STATE OF MICHIGAN

COURT OF APPEALS

JEFFERY A. POTTS, M.D.,

Plaintiff-Appellee,

v

MEL STIEVE and NANETTE STIEVE,

Defendants-Appellants.

UNPUBLISHED
May17, 2007

No. 268581
Arenac Circuit Court
LC No. 05-009226-CH

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

PER CURIAM.

Defendants appeal as of right an order granting specific performance to plaintiff and requiring defendants to proceed with the parties' real property purchase agreement. We affirm.

Defendants own property adjoining land owned by plaintiff's father and land owned by two of plaintiff's cousins. When defendants decided to sell their property, they contacted plaintiff's father, who contacted plaintiff. Plaintiff decided to purchase the property, and the parties entered into a purchase agreement. The purchase agreement was a standard form contract obtained by plaintiff from his title insurance company and filled in by defendants. Both parties testified that they found the form somewhat confusing, and they mistakenly signed the form in the wrong places. Defendants later sought to avoid the agreement because of their contention that plaintiff had agreed to pay the closing costs for both parties, which he denied and refused to do. Defendants did not dispute that the parties intended to enter into a binding agreement, but rather that the contract was invalid due to this signing error. The trial court disagreed, as do we.

Defendants first argue that plaintiff did not actually sign the purchase agreement, but rather signed an "acceptance." We disagree: both the acceptance and the offer are contained in a single form entitled "Agreement of Sale." It is divided into four sections: "Offer to Purchase Real Estate," "Broker's Acknowledgement of Deposit," "Acceptance of Offer," and "Purchaser's Receipt of Accepted Offer." On the final draft of the agreement, defendants signed under both the Offer to Purchase Real Estate and the Acceptance of Offer sections. Thus, defendants ostensibly agreed to both offer and purchase their own property. However, their testimony made it clear that they intended to make an offer to plaintiff and that plaintiff intended to accept their offer by signing under the Purchaser's Receipt of Accepted Offer section.

Defendants next argue that the purchase agreement they signed with plaintiff was not binding because the transaction was supposed to take place with both plaintiff and his wife, but

plaintiff's wife never signed the agreement. Defendants argue that the trial court should have found the contract ambiguous, thus warranting consideration of extrinsic evidence in the form of their testimony that defendants intended to offer their property to both plaintiff and his wife. We disagree.

Where "two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous." *Klapp v United Ins Group Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003). However, although signatures are generally formal requirements to a contract becoming binding on the signing party, they are not technically "provisions" of the contract. There are no conflicts in the body of the contract, and there was no mistake between the parties as to the intent of the agreement: to represent defendants' offer to sell their property and plaintiff's acceptance of that offer. Furthermore, even if the fact that the parties who signed the contract may not have done so in all of the correct places created some ambiguity, that ambiguity would not be whether plaintiff's wife was intended to be a party to the contract. Plaintiff signed the document as the purchaser under "Purchaser's Receipt of Accepted Offer," and one of the two places defendants' signatures appear indicates that they are the sellers. The intent of the parties is clear based on both the contract and the parties' testimony, and the provisions of the contract are not in conflict. Therefore, the contract is not ambiguous, so it would have been error for the court to rely on the parties' testimony over their written contract. See *Hamade v Sunoco, Inc* (*R & M*), 271 Mich App 145, 166-167; 721 NW2d 233 (2006) (noting that parol evidence is generally inadmissible to vary a clear and unambiguous written contract). The only evidence put forth by defendants that they originally made their offer to both plaintiff and his wife came via their testimony during trial; therefore, the trial court did not err in finding no evidence that plaintiff's wife was intended to be a party to the contract.

Defendants argue that plaintiff forfeited his right to sue for specific performance when he neglected to promptly return the check they sent him as a refund of his deposit. We disagree.

Paragraph four of the parties' purchase agreement, labeled "Seller's Default," states that "[i]n the event of default by the Seller hereunder, the Purchaser may, at his option, elect to enforce the terms hereof or demand, and be entitled to, an immediate refund of his entire deposit in full termination of this agreement." Defendants contend that plaintiff's failure to return the refund check they sent to his place of business within less than 55 days constitutes election of the second remedy in paragraph four. We find nothing in the parties' agreement that would support the conclusion that a lapse of 55 days between plaintiff's receipt of the check and its return constituted an election of the remedy of immediate return of the deposit. The parties' agreement also does not contain any provision from which we could determine what would constitute a "reasonable time."

Furthermore, the evidence shows that plaintiffs clearly did not "elect" the second remedy; rather, defendants attempted to elect it for him by returning the deposit after plaintiff, according to his testimony, had informed defendant husband by telephone that he would not accept the return of his deposit. The commencement of this litigation should also have put defendants on notice that the only affirmative step plaintiff had taken under paragraph four on seller's default was to seek specific performance. In fact, the defendant husband testified that plaintiff informed him during their last telephone conversation that he had spoken to a law firm and implied that any ensuing litigation would "cost [defendants] $15,000 and at the end I'm going to have your property." Thus, defendants were aware that plaintiff intended to seek specific performance of

their agreement. Because plaintiff took no steps to seek the return of his deposit, nor did he choose to keep the refund once he received it, it was not error for the court to find that plaintiff did not elect the remedy of return of his deposit. We also disagree that plaintiff was required to repudiate the action of his "agent" who deposited the check – the check was deposited by plaintiff's bookkeeper, who was responsible only for managing the financial aspect of plaintiff's patient accounts and had no authority to act on his behalf with respect to the subject of this litigation.

Affirmed.

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