STATE OF MICHIGAN

COURT OF APPEALS

BARRY J. DARVIN and JANET LILJA

Plaintiffs, Counter-Defendants, Appellees, Cross-Appellants,

v

EDWARD J. WALKER,

Defendant, Counter-Plaintiff, Third Party Plaintiff, Appellant.

and

WILHELM & ASSOCIATES REALTOR, INC

Third Party Defendant, Appellant.

UNPUBLISHED
August 7, 2003

No. 234837
235934
Oakland Circuit Court
LC No. 00-020187-CH

Before: Sawyer, P.J. and Meter and Schuette, JJ.

PER CURIAM.

In this real estate contract case, Edward Walker, defendant, counter-plaintiff, third party plaintiff, appellant appeals the May 23, 2001, final judgment following a bench trial in favor of Barry Darvin and Janet Lilja, plaintiffs, counter-defendants, appellees, cross-appellants. Plaintiffs cross appeal the amount of damages awarded. Wilhelm & Associates Realtor, Inc., third party defendant, appellant appeals the trial court's denial of case evaluation sanctions.[1] We affirm in part and remand for a recalculation of damages.

I. FACTS

[1] Walker will be referred to as defendant throughout; Darvin and Lilja will be referred to as plaintiffs; and third party defendant Wilhelm & Associates will be referred to as Wilhelm.

In March of 1999, defendant decided to purchase a new home to accommodate himself and his two children. He looked at a home on Clintonville Road on Lake Oakland. Defendant made an offer to purchase the Clintonville Road home. However, the home was under contract to another couple, subject to their ability to obtain financing. He tried and failed to buy out their position and continued to look for a home.

At the same time, Barry Darvin and Janet Lilja put their Lake Oakland home on the market with realtor Tom Wilhelm, of Wilhelm & Associates Realtor, Inc., third party defendant, appellant. Jerry Woodruff, a Wilhelm & Associates agent, showed plaintiffs' home to defendant. After an offer and counteroffer, the parties signed a purchase agreement for $640,000. A specific closing date was not established. Defendant paid a $5,000 deposit. After signing the purchase agreement, plaintiffs tried to obtain defendant's consent to extend possession to thirty or sixty days after closing, but defendant refused and insisted on obtaining possession at the time of closing.

Defendant then took the signed purchase agreement to his bank and applied for a mortgage. His bank then issued a commitment on and proceeded to order title work and an appraisal of the property. In May of 1999, the bank notified Wilhelm that it was ready to close. Wilhelm then attempted to schedule a closing with defendant, but was unable to reach him.

A few days later, defendant noticed that the house on Clintonville road that he had previously been interested in purchasing was back on the market. He then contacted Wilhelm and told him he wanted to buy that house instead of plaintiffs'. At that point, Wilhelm told him that plaintiffs could sue him for specific performance. Defendant went ahead and purchased the house on Clintonville road and did not purchase plaintiffs' house.

Relying upon what they believed to be the impending sale of their home, plaintiffs had already purchased and began the process of moving into another home. Ultimately, plaintiffs sold their first home a year later for $590,000 and sued defendant for damages resulting from the breached agreement. Plaintiffs sought the difference in the purchase price, difference in the commission in the sale of their home versus had the sale with defendant been consumated, financial losses related to the breached agreement and attorney fees. Defendant subsequently filed a third party complaint against Wilhelm for breach of contract and breach of fiduciary duty. Defendant sought to make Wilhelm responsible for any damages defendant would have to pay plaintiffs. Defendant claimed that Darvin, Lilja and Wilhelm were improperly withholding his $5,000 deposit.

The case went to mediation and the award relating to the claims against defendant was for him to pay plaintiffs $75,000. The mediators also specified that the $5,000 deposit be returned to defendant. Plaintiffs and Wilhelm accepted the mediation awards. Defendant did not.

The case proceeded to trial where Wilhelm brought a motion for summary disposition as a third-party against defendant. Defendant brought a motion for summary disposition of plaintiffs' complaint claiming that they could not proceed with specific performance since they elected under the purchase agreement to take the $5,000 deposit. The trial court determined that plaintiffs had not claimed the deposit and that Wilhelm should return the money to defendant.

After a bench trial, the court found that the purchase agreement had all the necessary elements of a valid agreement. The trial court awarded plaintiffs the difference in price between the defendant's original offer of $640,000 and the ultimate selling price of $590,000, a sum of $50,000. The trial court did not include the real estate commissions, financial losses related to the breached agreement and attorney fees in its award. The trial court found that the plaintiffs were not as diligent as they could have been in mitigating their damages and found problems with several of plaintiffs' claims relating to their financial losses.

The trial court then found that defendant's claims against Wilhelm were without merit. After trial, Wilhelm filed a motion for case evaluation sanctions seeking $25,720 in attorney fees and costs. The trial judge denied the motion. Defendant now appeals the judgment against him. Plaintiffs appeal the damages award. Wilhelm appeals the denial of case evaluation sanctions.

II. CONTRACT

A. Standards of Review

Interpretation of contractual language is a question of law subject to de novo review. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). This Court reviews a trial court's factual findings for clear error. MCR 2.613(C); *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602, 604; 423 NW2d 284 (1988). A trial court's factual findings are clearly erroneous when, although there is evidence supporting the findings, the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *Id.* at 604-605.

B. Analysis

Defendant first asserts that the trial court erred when it determined that a valid contract existed because plaintiffs had rejected his original offer by making a counteroffer, which was never accepted. We disagree.

It is well-established contract law that the material elements of a real estate contract are the identity of the property, the parties, and the consideration. *Brotman v Roelofs*, 70 Mich App 719, 727, 246 NW2d 368 (1976). Such a contract must be in writing, specify the time of performance, and be signed by the parties in order to comport with the statute of frauds, MCL § 566.106; *McFadden v Imus*, 192 Mich App 629, 633, 481 NW2d 812 (1992). *Giannetti v Cornillie*, 204 Mich App 234, 239-240, 514 NW2d 221 (1994). An examination of the purchase agreement reveals that it satisfies the above-mentioned requirements. Plaintiffs' attempts to alter the possession date after the signing of the contract was not a counteroffer and the trial court did not err when it determined that a contract existed.

Defendant next argues that the trial court erred in finding that a contract existed because plaintiff Lilja made material changes to the contract. We disagree.

Included in the purchase agreement was an agreement regarding several pieces of built-in furniture in the master bedroom. When plaintiff Lilja signed the purchase agreement, she changed the number of pieces of built-in furniture from five to three. Defendant claims that he

never agreed to this change and that had he known that he would be getting only three of the five pieces of furniture, it would have "absolutely" broken the deal for him.

Defendant made no mention of his problem with the number of pieces of furniture until litigation. Furthermore, defendant put thousands of dollars worth of renovations into the home that he ended up purchasing at a higher price. The trial court properly found defendant's testimony that he would have rejected the entire deal over two pieces of furniture incredible. The trial court correctly determined that the number of pieces of furniture was not a term material to the contract and that its reduction from five to three did not constitute a counteroffer.

III. SPECIFIC PERFORMANCE

A. Standard of Review

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; ___ NW2d ___ (2003).

B. Analysis

Defendant argues that the trial court erred in dismissing his motion for summary disposition of plaintiffs' specific performance claim. He asserts that specific performance was no longer an available remedy, due to the sale of plaintiffs' house and that their only available remedy was the retention of the $5,000 deposit. We disagree.

Paragraph 4 m of the purchase agreement provides:

> **Default.** In the event of default by Purchaser, Seller may at his option, elect to enforce the terms hereof or declare a forfeiture hereunder and retain the deposit as liquidated damages. In the event of default by Seller, 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 as Seller or Purchaser, their obligations shall be joint and several.

Here, plaintiffs elected to enforce the terms of the contract. In doing so, they were obligated to mitigate their damages by attempting to sell their house. Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing. *Morris v Clawson Tank Co*, 459 Mich 256, 263-264; 587 NW2d 253 (1998). "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." [*Shiffer v Gibraltar School Dist Bd of Ed*, 393 Mich 190, 197; 224 NW2d 255 (1974)(*quoting* McCormick, Damages, § 33, p. 127).]

In *Van Camp v Van Camp* 291 Mich 688, 695; 289 NW 297 (1939), the Court noted that when specific performance is no longer an option, the trial court may grant appropriate relief:

> [A] court of equity having rightfully assumed jurisdiction may grant appropriate relief. In the case at bar, the trial judge concluded that a money judgment was the most satisfactory manner of settling the affairs of the litigants. We are in accord with the determination of the trial court.
>
> In *Chantland v Sherman*, 148 Iowa 352, 125 NW 871, 874, the court said: 'The situation is somewhat novel, but courts of equity are not bound to give any stereotyped form of relief. They readily adapt the relief to the peculiar facts of the case, and their sole concern is that the decree entered shall effectuate justice.'

Here the contract provision clearly allowed plaintiffs to sue for specific performance. Their mitigation should not cause them further harm. Such a result would be contrary to public policy as it would discourage mitigation. The trial court correctly denied defendant's motion for summary disposition of plaintiffs' claim for specific performance and correctly granted monetary relief in place of specific performance where plaintiffs mitigated their damages by selling their house.

IV. FIDUCIARY DUTY

A. Standard of Review

Whether to recognize a cause of action for breach of fiduciary duty in a particular context is a question of law subject to review de novo on appeal. *Teadt v Lutheran Church Missouri Synod,* 237 Mich App 567, 574; 603 NW2d 816 (1999).

B. Analysis

Defendant next argues that Wilhelm breached his fiduciary duty by: (1) failing to disclose that he was either a dual agency or transaction coordinator; (2) failing to advise defendant that there was an agreement between the parties; and (3) advising defendant that the deal was dead and to purchase another house. We disagree.

Wilhelm testified that he had obtained a listing from plaintiffs and that the "disclosure regarding real estate transactions" form signed by Wilhelm and plaintiffs listed Wilhelm as a "transaction coordinator." This contention is supported by a copy of this form attached to Wilhelm's brief as exhibit two. In short, at the time plaintiffs listed their home, Mr. Wilhelm was acting as their transaction coordinator. An employee of Wilhelm & Associates, Woodruff, represented defendant as his buyer's agent. Defendant's agent testified that such an arrangement is permitted.

Defendant testified that he believed that Wilhelm failed to disclose to him that a purchase agreement existed. This is directly contradicted by Wilhelm's testimony and is also contradicted by defendant's actions. Defendant applied for a bank loan in order to purchase plaintiffs' house. Defendant himself testified that he believed that plaintiffs were still bound to sell him their house

as of the end of April 1999 and that he never would have applied for the loan without an agreement.

Additionally, Wilhelm testified that he informed defendant that if he chose to purchase the Clintonville house instead of plaintiffs' that they could sue him for specific performance. As noted above, the essence of defendant's response was that he did not care.

In short, defendant urges this court to find Wilhelm's testimony at trial incredible and to believe his own testimony instead. The trial court specifically noted that it found Wilhelm's testimony to be "quite convincing." This Court must recognize the unique opportunity of the trial judge to observe witnesses and the factfinder's responsibility to determine the credibility and weight of the testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Here, the record supports the trial court's determination that Wilhelm's testimony was "quite credible" while the record also supports a de novo determination that defendant's testimony was less than credible.

A review of the record reveals that the trial court did not err in finding that Wilhelm was acting as a transaction coordinator in this home sale. Further, defendant has presented no credible evidence that Wilhelm failed to disclose that there was a dual agency, failed to advise defendant that there was a purchase agreement, or that Wilhelm advised him to go ahead and purchase the other home.

V. PLAINTIFFS' DAMAGES

A. Standard of Review

This Court reviews for clear error any challenge to the issue of damages determined by the trial court following a bench trial. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

B. Analysis

Plaintiffs assert that the trial court erred factually in its calculation of damages. First, they believe that the trial court mistakenly calculated the difference between the commission they paid following the sale of their home and the commission they would have paid to Wilhelm had he sold their home.

Plaintiffs sought $16,200 in damages for real estate commissions that they believed they would not have paid had they sold their house to defendant for $640,000 with a 3% commission, instead of the actual sale price of $590,000 with a 6% commission. The trial court found that plaintiffs actually had an agreement with Wilhelm to pay a 5% commission and that the difference between 5% of $640,000 and 6% of $590,000 was negligible. The difference between the commissions is actually $3,400 and is not negligible.

In their brief on appeal, plaintiffs merely assert that their agreed upon commission with Wilhelm was 3%. They cite to plaintiff Darvin's testimony at trial to support this contention. However, they offered no additional supporting documents to bolster this contention below. In fact, as defendant notes, when questioned on this matter by defendant's attorney, plaintiff Lilja

admitted that the written exclusive right to sell contract with Wilhelm & Associates, signed by plaintiff Darvin, stated that there was to be a 5% commission. Thus, it appears that the only written evidence at trial supported the trial court's use of the 5% commission figure. If there is some other evidence of the 3% figure, plaintiffs have neglected to indicate so to this Court. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

The trial court did not err in using the 5% figure supported by the evidence, however it appears to this Court that there remains a difference in commissions of $3,400. As a result, we remand this case to the trial court and instruct the trial court to recalculate the damages based on our determination that the difference in commissions of $3,400 is not negligible and was not included in the final determination of damages.

Second, plaintiffs argue that the trial court mistakenly concluded that they had not done enough to mitigate their damages including allowing lapses in their listing agreements and in failing to rent their vacant home while it was on the market.

Plaintiffs also sought an additional $100,000 in damages for costs they incurred while they owned the house for an additional year. The trial court held:

> Plaintiffs asked for nearly $100,000 in additional damages. The Court does not believe it equitable to charge such damages to Defendant Walker. In general, the Court believes that Plaintiffs were not as diligent as they might have been in attempting to mitigate their damages. There were significant gaps in various real estate listings with Wilhelm & Associates and Century 21. In addition, the plaintiffs never attempted to rent the home.

Plaintiffs argue that there was only one gap in real estate listings and that gap lasted only two weeks. Further, they argue that renting the home would have been a bad idea. They note that tenants can cause major problems, and that renting a large, upscale house would be nearly impossible, especially given that the tenant would be forced to move out on short notice once the house sold. They assert that defendant should have bought the home and if he did not want to live there, he should have put it up for sale and had the burden of maintaining it while it was on the market.

Defendant argues that the trial court correctly determined that plaintiffs failed to mitigate as diligently as they should have. He notes that he suspects that the trial court discredited much of plaintiffs' damage estimate testimony because it was later proven inaccurate. Defendant asserts that plaintiffs had the option of declining to purchase the other house and would not have incurred damages over the $5,000 of their deposit on that property. He also notes that there were no open houses while plaintiffs' house was listed, nor did they attempt to rent out their vacant house. Furthermore, the following testimony of Darvin indicates that the gap in the listing of the house was significantly more than two weeks:

> *Q.* So fair statement that you haven't produced a listing agreement for the property from July 15th 1999 through October 15th 1999, correct.
>
> *A.* It appears that way.

Q. There's a gap there and there's also a gap between January 21st, 2000 and May 16th 2000, correct?

A. You're correct.

Defendant asserts that plaintiffs' credibility was at issue due to their admissions at trial on cross-examination. For example, they claimed they were entitled to damages for all the mortgages paid on the house, but did not advise the court that they used all of the interest paid as a deduction against income on their income tax return and received a third of the interest payments back.

The trial court stated with regard to the additional damages:

> Specifically, there were some problems with several of Plaintiffs' damages claims. As to their claims for interest, expenses for 1999 and 2000, and real estate taxes for those same years Defendant pointed out, and Plaintiffs admitted, that these items were listed on their income tax form resulting in significant tax deductions. As to their claims for interest expenses on loans from Ms. Lilja's mother and from Mr. Heck, there was evidence which led the Court to believe that this expense of more than $13,000 was necessitated by Plaintiffs' wish to pay a larger than necessary amount as a down payment. The same is true of the $16,200 withdrawal penalty on the IRA and the loss of $6,200 for cashing in the annuity.

Thus, the trial court's denial of additional damages was based on a number of factors, including plaintiffs' dishonesty in calculating their damages. The denial of additional damages, except as pertaining to the difference in commissions was not clear error.

VI. CASE EVALUATION SANCTIONS

A. Standard of Review

A trial court's decision whether to grant case evaluation sanctions pursuant to MCR 2.403(O) presents a question of law this Court reviews de novo. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). The interpretation of court rules is an issue that this Court reviews de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). A party who rejects a case evaluation is generally subject to sanctions if he fails to improve his position at trial as occurred in the case at bar. *Elia, supra* at 378.

B. Analysis

Case evaluation sanctions are governed by MCR 2.403(O), which provides:

> (1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation.
>
> ***

(4) In cases involving multiple parties, the following rules apply:

> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

Wilhelm argues that, pursuant to MCR 2.403(0)(4)(a), the trial court is limited to evaluating only the award between the parties involved in the third party complaint. Thus, the lower court should not have aggregated the award from plaintiffs' original complaint against defendant and the third party award when determining whether defendant did better at trial or case evaluation. We disagree.

The trial court correctly denied Wilhelm's motion for case evaluation sanctions pursuant to MCR 2.403(O)(4)(a). The awards granted on the original and third party complaints must be viewed as one for purposes of analysis because defendant was only able to reject or accept one sum after the case evaluation. The aggregate adjusted verdict at trial was more favorable to defendant than the case evaluation.

Wilhelm next argues that he had to keep the deposit until the transaction was terminated or consummated pursuant to MCL 339.2512(j)(i) which states:

> j) Except in the case of property management accounts, failure to deposit in the real estate broker's custodial trust or escrow account money belonging to others coming into the hands of the licensee in compliance with the following:
>
> ***
>
> (*i*) A real estate broker shall retain a deposit or other money made payable to a person, partnership, corporation, or association holding a real estate broker's license under this article pending consummation or termination of the transaction involved and shall account for the full amount of the money at the time of the consummation or termination of the transaction.

The case evaluation suggested that Wilhelm pay the deposit to defendant. However, defendant refused to accept the case evaluator's recommendation. At trial, the court also awarded the deposit plus interest. Wilhelm argues that returning the deposit, only when the court decided which party was entitled to the money, was his duty as a real estate agent and should not preclude him from case evaluation sanctions.

Wilhelm states that both plaintiffs and defendant had an interest in the $5000 deposit, and Wilhelm had to retain the deposit. Original plaintiffs sued defendant for specific performance of the land contract instead of declaring forfeiture and taking the deposit as liquidated damages. After plaintiffs chose an equitable remedy over liquidated damages, defendant was finally entitled to the deposit. Wilhelm relies on *Hughes v White,* 5 Mich App 666; 147 NW2d 710 (1967).

In *Hughes*, this Court found held that "[w]here a down payment for real estate had been forfeited by purchaser and broker was not indebted to purchaser, vendor was not entitled to maintain garnishment action against broker for portion of down payment." *Id.* at 666. However, defendant distinguishes the *Hughes* case from the instant situation. In *Hughes*, the seller garnished the broker for a deposit once he had obtained a judgment against the buyer. This Court held that the seller could not sue the broker because the broker had already given the deposit back to the buyer. Id. at 671. In the present case, the buyer is attempting to reclaim the deposit from the agent's possession rather than the seller garnishing money from the agent.

Defendant argues that the deposit is part of the verdict that the court should consider when determining if the award improved at trial. The court rule states, "Verdict, includes a judgment entered as a result of a ruling on a motion after the rejection of the case evaluation." MCR 2.403(O)(2)(c).

Here, the trial court was correct in denying Wilhelm's motion for case evaluation sanctions because defendant did improve his position at trial, not only with the deposit but with the original plaintiff's complaint as well. Defendant was entitled to the deposit and it was part of the verdict awarded at trial that the court should consider when determining sanctions.

Affirmed in part and remanded for a recalculation of damages consistent with this opinion. We retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette