STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. MORREN REVOCABLE GRANTOR TRUST OF JULY 17, 1972, AS AMENDED, by James R. Morren, Trustee, Plaintiff-Counterdefendant-Appellee,	UNPUBLISHED April 20, 2001
v	No. 218714 Kalamazoo Circuit Court
DANIEL J. BUSSEMA and BARBARA BUSSEMA, Defendants-Counterplaintiffs-Appellants.	LC No. 97-001162-CK

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Defendants Daniel and Barbara Bussema appeal as of right from a judgment and award of $21,380.24, less $2,000 earnest money already paid to the plaintiff Trust, for breach of contract in a failed real estate transaction. The judgment followed a bench trial. We affirm.

I. Basic Facts And Procedural History

The Trust and the Bussemas entered into a buy-sell agreement concerning a commercial building the Trust owned in Galesburg, Michigan. Subsection 3.B of the agreement, which trustee James Morren signed on May 28, 1996, provided in pertinent part:

> This agreement is contingent on Buyer's ability to obtain a(n) conventional (type) mortgage loan in the amount of $130,000. *Buyer will apply for the loan within 5 days after Seller's acceptance.* Buyer may waive the mortgage contingency by written notice and pay cash as provided in paragraph A above. If buyer fails to provide evidence of the loan approval or waive the mortgage contingency on or before June 28, 1996 (Date), Seller may cancel this Agreement. If buyer is unable to obtain written verification of Lender's approval, oral verification from Lender to Seller or Listing Broker shall be adequate. The sale

> will be completed upon Seller's delivery of a warranty deed conveying marketable title.[1]

The buy-sell agreement required an earnest money deposit of $2,000 and established that closing would take place no earlier than July 12, 1996, and no later than July 19, 1996. The Trust accepted the Bussemas' offer on May 28, 1996, and the parties entered into a two-month lease agreement so the Bussemas could occupy the property before closing. Realtor Bryce Greenman of Preferred Carlson acted as a dual agent in facilitating the transaction.

Daniel Bussema called Micah Glenn of GE Capital Services Small Business Finance (GE) to inquire about a Small Business Administration (SBA) loan to purchase the property some time after May 28, 1996. The Bussemas submitted a written application for a loan on June 22, 1996, proposing unimproved property at another location, not the property the Trust owned, as collateral. This was well after the expiration of the five day application period that subsection 3.B of the buy-sell agreement specified. When GE, through Glenn, denied their loan application, the Bussemas asked James Morren to extend the closing deadline. Although James Morren subsequently testified that he agreed to give the Bussemas additional time, he did not sign the addendum to the buy-sell agreement extending the time to secure financing that the Bussemas had submitted to him. Ultimately, the transaction fell apart when the Bussemas failed to secure financing. The Trust sold the building to another purchaser for $105,000 after sustaining an additional $1,686.52 in expenses maintaining the building and property before completing this sale.

The Trust sued the Bussemas for breach of contract, contending that the Bussemas had failed to apply for a conventional loan secured by a mortgage on the property within five days of when they executed the buy-sell agreement. Further, the Trust asserted that the Bussemas had failed to act in good faith in attempting to satisfy the condition in the agreement requiring loan approval by June 28, 1996.

The Bussemas, however, argued that they applied for a loan, as evidenced by GE's denial, thereby satisfying their obligation under the buy-sell agreement. Essentially, they asserted that Daniel Bussema's telephone call to Glenn inquiring about a SBA loan was the timely application required under the contract. The Bussemas also contended that if they had breached the contract, James Morren had waived those breaches by orally consenting to continue the contract after they gave notice that they needed more time. Finally, the Bussemas claimed that the buy-sell agreement limited damages to the $2,000 earnest money deposit.

The trial testimony provided only conflicting definitions of what the term "conventional" mortgage loan meant. To James Morren, a conventional mortgage loan was simply a bank loan. Greenman believed that the term was nonrestrictive and could mean any type of business or commercial loan. Glenn had the opposite view, in that he associated conventional loans with residential real estate transactions.

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[1] Italicized emphasis added.

The trial court agreed with the Trust, ruling that the Bussemas had failed to apply for a conventional mortgage loan within the five-day time frame and that the Trust had not waived this contractual term or extended the time in which the Bussemas could apply for a conventional mortgage loan. From the trial court's perspective, Daniel Bussema's preliminary inquiry regarding a loan did not constitute applying for a loan. The word "conventional," which the Bussemas added to the buy-sell agreement, was ambiguous and did not include the SBA loan. In reaching this conclusion, the trial court construed the ambiguity against the Bussemas. Further, the trial court held that the Bussemas breached the buy-sale agreement by failing to make a good faith effort to secure financing, causing the Trust's losses. The trial court measured these losses as the difference between the purchase price in the buy-sell agreement and the market value of the property at the time of the breach, plus the added maintenance costs until the subsequent sale. These damages totaled $21,380.24, which the trial court reduced by the Bussemas' $2,000 earnest money.

II. Standard Of Review

We review de novo the Bussemas' argument that that the trial court erroneously construed and applied the buy-sell agreement.[2] To the extent that we must rely on the trial court's factual findings to carry out this analysis, we use the clear error standard to afford the trial court the level of deference due its superior ability to determine witness credibility.[3]

III. Contract Construction

The primary goal of interpreting contracts is to determine and enforce the parties' intent.[4] This Court accomplishes this goal by reading the agreement as a whole and applying the plain language of the contract itself.[5] However, when a contract term is ambiguous, this Court may construe the agreement in an effort to find and enforce the parties' intent.[6] "In interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction."[7]

IV. The Five-Day Period

The Bussemas first argue that the trial court erred when it concluded that they failed to apply for a conventional mortgage loan within five days in order to meet the June 28th deadline for securing financing. This prompt application was critical because, if the Bussemas did apply

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[2] *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

[3] MCR 2.613(C).

[4] *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994).

[5] *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 383-383; 591 NW2d 325 (1998), quoting *Royce v Citizens Ins Co*, 219 Mich App 537, 542-543; 557 NW2d 144 (1996); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996).

[6] *Zurich Ins Co v CCR & Co* , 226 Mich App 599, 607; 576 NW2d 392 (1997).

[7] *Schroeder v Terra*, 223 Mich App 176, 188; 565 NW2d 887 (1997).

for a conventional mortgage loan within five days and were subsequently denied financing, then they are not liable for any damages the Trust sustained.[8] Note, however, that securing financing for the transaction by June 28, 1996, not the initial period in which the Bussemas had to apply for such financing, was the condition precedent in this case.[9] The speed with which the Bussemas applied for a conventional mortgage loan was relevant to the good faith they had to demonstrate when attempting to fulfill the condition precedent of securing financing by June 28, 1996.[10]

Interestingly, the Bussemas do not challenge the trial court's conclusion that the five-day period is a material term of the contract they had to fulfill in order to avoid liability. Nor do they challenge the trial court's conclusion that the word "apply" in the buy-sell agreement means "to make an appeal or request, especially in the form of a written application." Rather, they claim that the evidence indicates that they did apply for a mortgage loan within this period contrary to the trial court's factual findings.

Having reviewed the record, we can say with assurance that the trial court did not clearly err when it found that they did not apply for financing within five days of when they executed the buy-sell agreement. Barbara Bussema did not claim to know when her husband applied for a loan and Daniel Bussema did not testify at trial. Glenn gave the only testimony that shed any light on how quickly the Bussemas proceeded to contact him and apply for the SBA loan. While Glenn confirmed that Daniel Bussema called to ask about a SBA loan, he could not recall much about that conversation or when it occurred. Greenman's notes suggested that he spoke with Daniel Bussema on May 31, they met on June 18, and the Bussemas later submitted a written loan application that they had dated June 22. Only this first contact, allegedly on May 31, fell within the five-day period. There is no evidence on the record that clearly established what occurred during the telephone contact so as to permit any inference other than that the Bussemas requested a written loan application. There is no evidence that in this conversation Daniel Bussema conveyed any of the necessary information that lenders ordinarily require from potential borrowers before deciding whether to loan money, such as the thorough financial data that GE required the Bussemas to supply in the written application. Further, it is possible to infer from his request for the written loan application form, contrary to the Bussemas' argument on appeal, that applying in writing was the standard form of application for GE, regardless of other industry practices.

We agree with the Bussemas that GE's denial of their loan application indicates that they did actually apply for a loan. However, the documentation associated with that denial fails to indicate when that application took place, regardless of whether the application was oral or

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[8] *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982).

[9] *McCall v Freedman*, 35 Mich App 243, 245; 192 NW2d 275 (1971) ("Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed.").

[10] *Mehling v Evening News Ass'n*, 374 Mich 349, 352; 132 NW2d 25 (1965), quoting *Hayes v Beyer*, 284 Mich 60, 64-65; 278 NW 764 (1938), quoting 13 CJ p 648, § 722 (conditions precedent include an implied promise not to interfere with the course of events that will allow that condition to occur).

written. We also agree that the Bussemas' decision to enter into the lease agreement with the Trust is circumstantial evidence of their intent, at least in May 1996, to complete the transaction by securing the appropriate financing. However, in light of the critical weight given to timing in the language of the contract, this evidence of their intent is insufficient to contradict the otherwise clear evidence that they did not apply for the appropriate financing within the prescribed five day time period.

For reasons that are not clear to us, the Bussemas simply failed to meet the five day deadline. This is not to say that, in the abstract and absent this five-day limitation, we would have any reason to conclude that the Bussemas acted in bad faith. Rather, we simply enforce the language that was included in the buy-sell agreement.[11]

Moreover, we cannot say that this five-day period is completely unrelated to fulfilling the condition precedent. Without a timely application, it was virtually impossible for the Bussemas to secure the financing they needed by June 28, 1996. In other words, by waiting until June 22, 1996, to apply to GE, the Bussemas virtually ensured that if GE denied their application they would have no opportunity to seek financing elsewhere or to convince GE to finance them by providing other collateral or correcting any misperceptions about their current fiscal situation. One might even assume that, given the tight deadlines imposed in the buy-sell agreement, such a late application evidenced the Bussemas' disinterest in completing the transaction because of the probability that it might not be processed in time to secure financing by June 28. Thus, while the delay in this case was not objectively egregious, it could be interpreted reasonably as indicative of the Bussemas' lack of good faith, justifying the liability the trial court imposed in this case.

V. Conventional Mortgage Loan

The Bussemas also argue that the trial court erred in concluding that the SBA loan was not a "conventional mortgage loan." Case law provides only the broadest definition of a conventional mortgage in the sense that refers to loans secured with a mortgage offered by a private lender as a conventional loan and the same financial arrangement offered through government programs, such as subsidized home loans from the Department of Housing and Urban Development, as a nonconventional loan.[12] Alternatively, "conventional" has been used to distinguish between commercial lending in which the mortgagor has title to the property used to secure the loan, regardless of whether the lender is a private or governmental entity, and the unusual occasions when the seller finances the sale by retaining title to the property and allowing the purchaser to pay over time, such as under a land contract.[13] At best, the ways these cases use

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[11] *Michigan Twp Participating Plan*, *supra*.

[12] See *Federal Nat'l Mortgage Ass'n v Wingate*, 404 Mich 661, 668; 273 NW2d 456 (1979) ("Absent a special program, Mrs. Wingate could not have made such a purchase because she had neither sufficient income nor assets to qualify for a conventional mortgage. She was able to effectuate the purchase of her own home only through federal programs established by the Department of Housing and Urban Development . . . .").

[13] See *Antisdale v City of Galesburg*, 109 Mich App 627, 635-636; 311 NW2d 432 (1981) (Bronson, J., dissenting), rev'd 420 Mich 265 (1984).

the term "conventional mortgage" indicates that these are mortgages that are conventional in the sense that they are "conforming or adhering to accepted standards,"[14] perhaps even that they are usual or widely used.

More important than case law's failure to give guidance by prescribing a single meaning for the term "conventional mortgage loan," is the absence of conclusive evidence in this case that the parties intended for this term to have a precise meaning. The contract does not define the term. Considering the meaning of the word conventional,[15] we think it possible that the term "conventional mortgage loan" means a long-term loan with a favorable interest rate secured by property, without regard to the lender's identity or whether the loan is subsidized. Such a definition would include the SBA loan the Bussemas attempted to obtain and would generally match the all-encompassing definition Greenman gave for the term. Critically, however, the Bussemas never testified that this is what *they* meant by "conventional mortgage loan." Glenn, whose testimony the trial court found persuasive, stated that this term referred to a residential property loan, which plainly was not at issue in this case. Construed in the context of the buy-sell agreement, Glenn's definition makes no sense because it would have required the Bussemas to apply for a type of financing for which this commercial property would never qualify, making the application irrelevant to the Bussemas' ability to arrange for financing by June 28. James Morren, who believed that the term referred generally to a bank loan, posited the most reasonable definition. Still, none of the witnesses were able to confirm that the loan the Bussemas sought from GE complied with any of these definitions. At best, the term "conventional mortgage loan" is ambiguous. Therefore, even if the trial court erred when it accepted Glenn's testimony on this issue, it nevertheless properly construed the meaning of a "conventional mortgage loan" against the Bussemas, who inserted that term in the buy-sell agreement, in determining whether the GE loan they sought was the type required under the buy-sell agreement.[16]

VI. Waiver

Regardless of their failure to seek the appropriate type of financing within five days, the Bussemas nevertheless contend that they are not liable for the Trust's losses because James Morren agreed to extend the time in which they could seek financing and they pursued this financing in good faith during this extra time. Evidently, they claim that the Trust waived the mortgage loan application procedures prescribed in the buy-sell agreement. However, the Bussemas fail to cite any legal authority to support their proposition, indicating that they have abandoned it on appeal.[17]

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[14] *Random House Webster's College Dictionary* (1997).

[15] *Id*.

[16] *DeMello v McNamara*, 178 Mich App 618, 622-623; 444 NW2d 149 (1989).

[17] *Dresden v Detroit Macomb Hosp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

VII. Liquidated Damages

The Bussemas argue that even if they breached the buy-sell agreement, the contract limited damages by including a liquidated damages clause. Again, they fail to cite authority or discuss the liquidated damages provisions, effectively abandoning this issue on appeal as well.[18] Needless to say, however, the argument lacks merit. Section 26 of the buy-sell agreement provides:

> Buyer is depositing $2,000 . . . with Broker as earnest money evidencing good faith. Within 2 banking days after this Agreement is signed by all parties, but not later than 5 days after receipt, Broker is required by law to deposit the earnest money in a separate custodial or trust fund account. If the offer made is not accepted or if the sale is not closed due to a failure to satisfy a contingency specified herein for a reason other than the fault of the Buyer, the earnest money shall be refunded to Buyer. The earnest money will be applied to the purchase price at closing.

This language clearly governs which party is entitled to keep the earnest money depending on whether the parties complete the transaction because, under the plain language of the contract, the parties may fail to complete the transaction without breaching the contract. This provision does not attempt in any way to quantify or limit damages awarded in the case of a breach, which is the situation a liquidated damages clause addresses.[19] Thus, the trial court did not err by awarding the Trust damages that exceeded the earnest money the Bussemas had already paid.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper

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[18] *Id*.

[19] See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998) ("A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach.").