique) problem, we see no pressing reason to deviate from longstanding contract principles.