

STATE OF MICHIGAN
COURT OF APPEALS

RAZZOOK’S PROPERTIES, L.L.C., COUSINS
SUPERMARKET, INC., and JAMAL ABRO,

UNPUBLISHED
November 21, 2006

Plaintiffs/Counter-Defendants-
Appellants,

v

No. 263010
Genessee Circuit Court
LC No. 03-077470-CZ

NICK YONO,

Defendant/Counter-Plaintiff-
Appellee.

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiffs/counter-defendants, Razzook’s Properties, L.L.C. (“Razzook’s”), Cousins Supermarket, Inc. (“Cousins”), and Jamal Abro, appeal by leave granted from an order denying their motion to set aside a purchase agreement and other written agreements concerning the sale of a convenience store, entered in favor of defendant, Nick Yono. We reverse and remand for further determination of the rights and obligations of the parties in light of our decision.

Plaintiffs first argue that the circuit court erred by denying their motion to rescind the purchase agreement based on impossibility of performance. We disagree.

“We review equitable actions de novo but review the trial court’s factual findings for clear error.” *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002) (citation omitted). A finding is “clearly erroneous” if “the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made.” *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

To determine the application of the defense of impossibility, one must examine whether an unanticipated circumstance has made the promised performance vitally different from what was contemplated by the parties at the time of the contract’s formation. *Bissell v L W Edison Co*, 9 Mich App 276, 285; 156 NW2d 623 (1967). The circumstances excuse performance only to the extent that performance is impossible, and the application of impossibility is based on the individual facts of each case. *Id.* at 286. Accordingly, plaintiffs must show that the event or circumstance causing the frustration or impossibility was not foreseeable at the time the contract

was made. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 134-135; 676 NW2d 633 (2003); *Bissell, supra* at 285.

The fact that a fire could destroy the building or its contents was foreseeable. When the parties signed their agreements, they executed a corporate lease agreement that required defendant to maintain fire insurance on the property. The lease specifically provides that “in the event the demised premises are, in the opinion of the Lessor, totally destroyed or rendered wholly unfit for occupancy by fire or other casualty, Lessee shall rebuild the demises [sic] premises.” Because the fire loss that plaintiffs claim renders performance impossible was foreseeable, the impossibility of performance doctrine is inapplicable. *Liggett, supra* at 134-135; *Bissel, supra* at 285. The trial court, therefore, correctly denied plaintiffs’ motion to rescind the purchase agreement on that basis.

Plaintiffs alternatively argue that *all* of the agreements should be rescinded because of defendant’s material breach of the lease agreement. We agree.

In granting equitable relief, the court looks to the whole situation, and grants or withholds relief as dictated by good conscience. *McFerren, supra* at 522. Restitution is among the remedies available to a court in cases of fraud and misrepresentation to achieve a just result. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 134; 313 NW2d 77 (1981). Rescission itself involves restitution because it is based on the idea that parties should be restored to the status quo. *Lash v Allstate Ins Co*, 210 Mich App 98, 102-103; 532 NW2d 869 (1995). To rescind a contract is to undo it from the beginning. *Id.*

“In order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract.” *Omnicom v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). In determining whether a breach is material, a court should consider whether the plaintiff obtained the benefit that he or she reasonably expected to receive. *Id.* Also relevant are the willfulness of the defendant’s conduct, and the extent to which the plaintiff can be adequately compensated for damages for lack of complete performance. *Id.*

Plaintiffs argue that the lease agreement should be rescinded because of defendant’s failure to secure fire insurance covering the property, as required by the parties’ lease agreement. Defendant argues that he was not required to satisfy his obligations under the lease because the circuit court entered a preliminary injunction on November 6, 2003, which required defendant to surrender the property to plaintiffs and cease and desist from operating his business there.

Subsequent to the circuit court’s November 6, 2003, preliminary injunction, however, the circuit court entered its “amended judgment” ordering that the “written agreements between the parties shall be specifically enforced according to their terms.” Neither party challenges the circuit court’s ruling in this regard. The proper interpretation of a court order is a question of law that we review de novo. See *Cardinal Mooney High School v Michigan High School Athletic Ass’n*, 437 Mich 75, 80; 467 NW2d 21 (1991). It is well-settled law that “a court speaks through its written orders.” *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). This Court’s jurisdiction is confined to written orders and judgments. *Lown v JJ Eaton Place*, 235 Mich App 721, 725-726; 598 NW2d 633 (1999). According to the amended judgment, which effectively superseded the November 6, 2003, preliminary injunction, the parties were bound by

the provisions of the corporate lease agreement, which required defendant to maintain insurance on the subject property.

Defendant breached the lease agreement by failing to maintain insurance coverage. This breach is material because the building that plaintiffs are required to lease to defendant no longer exists, and plaintiffs must now provide defendant with a newly constructed building to perform under the lease, at their own expense. As a result, plaintiffs are entitled to rescission of the lease on the basis that defendant materially breached the lease agreement. *Omnicom, supra* at 348.

Defendant argues that his obligations under the lease were not triggered until “he purchased the business” but fails to articulate a factual or legal basis for this assertion. This Court will not search the record for factual support for a claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see also MCR 7.212(C)(7). Nevertheless, the lease does not contain a specific start date, or a provision conditioning the lease on defendant’s purchase of the property.

Plaintiffs further argue that because defendant breached the lease agreement, rescission of the Business Purchase Agreement and Offer to Purchase Real Estate is also proper. Plaintiffs fail to cite any authority specifically indicating that a party’s material breach of one contract can serve as the basis for rescission of another contract regarding a closely related subject matter. Yet, “a Court acting in equity looks at the whole situation and grants or withholds relief as good conscience dictates.” *McFerren, supra* at 522 (citation omitted). This fundamental legal principle evinces this Court’s ability to rescind an agreement or series of agreements based on the totality of the circumstances. It follows that a court acting in equity is not limited to rescission of only the contract that a party has materially breached, but any other contract necessary to “grant . . . relief as good conscience dictates.” *Id.*

This conclusion is consistent with the principle that where one writing references another instrument for additional contract terms, the two writings should be read together. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). Here, the purchase agreement includes a provision that a condition of the purchase agreement was that defendant would secure a 10-year lease for \$3,000 a month. The agreements, taken together, demonstrate that the risk of loss was placed on defendant under the lease agreement while the sale was pending. Rescission of all the agreements is necessary to sufficiently return the parties to the positions they were in before the contracts were made. Allowing defendant to receive the benefits under the other agreements while his failure to secure fire insurance creates a greater burden on plaintiffs would be an inequitable result. The circuit court erred by refusing to rescind the agreements on this ground.

Reversed. We remand to the circuit court for determination of the rights and obligations of the parties after rescission of the agreements. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot