

STATE OF MICHIGAN
COURT OF APPEALS

MAYURBHAI PATEL,

Plaintiff-Appellee,

v

ALLIE BERRY and CHARLES A ROEHL,

Defendants-Appellants.

UNPUBLISHED

May 22, 2007

No. 273767

Wayne Circuit Court

LC No. 05-535189-CK

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendants appeal as of right from the order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and directing the return of plaintiff's earnest money in this dispute arising out of an offer to purchase a gas station business and the real property associated therewith. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On July 11, 2005, plaintiff and defendant Berry entered into a Preliminary Offer to Purchase concerning the business and real property of a gas station in Taylor, Michigan. Plaintiff provided \$50,000 earnest money for the transaction. That earnest money was deposited with defendant Roehl who was acting as the escrow agent.

On October 12, 2005, after review of a Product and Supply Agreement related to the subject gas station, plaintiff's attorney sent written notice to defendants stating that plaintiff could not approve the Product and Supply Agreement, and he was therefore declaring the Purchase Agreement null and void and demanding the return of the earnest money. When defendants did not return plaintiff's earnest money, plaintiff filed his complaint in December 2005. The complaint alleged that the preliminary offer to purchase was breached, no final purchase agreement was ever entered, and the earnest money should have been returned.

During discovery, defendant Berry testified at his deposition that he did not own and therefore could not sell the real property that was the subject of the preliminary offer to purchase, as his brother owned the property in question. Defendant Berry also made statements that he testified that his brother had authorized him to sign the document.

In June 2006, plaintiff filed a motion for summary disposition and for return of the earnest money, arguing that defendant Berry did not have an interest in the business property.

Because defendant Berry could not have sold the property, there was no mutuality of contract. Plaintiff also argued that a final purchase agreement was never entered and therefore the terms and conditions of the preliminary offer to purchase were not fulfilled.

Defendants argued that there was no requirement under the preliminary offer to purchase to return the earnest money solely because plaintiff disapproved of the product supply agreement. Defendants also argued that there must have been a binding agreement between the parties because plaintiff gave them a \$50,000 deposit. Without explanation, the trial court granted plaintiff's motion.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Randolph v Reisig*, 272 Mich App 331, 333; 727 NW2d 388 (2006). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court "considers all the evidence, affidavits, pleadings, admissions, and other information available in the record in the light most favorable to the nonmoving party.... Summary disposition is properly granted if no factual dispute exists, thereby entitling the moving party to judgment as a matter of law." *Id.* Additionally, "[t]he nonmoving party must present more than mere allegations in order to demonstrate a genuine issue of material fact for resolution at trial." *Id.*

Mutuality of obligation means that either both parties to an agreement are bound or neither party is bound. *Reed v Citizens Ins Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993), overruled on other grds by *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 540; 697 NW2d 895 (2005). More specifically, mutuality of obligation means "there must be consideration, without which there is no obligation on either party because there is no binding contract." *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005).

"Contracts conveying an interest in land made by an agent having no written authority are invalid under the statute of frauds unless ratified by the principal." *Forge v Smith*, 458 Mich 198, 208-209; 580 NW2d 876 (1998). According to Michigan's applicable statute of frauds, any interest in lands, other than for a lease not exceeding one year, must be conveyed according to a writing and that writing must be "subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing." MCL 566.106. Further a contract for any interest in lands "shall be void" unless the person granting such interest, or "some person thereunto by him lawfully authorized in writing" signs the contract, note or memorandum concerning the conveyance. MCL 566.108.

In the present case, defendant Berry testified that he did not have an ownership interest in the gas station property, which was the subject of the offer to purchase. Defendant Berry's testimony was that his brother owned the property, and his brother authorized defendant Berry to sign for him, although there was no indication of an agency relationship on the offer to purchase. Notwithstanding defendant Berry's assertion of authority, defendants did not produce any evidence of written authority to enter into the transaction or subsequent ratification of the transaction by the brother. Nonmoving parties must present more than mere allegations to survive a motion for summary disposition by showing that a genuine issue of material fact exists. *Randolph, supra* at 333.

Defendants provided no evidence of written authorization or actual ratification by the principal showing that defendant Berry had authority to sign for the owner of the property. Accordingly, the offer to purchase, dealing with the sale of a gas station including the real property on which it sits, is invalid and requires the return of plaintiff's earnest money pursuant to the statute of frauds. MCL 566.108; *Forge, supra* at 208-209.

Affirmed.

/s/ Helene N. White

/s/ Henry William Saad

/s/ Christopher M. Murray