# STATE OF MICHIGAN

# COURT OF APPEALS

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CURTIS W. BOYD and EULANDA L. BOYD,

Plaintiffs-Appellants,

v

PAUL E. BURKE, SR.,

Defendant,

and

RE/MAX GAYLORD and PETER W. WHYTE,

Defendants-Appellees.

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UNPUBLISHED
May17, 2007

No. 275313
Otsego Circuit Court
LC No. 06-011740-CH

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiffs Curtis W. Boyd and Eulanda L. Boyd appeal an order granting summary disposition in favor of defendants RE/MAX of Gaylord and Peter W. Whyte and granting them attorney fees. We affirm.

This case arose out of a failed real estate transaction between plaintiffs and defendant Paul E. Burke, Sr. (hereinafter "Burke"). Plaintiffs became interested in purchasing a house owned by Burke, and apparently wished to purchase the house in a furnished state. Defendants RE/MAX of Gaylord and Peter W. Whyte acted as dual agents with Burke and plaintiffs in connection with the property transaction. There is no dispute that this dual agency was by the agreement of both parties and after all relevant and legally required disclosures. See *HJ Tucker and Assocs, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 574; 595 NW2d 176 (1999). Burke did not appear in this action, and plaintiffs eventually stipulated to dismiss their claims against Burke with prejudice. Therefore, the only issues on appeal pertain to plaintiffs' claims against defendants RE/MAX of Gaylord and Peter W. Whyte (hereinafter "defendants"). Plaintiffs assert that defendants breached their fiduciary duties by failing to resolve issues arising out of the purchase agreement.

Plaintiffs initially sent a "Buy and Sell Agreement" to Burke. In relevant part, it provided as follows:

> ALL IMPROVEMENTS AND APPURTENANCES ARE INCLUDED in the purchase price, including now in or on the property, the following: T.V. antenna and complete rotor equipment; garage door opener and transmitter(s); carpet; lighting fixtures and their shades; drapery and curtain hardware; window shades and blinds; screens, storm windows and doors; stationary laundry tubs; water softener (unless rented); water heater; incinerator; heating and air conditioning equipment; water pump and pressure tank; built-in kitchen appliances including garbage disposal; awnings; mail box; all plantings; fence(s). Exceptions:* [sic] The sale shall include the range, ref. and window treatments. The sale shall also include all furnishings located at the property, excluding personal items. Inventory list to be provided.

The list through "Exceptions:" was boilerplate language; the remainder of the above list was manually added. Attached to this document was an addendum that provided in relevant part:

> In any action or proceeding arising out of this agreement, the prevailing party, [sic] shall be entitled to actual and reasonable attorneys fees and costs. This shall also be applicable to any Realtor(s) who become a party to such action or proceeding which Realtors shall be considered a third party beneficiary to this contract.

Burke apparently agreed to and signed the Buy and Sell Agreement, subject to two addendums. The first was essentially identical to the original addendum that plaintiffs had forwarded. The second addendum, which the parties construed as a counter-offer, provided in part:

> The personal property shall be removed on or before May 1st. 2006. Upon [sic] the personal property has been removed an inventory list will be provided for the Sellers and Purchasers review and approval.
>
> Purchasers shall have until 5:00 p.m. on March 18, 2006, to accept Sellers counter offer at which point this agreement shall be NULL & VOID.

Plaintiffs signed this counter-offer.

The next day, however, plaintiffs sent an email to defendant realtors that read as follows:

> Bill,
>
> Find attached the signed paperwork for the offer on the property, 5611 Harvey. Please note that Eulanda and I expect the personal items to be limited to personnel [sic] effects (clothing, etc...), the gun and the boat, not furniture or furnishings, appliances or case goods. I mention this because the sellers acceptance does not make this clear.
>
> Please do not hesitate to call.

The parties had no further communications until May, 2006. Plaintiffs prepared a list of "missing items" from the house, which indicated that it was "prepared in accordance with the

acceptance of the Buy and Sell agreement between Curtis & Eulanda Boyd and Paul Burke," and which they forwarded to defendants. The only item on the "missing items list" that was explicitly enumerated in the original Buy and Sell Agreement was a refrigerator. Defendant Whyte subsequently prepared an "inventory list" for plaintiffs. Among other items, this inventory list indicated that a refrigerator had actually been left, and it further listed the range and window treatments. Plaintiffs demanded compensation for the furnishings listed in the "missing items list," which they contended were required by the purchase agreement to have been included in the sale. Burke disagreed, denied the requested compensation, and rescinded the Buy and Sell Agreement. Plaintiffs commenced this suit.

Plaintiffs' theory against defendants was that they breached the agency agreement as follows:

> That in the event the aforementioned "Buy and Sell Agreement" Addendums and March 15, 2006 email did not create a binding purchase agreement, then the Defendants Re/Max of Gaylord and/or Peter W. (Bill) Whyte had an obligation to inform the Plaintiffs, and the Defendant Paul E. Burke, Sr., that there was no binding agreement so that a binding agreement could be completed.

The trial court concluded that this constituted an assertion that defendants had a duty to engage in the unauthorized practice of law, so the trial court granted defendants summary disposition pursuant to MCR 2.116(C)(8). We do not believe it necessary to determine what would constitute unauthorized practice of law for a realtor,[1] but we agree with the result reached by the trial court.

The only ambiguity we perceive in the documents we have been provided is whether a particular refrigerator was, in fact, removed from the house. Plaintiffs' list of missing items indicates that a refrigerator was taken, whereas defendants' inventory list indicates that a refrigerator remains. Otherwise, all the items enumerated in the original Buy and Sell Agreement that had been in the house to begin with (some which may not have applied) were left in the house. An exception was explicitly provided for "personal property." In contrast, "furniture" was not mentioned. The Buy and Sell Agreement required provision of an inventory list, and the first addendum – agreed to by the seller – provided that the parties' respective attorneys would review "all of their clients documents" before closing. The counter-offer did not change any material provisions: it only specified a date by which the "personal property" would be removed, and it confirmed that the parties would be given an inventory list for their "review and approval."

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[1] We do observe in passing that it has long been the law in Michigan to distinguish between, on the one hand, merely drafting a standardized document or taking dictation, and on the other, making a determination of or rendering advice regarding the legal significance of a document. See *Dressel v Ameribank*, 468 Mich 557, 565-569; 664 NW2d 151 (2003); *Ingham Co Bar Ass'n v Walter Neller Co*, 342 Mich 214, 222; 69 NW2d 713 (1955).

A contract is only ambiguous if its language, read in its entirety and given its plain and ordinary meaning, fairly permits more than one interpretation. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467-469; 663 NW2d 447 (2003). "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Whether there was a meeting of the minds is to be determined objectively by looking to the parties' expressed words and acts. *Kloian v Domino's Pizza*, 273 Mich App 449, 454; ___ NW2d ___ (2006). Parties are presumed to understand the plain language of the contracts they sign, and "the unilateral subjective intent of one party cannot control the terms of a contract." *Burkhardt v Bailey*, 260 Mich App 636, 655-656; 680 NW2d 453 (2004). The courts must enforce unambiguous contracts as they are written, unless they violate the law or public policy. *Id*., 657.

The language of the parties' agreement, when viewed as a whole, contains a specific list of items that are required to remain in the house as part of the purchase, and nothing in the counter-offer changed that list in any way. Notably, in addition to the boilerplate language, that list additionally requires "furnishings" to be included, but further provides that "personal items" are to be *excluded*. Neither category of item is defined, but the agreement goes on to mandate an inventory list *and* condition closing on approval of all documents by each party's own legal counsel. The counter-offer contains a typographical error, but can only be interpreted as providing for the inventory list to be given *after* removal of the "personal property," whereupon the parties may give final approval to that list. This is consistent with the language of the original Buy and Sell Agreement, as well. We cannot find any other way to interpret the parties' agreement: plaintiffs specified numerous items to be left in the house, and Burke complied with this list. Plaintiffs declined to identify the "personal items" that Burke was to remove, instead requiring an inventory list to be provided for final approval before closing on the purchase.

Plaintiffs' later unilateral statement about what they expect "personal items" to consist of does not create an ambiguity in the contract. The plain language of the contract fairly admits only one interpretation: that certain items were to be included in the sale, but that the seller's "personal property" was to be left to the discretion of the seller, subject to the provision of an inventory list that the buyers were then permitted to approve or decline before closing. Here, plaintiffs' email regarding their expected interpretation of what constituted "personal items" is no more than their subjective expectation, and the plain language of the unambiguous contract was complied with. *Burkhardt, supra* at 655-656. Whatever duty plaintiffs allege was violated by defendants never arose, because there was no ambiguity to resolve or lack of mutual assent to point out.[2] Therefore, under the facts of this case, it is unnecessary for this Court to engage in a lengthy analysis of what would constitute the practice of law for a realtor. This is especially so because the Buy and Sell Agreement specifically provides that each party would independently have the documents reviewed by the party's own counsel.

[2] The possible issue of the refrigerator was not argued or articulated here or in the trial court.

Although we do not deem it necessary to address whether plaintiffs' proposed duty would entail the unauthorized practice of law, we agree with the ultimate conclusion reached by the trial court: defendants did not breach any duty to plaintiffs.

Plaintiffs assert that they should have been permitted to amend their pleadings. Plaintiffs correctly note that leave to amend pleadings should be freely given by a trial court after granting summary disposition pursuant to MCR 2.116(C)(8) or (C)(10), "unless the amendment would not be justified." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). However, we "will not reverse a trial court's decision to deny leave to amend pleadings unless it constituted an abuse of discretion." *Id*., 53. We find no abuse of discretion here. The trial court provided plaintiffs ample opportunity to explain some alternative theory that would justify amendment, listened patiently, and determined that plaintiffs had identified none. On appeal, the theories plaintiffs propose are either without merit or appear to be restatements of their original theory. We are unable to discern any indication that the trial court abused its discretion in denying leave to amend.

Plaintiffs finally contend that the trial court should not have awarded attorney fees to defendants. There is no dispute that the basis for the attorney fee award was in a contractual provision in the Buy and Sell Agreement: plaintiffs' offer and Burke's counter-offer, both signed by plaintiffs, contain essentially identical language providing for attorney fees to the prevailing party in any litigation arising out of "this agreement." Therefore, both parties to the agreement had a "meeting of the minds" as to the attorney fee provision. Plaintiffs argue that the agreement itself was either rescinded or invalid, so the attorney fee provision must also be rescinded or invalid. Specifically, plaintiffs contend that the attorney fee provision is not severable from the rest of the agreement. We disagree.

"In general, rescission abrogates a contract completely." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995). However, if the parties intend provisions of a contract to be severable, the failure of one provision will not make any other provisions void. *Id*., 641. In *Samuel D Begola Services, Inc*, the "defendants rescinded the purchase agreements, yet [sought] to enforce the attorney fee provisions contained in those same purchase agreements." *Id*. "The purchase agreements provided that '[i]n the event either party shall prevail in any legal action commenced to enforce this agreement, he shall be entitled to all costs incurred in such action including legal fees.'" *Id*., 640. This Court concluded that the parties had clearly "intended to deter litigation with regard to the contract" by providing that "if litigation should arise, the loser of that litigation was to reimburse the prevailing party." *Id*., 641-642. Therefore, the parties must have intended the attorney fee provision to be "severable from the purchase agreements proper and survive the rescission of the purchase agreements." *Id*., 642. We perceive no meaningful distinction between *Samuel D Begola Services, Inc* and the instant case. Therefore, even if the purchase agreement proper was rescinded or invalid, the attorney fee provision remains valid and enforceable, as the trial court properly found.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis