STATE OF MICHIGAN

COURT OF APPEALS

JERRY SAURMAN,

Plaintiff-Appellant,

v

BRICE BOSSARDET, GRANDVILLE EAST CONDOMINIUMS, LLC, UNITED BANK MORTGAGE CORPORATION, JANE NELSON, INGRID NELSON, J. SCOTT TIMMER, and BRUCE BYTWERK,

Defendants-Appellees.

UNPUBLISHED
July 3, 2007

No. 268255
Kent Circuit Court
LC No. 05-05694-CK

JERRY SAURMAN,

Plaintiff-Appellee,

v

BRICE BOSSARDET,

Defendant-Appellant,

and

GRANDVILLE EAST CONDOMINIUMS, LLC, UNITED BANK MORTGAGE CORPORATION, JANE NELSON, INGRID NELSON, J. SCOTT TIMMER, and BRUCE BYTWERK,

Defendants.

No. 269550
Kent Circuit Court
LC No. 05-005694-CK

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff Jerry Saurman appeals as of right the trial court's dismissal, pursuant to MCR 2.116(C)(10), of his breach of contract and related tort claims (Docket number 268255), and defendant Brice Bossardet appeals as of right the trial court's denial of his motion for costs and

attorney fees, pursuant to MCR 2.405 (Docket number 269550). We affirm in part, reverse in part, and remand for a determination of the amount of costs and fees that should be awarded to Bossardet.

I. Pertinent Facts

Defendants Scott Timmer[1] and Bruce Bytwerk equally shared ownership in Humble Hollanders, LLC. Humble Hollanders, LLC's sole asset was a 36-unit apartment building in Grandville, Michigan. In late 2004, Timmer and Bytwerk began to look for potential buyers for the property. On December 23, 2004, plaintiff entered into a purchase agreement with Humble Hollanders, LLC to purchase the property for $1,100,000. The purchase agreement provided that closing occur on or before February 15, 2005. On February 7, 2005, plaintiff and Bossardet entered into an agreement to assign plaintiff's interest in the purchase agreement to Bossardet. The assignment agreement provided in relevant part:

> THIS ASSIGNMENT OF INTEREST IN PURCAHSE AGREEMENT (herein called the "Assignment"), is made this 7th day of February, 2005, by Jerry Saurman . . . to Brice Bossardet . . . .
>
> Recitals
>
> WHEREAS, Saurman has entered into a Purchase Agreement, dated December 23, 2004 ("Purchase Agreement"), with Seller Humble Hollander, LLC, for the purchase and sale of property and improvements in the city of Grandville, Kent County, Michigan commonly known as Grandville East Apartments ("Subject Property"). A copy of the Purchase Agreement is attached hereto as Exhibit A; and
>
> WHEREAS, Saurman desires to assign and Bossardet desire[s] to acquire the rights to the Purchase Agreement for an agreed upon assignment fee.
>
> NOW THEREFORE, for good and valuable consideration, the parties agree as follows:
>
> 1. Assignment. Saurman does hereby agree to assign to Bossardet all of his right, title and interest in and to the Purchase Agreement.
>
> 2. Assignment Fee. Bossardet does hereby agree to pay to Saurman as an assignment fee the sum of One Hundred Thousand Dollars ($100,000) including a non-refundable deposit in the amount of Ten Thousand Dollars ($10,000) due upon execution of this Assignment. Saurman's signature below serves as acknowledgement of his receipt of the non-refundable deposit.

[1] Defendants Jane Nelson and Ingrid Nelson are Timmer's mother-in-law and wife respectively.

The balance of the assignment fee being Ninety Thousand Dollars ($90,000) shall be due and payable at the closing on the Subject Property.

3. Closing. If closing does not occur, for any reason other than the default of Bossardet, the balance of the assignment fee is waived and Saurman shall be entitled to keep the deposit of Ten Thousand Dollars ($10,000) as his sole remedy. If closing does not occur, due to the default of Bossardet or the failure of Bossardet to close by March 5, 2005, Saurman shall have the option to retain the Ten Thousand dollars ($10,000) as liquidated damages or he may elect to refund the deposit to Bossardet and to cancel this Assignment taking back the Purchase Agreement for himself or for purposes of re-assignment to another purchaser.

4. Right to Designate. Bossardet expects to form a limited liability company or limited partnership to be the ultimate recipient of this Assignment and to close as buyer under the Purchase Agreement. Saurman acknowledges same and has no objection thereto.

5. Broker Status. Saurman acknowledges that he has been informed by Bossardet, prior to entering into this Assignment, that Bossardet is a licensed real estate broker in accordance with the laws of the State of Michigan.

6. Representations. Saurman represents as follows:

a. That he is not aware of any other agreements of sale or assignment with respect to the Subject Property other than the Purchase Agreement and this Assignment.

b. That he has authority to make this Assignment and that he does not need the approval or authority of another to enter into this Assignment.

c. That he has, or will, turn over to Bossardet all documents in his possession, custody or control related to the Subject Property including all copies of appraisals, title commitments, rent records and the like.

7. Commission. Saurman and Bossardet each represent to the other that no person is entitled to a fee or commission, other than the assignment fee referred to herein, as a result of the Assignment described herein.

8. Governing Law. This Assignment shall be governed by the law of the State of Michigan.

Bossardet formed a limited liability company and completed other arrangements in preparation to close on the property by February 15, 2005. However, Bossardet was informed that due to the sellers' failure to resolve outstanding title defects, the closing could not take place by that date. Timmer and Bossardet agreed verbally to extend the closing date to February 28, 2005, if Bytwerk agreed. But Bytwerk refused to extend the closing date and then refused to sell under the terms of plaintiff's purchase agreement. Bytwerk wrote a letter to Bossardet stating:

> My concern is that you are premature in conducting and incurring the costs of this appraisal, as we do not have a valid purchase agreement on the property. The PA signed with Mr. Saurman last fall that had evidently been assigned to you expired on February 15. Given the vastly improved financial operations of the property, I'm no longer willing to sell at anywhere near the numbers in the PA. I certainly will join my partner Scott Timmer in selling, but only at a price more reflective of the actual value.

On March 23, 2005, Bossardet entered into a new purchase agreement with Timmer and Bytwerk to purchase the property for $1,220,000. On March 31, 2005, they amended that purchase agreement and closed on it.

After plaintiff discovered that closing had occurred on the purchase of the property, he filed a one-count complaint against Bossardet for breach of contract alleging that Bossardet breached the assignment agreement by failing to pay him $90,000 when he closed on his purchase of the property. Bossardet served plaintiff with an offer to stipulate to entry of judgment in the amount of $100. Simultaneously, Bossardet moved for summary disposition. The trial court granted Bossardet's motion finding that the language of the assignment agreement was unambiguous.

Plaintiff was granted leave to file an amended complaint. This amended complaint, naming Bossardet as well as the other defendants, alleged 1) (again) that Bossardet breached the assignment agreement by failing to pay him $90,000 when he closed on his purchase of the property, 2) that because Bossardet failed to close on the property by March 5, 2005, he should be ordered to perform the obligations in paragraph 3 of the assignment agreement, 3) that Bossardet committed fraud by entering into a new purchase agreement, closing on that agreement, and failing to inform plaintiff, 4) that defendants Jane Nelson, Ingrid Nelson, J. Scott Timmer, and Bruce Bytwerk interfered with contractual and business relations, and 5) that these defendants conspired with Bossardet to breach the assignment agreement and interfere with plaintiff's contractual and business relations.

Defendants filed motions for summary disposition, and the trial court granted summary disposition on all of plaintiff's claims. In regard to plaintiff's contract claims, the trial court dismissed them on the basis that the assignment agreement's unambiguous language did not require Bossardet to pay plaintiff $90,000 and there was no question of fact that Bossardet did not default and was not at fault for the failure of the December 23, 3004, purchase agreement to close. The trial court entered an order dismissing plaintiff's claims with prejudice.

After the trial court dismissed plaintiff's claims with prejudice, Bossardet filed a motion, pursuant to MCR 2.405, for costs and fees incurred as a necessary result of plaintiff's rejection of Bossardet's offer to pay $100 in exchange for a stipulation to enter judgment in plaintiff's favor.

The trial court denied the motion reasoning that Bossardet's offer was "not a bona fide offer, it was a de minimis offer, it was an offer that – to set the parties up for the awarding of fees which they now ask for." Considering the small amount of the offer along with the wider scope of events surrounding the transactions in this case, the trial court applied the "interest of justice" exception and decided that Bossardet should not be awarded costs and fees. The trial court entered an order denying Bossardet's motion for costs and fees.

II. Analysis

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 164; 645 NW2d 643 (2002). Interpretation of a contract is a question of law that is reviewed de novo, *Burkhardt v Bailey,* 260 Mich App 636, 646; 680 NW2d 453 (2004), "including whether the language of a contract is ambiguous and requires resolution by the trier of fact," *Daimler Chrysler Corp v G Tech Professional Staffing, Inc,* 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

B. Breach of Contract

The primary goal of contract interpretation is to enforce the parties' intent. *Burkhardt, supra* at 656. When the language of the contract is clear and unambiguous, interpretation is limited to the actual words used. *Id.* "A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation." *Cole Ladbroke Racing Michigan, Inc,* 241 Mich App 1, 13; 614 NW2d 169 (2000). A court must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 468; 663 NW2d 447 (2003). If provisions of a contract irreconcilably conflict, the contractual language is ambiguous, and the ambiguous contractual language presents a question of fact to be decided by a jury. *Id.* at 469.

With regard to plaintiff's breach of contract claims, the relevant question is whether there is any genuine question of fact as to whether Bossardet breached the terms of the assignment agreement. To resolve this question, it is necessary to consider the plain language of the assignment agreement to determine if what the parties intended was unambiguously conveyed in the contract. Plaintiff and Bossardet agreed that, "The balance of the assignment fee being Ninety Thousand Dollars ($90,000) shall be due and payable at the closing on the Subject Property." Plaintiff contends that, pursuant to this clause, when Bossardet closed on the March 23, 2005, purchase agreement, Bossardet was required to pay him $90,000. We disagree.

First, reading that phrase in context, it is clear that the plaintiff and Bossardet meant for Bossardet to pay plaintiff $90,000 upon closing of the December 23, 2004, purchase agreement. As our Supreme Court recently noted, "Under the doctrine of *noscitur a sociis* [("It is known by its associates." Black's Law Dictionary (7th ed).)], a phrase must be read in context. A phrase must be construed in light of the phrases around it, not in a vacuum. Its context gives it meaning.

Koontz v Ameritech Services, Inc, 466 Mich 304, 318; 645 NW2d 34 (2002)." *Apsey v Mem'l Hospital*, 477 Mich 120, 130; 730 NW2d 695 (2007) (footnote omitted).

The assignment agreement clearly identified the purchase agreement that plaintiff agreed to assign to Bossardet:

> WHEREAS, Saurman has entered into a Purchase Agreement, dated December 23, 2004 ("Purchase Agreement"), with Seller Humble Hollander, LLC, for the purchase and sale of property and improvements in the city of Grandville, Kent County, Michigan commonly known as Grandville East Apartments ("Subject Property"). A copy of the Purchase Agreement is attached hereto as Exhibit A . . . .

Accordingly, the purchase agreement that was the subject of the assignment agreement was the December 23, 2004, purchase agreement between Saurman and Humble Hollander, LLC and no other. Thus, when plaintiff and Bossardet agreed that Bossardet would pay plaintiff $90,000 "at the closing on the Subject Property," it is clear they meant the closing on the only purchase agreement identified in the assignment agreement – the December 23, 3004, purchase agreement.

In addition to this interpretation being supported by the language surrounding the provision in question, it is the only interpretation offered that does not impose an absurd condition on one of the parties. "Courts will not interpret a contract in a manner which would impose an absurd or impossible condition on one of the parties." *Wembelton Dev Co v Travelers Inc Co*, 45 Mich App 168, 172; 206 NW2d 222 (1973). If the clause means what plaintiff suggests, i.e., that closing on any purchase agreement on the subject property required Bossardet to pay plaintiff $90,000, then not only would Bossardet owe plaintiff $90,000 when he closed on the March 23, 2005, purchase agreement, but he would owe plaintiff $90,000 if anyone closed on any purchase agreement for the subject property. According to this interpretation, after Timmins and Bytwerk refused to close on the December 23, 2004, purchase agreement, if they had entered into a new purchase agreement with someone other than Bossardet, Bossardet would still have owed plaintiff $90,000. The plain language of the assignment agreement simply does not support this interpretation.

Because we interpret the plain language of the assignment agreement to require Bossardet to pay plaintiff $90,000 upon closing of the December 23, 2004, purchase agreement, we conclude that there is no genuine issue of material fact as to whether Bossardet breached the assignment agreement by not paying plaintiff $90,000. The undisputed evidence demonstrates that no closing ever took place on the December 23, 2004, purchase agreement. Rather, after Timmins and Bytwerk defaulted on the December 23, 2004, purchase agreement, Bossardet negotiated a new purchase agreement with them and closed on that agreement. While plaintiff offered his suspicions regarding defendants' motives for taking this course of action, the fact remains that the assignment agreement did not require Bossardet to pay plaintiff anything upon the closing of the newly negotiated purchase agreement.

The next question is whether plaintiff is entitled to anything other than the $10,000 that he already received pursuant to paragraph 3 of the assignment agreement, which provides:

> 3. Closing. If closing does not occur, for any reason other than the default of Bossardet, the balance of the assignment fee is waived and Saurman shall be entitled to keep the deposit of Ten Thousand Dollars ($10,000) as his sole remedy. If closing does not occur, due to the default of Bossardet or the failure of Bossardet to close by March 5, 2005, Saurman shall have the option to retain the Ten Thousand dollars ($10,000) as liquidated damages or he may elect to refund the deposit to Bossardet and to cancel this Assignment taking back the Purchase Agreement for himself or for purposes of re-assignment to another purchaser.

Taking the second sentence first, it describes plaintiff's remedies if the closing on the December 23, 2004, purchase agreement does not occur (1) "due to the default of Bossardet" or (2) "due to . . . the failure of Bossardet to close by March 5, 2005." Plaintiff does not assert that Bossardet defaulted on the December 23, 2004, purchase agreement. The remaining question is whether the closing on the December 23, 2004, purchase agreement did not occur due to Bossardet's failure to close by March 5, 2005. The evidence demonstrates that Bossardet was ready to close by March 5, 2005, but that Timmins and Bytwerk refused to close because they wanted to negotiate a new purchase price. Based on this record, we agree with the trial court that Bossardet did not himself fail to close by March 5, 2005, rather the closing did not take place for other reasons.

With regard to the first sentence, the parties agreed, "If closing does not occur, for any reason other than the default of Bossardet, the balance of the assignment fee is waived and Saurman shall be entitled to keep the deposit of Ten Thousand Dollars ($10,000) as his sole remedy." There is nothing ambiguous about this provision read in context of the whole assignment agreement. It provides that if the closing on the December 23, 2004, purchase agreement does not occur for any reason other than Bossardet's default, plaintiff's only remedy is to keep the $10,000 deposit. The evidence demonstrates that the closing on the December 23, 2004, purchase agreement did not occur. There is no evidence that it did not occur because of Bossardet's default. Accordingly, there is no genuine issue of fact as to what plaintiff's contractual remedy was: he was entitled to keep the $10,000 deposit, which he did. Bossardet owed plaintiff nothing more.

For these reasons, we conclude that the trial court did not err in dismissing plaintiff's breach of contract claims.

C. Fraud

In his silent fraud claim, plaintiff alleged that Bossardet committed fraud by entering into a new purchase agreement, closing on that agreement, and failing to inform plaintiff of the closing. A claim based on silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). "Further, there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud." *Id.* (punctuation and citation omitted).

In this case, plaintiff relies on the assignment agreement to establish Bossardet's duty to disclose that he entered into a new purchase agreement and closed on it. However, the assignment agreement did not impose such a duty. As discussed above, the assignment agreement only referenced the December 23, 2004, purchase agreement and imposed no duties

on Bossardet with respect to any other purchase agreement regarding the subject property. Therefore, we conclude that the trial court did not err in dismissing this claim.

D. Tortious Interference and Conspiracy

In these claims, plaintiff alleged that defendants Jane Nelson, Ingrid Nelson, Timmer, and Bytwerk tortiously interfered with plaintiff's contractual and business relations, and that these defendants conspired with Bossardet to breach the assignment agreement and interfere with plaintiff's contractual and business relations. Because we conclude that there was no genuine issue of material fact as to whether Bossardet breached the assignment agreement, we also conclude that dismissal of these claims was proper.

E. Bossardet's Motion for Costs and Fees

Bossardet contends that the trial court erred in denying his motion for costs and fees pursuant to MCR 2.405. We agree. Although Bossardet failed to produce the transcript of the hearing on this motion and this Court consequently need not address this issue, *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991), we nonetheless address it because both parties quote from the transcript and do not disagree about the what the trial court stated from the bench.

This Court will not reverse a trial court's decision to award sanctions under MCR 2.405 unless there was an abuse of discretion. *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). A trial court will be found to have abused its discretion if it selects an outcome that is not reasonable or principled. *Maldonado v ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Pursuant to MCR 2.405(D),

> If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> * * *
>
> (3) The court shall determine the actual costs incurred. The court may, in the interest of justice refuse to award an attorney fee under this rule.

Pursuant to MCR 2.405(A)(6), "actual costs" means "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." Thus, a trial court *may* refuse to award attorney fees, if doing so is in the interest of justice. However, this Court has held that "[t]he grant of attorney fees under MCR 2.405 should be the rule rather than the exception." *Miller v Meijer, Inc*, 219 Mich App 476, 480; 556 NW2d 890 (1996). Accordingly, the circumstances justifying refusal must be unusual. *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996).

The "interest of justice" exception appears to be directed at remedying the possibility that parties might make offers of judgment for gamesmanship purposes, rather than as a sincere effort

at negotiation. *Luidens, supra* at 35. Factors such as the reasonableness of the offeree's refusal of the offer, disparity of income, and the fact that the claim was not frivolous are too common to constitute the unusual circumstances encompassed by the interest of justice exception. *Id.* at 34-35. But if an offer is made out of "gamesmanship . . . rather than as a sincere effort at negotiation," or when the litigation of the case affects the public interest or is a case of first impression, the exception may be applicable. *Id.* at 35.

In this case, after the trial court entered the order dismissing plaintiff's claims with prejudice, Bossardet filed a motion for costs and fees incurred as a necessary result of plaintiff's rejection of Bossardet's offer to pay $100 in exchange for a stipulation to entry of a judgment in plaintiff's favor. The trial court ruled that Bossardet's offer was "not a bona fide offer, it was a de minimis offer, it was an offer that – to set the parties up for the awarding of fees which they now ask for." Considering the small amount of the offer along with the events surrounding the transactions in this case, the trial court applied the "interest of justice" exception and entered an order denying Bossardet's motion for costs and fees.

Initially, it is clear that the trial court erred in denying Bossardet's motion for costs because MCR 2.405 *requires* the trial court to award costs to the offeror if the verdict is more favorable to the offeror than the offer. The imposition of costs, other than attorney fees, is mandatory. *Luidens, supra* at 30.

The trial court also abused its discretion in denying Bossardet's request for attorney fees. As noted above, "[t]he grant of attorney fees under MCR 2.405 should be the rule rather than the exception." *Miller, supra* at 480. And while a de minimus offer may indicate that it was made for gamesmanship purposes, *Luidens, supra* at 35, we disagree that the $100 offer in this case is indicative of gamesmanship.

Bossardet made an offer of judgment simultaneously with service of his first motion for summary disposition, in which he explained his position on why plaintiff's breach of contract in the original complaint should be dismissed. The reason was that while he was prepared to timely close on the December 23, 2004, purchase agreement, the sellers defaulted on that agreement, and consequently a new purchase agreement was negotiated. Bossardet presented a similar argument in his second motion for summary disposition of the contract claims in plaintiff's amended complaint. As discussed above, this argument had merit. According to the plain language of the assignment agreement, Bossardet was not required to pay plaintiff anything more under those circumstances, regardless what nefarious motives plaintiff believes underlied these events or indeed regardless whether nefarious motives really did underlie these events. The trial court could not rationally determine that there was no genuine issue of material fact as to whether Bossardet breached the assignment agreement and determine that Bossardet engaged in misconduct by negotiating a new purchase agreement and not paying plaintiff $90,000. Furthermore, we take issue with the trial court's reasoning that "relatives of defendants who are realtors" were "doing things, and lack of disclosures" warranted the interest of justice exception. It was Bossardet who offered to settle the claim and sought attorney fees, not these other parties, and the trial court twice dismissed the claims against Bossardet. Finally, after Bossardet served his first motion for summary disposition along with his $100 offer of judgment, plaintiff chose to reject that offer rather than make a counteroffer. Because plaintiff left the last offer on the table, it could just as easily be said that plaintiff engaged in gamesmanship rather than make genuine efforts to negotiate a settlement. These parties were similarly sophisticated and both represented

by counsel. According to the plain language of the court rule, Bossardet did nothing that was inappropriate or illegal by making an offer of settlement. Under these circumstances, we conclude that justice was not served by denying Bossardet's request for attorney fees, to which he is entitled under MCR 2.405. The trial court abused its discretion by denying Bossardet's request for these fees.

We affirm in part, reverse in part, and remand for a determination of costs and fees that should be awarded to Bossardet.

/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly