STATE OF MICHIGAN

COURT OF APPEALS

CITY OF FLINT,

Plaintiff-Appellee,

v

GREATER EASTSIDE COMMUNITY ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
October 11, 2007

No. 271822
Genesee Circuit Court
LC No. 06-083123-CK

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right the final order of the trial court awarding defendant damages for plaintiff's breach of contract, granting judgment for plaintiff on defendant's counterclaim, and denying defendant attorney fees and costs. We affirm.

Defendant is a nonprofit corporation dedicated to the revitalization of Flint's East Side. Plaintiff regularly applies for and receives housing development grants from the United States Department of Housing and Urban Development ("HUD"), and it then contracts with nonprofit organizations ("sub-recipients"), such as defendant, to purchase, restore, and sell homes to low-income residents of Flint. The dispute that gave rise to this appeal involves a contract between the parties executed in June 2003 ("the 2003-2004 contract"), under which defendant was to purchase, restore, and sell three homes in a specific area of Flint. In addition, defendant argued before the trial that the parties executed a second "2004-2005 contract" in June 2004. Plaintiff acknowledged that defendant's executive director, Kathleen Fields, was presented with a draft contract and signed it, but argued that no valid contract was entered into because city officials never executed it.

Defendant's first argument on appeal is that the trial court erred in failing to award defendant its lost revenues for plaintiff's breach of the 2003-2004 contract that existed between the parties. The trial court found that plaintiff breached the 2003-2004 contract, and that finding is not contested on appeal. Rather, the subject of dispute is the appropriate remedy for the breach. It is important to identify the particular arguments presented to the trial court by the parties on this matter and the court's ruling.

In a brief filed by defendant before the separate hearing on damages, defendant demanded the recovery of revenues that were lost due to plaintiff's breach, and these lost

revenues consisted of, as claimed by defendant, the difference between the contract price of $203,915 and $81,530, which was the amount paid by plaintiff on the contract prior to the breach. This resulted in a claim for $122,385, which defendant framed as expectation damages or a form of equitable relief that would allow the project to be completed. Defendant did not request damages for lost profits; rather, it simply sought an order requiring plaintiff to pay the monies owed under the contract. Plaintiff, below and on appeal, agreed that defendant was entitled to receive contract damages based on defendant's expectation interest or benefit-of-the-bargain principles. However, plaintiff argued that defendant's lone expectation, with respect to a direct monetary benefit to itself, was recovery of project-related administrative expenses. Plaintiff maintained that lost profits were not recoverable because defendant never contemplated or expected to own the homes or to make a profit from a sale of the homes. According to plaintiff, all funds received by defendant, other than those earmarked to cover administrative expenses, were to be channeled into homes eventually owned by others, and defendant was mandated to provide source documentation for all expenses it incurred. Plaintiff did address defendant's claim for $122,385, i.e., the difference between the contract price and payments actually dispersed, arguing:

> The only way to fulfill this expectation interest is to order the specific performance of the contract; namely, [plaintiff] working with [defendant] in a cooperative venture, supervising its use of the funds for another 12 months. Disputes will inevitably arise then, interjecting the Court as mediator and project supervisor.
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> Without [plaintiff's] supervision over the use of the funds, [defendant] could use them in any way it wanted. It could finish its work refurbishing the three homes, but without the contract restrictions [defendant] could simply deposit the funds into a bank account and use them as it saw fit. This would place [defendant] in a better position than it would be in had [plaintiff] fulfilled the . . . contract.

Against this backdrop of briefed arguments, the court conducted the hearing. At the hearing, defendant again reiterated that it expected to receive $203,915, but it only received $81,530, leaving a difference of $122,385, which was the amount defendant thought "the [c]ourt should award in this case." However, defendant then proceeded to argue that some document handed to the court reflected that each home was expected to resell for $48,125, for a total of $144,375 on three homes, and that defendant was entitled to that amount because under the program all proceeds from a resale flowed to defendant alone.[1] In its appellate brief, defendant

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[1] In an affidavit submitted by defendant, affiant Fields stated that to be made whole, defendant should be placed in the same position it would have been in were the project completed. "This means three homes would be ready to sell to eligible homeowners, [defendant] would be financially ahead, and the targeted project would be further along." Fields averred that program income generated by the sale of the homes would accrue to defendant for use in future home-eligible activities. In an affidavit submitted by plaintiff, Karen Morris, a person who monitored contracts for the city, stated that defendant could retain the revenue or proceeds it generated by

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requests that this Court "issue an order that [defendant] is to receive its lost revenues in the amount of $144,375." Thus, the only claim for damages that we are left with in this appeal relates to lost revenues that might have been generated by sales of the homes. At the hearing, plaintiff made the same arguments presented in its brief. The trial court ruled from the bench as follows:

> When I look at the case, it's clearly a case involving a non-profit organization. Non-profit organizations, by definition, are not in business to make a profit. In this particular case, clearly they're not here to make a profit: they're here to take monies that come from HUD to rehab homes, to be compensated to the extent of their administrative costs, and then to give the money back to [plaintiff] along with the title to the homes so that they can be sold. So the purpose here is not to make a profit; the purpose is to rehab homes and to make them available. Um, I didn't see anything in any of the evidence that was presented that would indicate that [defendant] is here to make a profit; and therefore, there's just no damages I can award for profits, because they're just not entitled to make any. They are entitled to recover their administrative costs; and, at this point, it looks like that's about $2,690[], which I will award to them. It's my understanding that they owe [plaintiff] some money, probably about $22,422[]; and so I would order that [defendant] return those monies back to [plaintiff] with an offset for the amount of the administrative costs. I would also order that [defendant] surrender title . . . to [plaintiff].

In general, we review a trial court's determination of damages following a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). Factual findings in general are reviewed for clear error in bench trials; however, we review questions of law de novo. *Fraser Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289, 293; 715 NW2d 89 (2006). The general rule is that a remedy for breach of contract should make the nonbreaching party whole or place it in as good a position as if the contract had been fully performed. *Roberts v Farmers Ins Exchange*, 275 Mich App 58, 69; 737 NW2d 332 (2007). Put another way, the nonbreaching party is entitled to the monetary value of the bargain made by the parties. *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47; 54; 731 NW2d 94 (2006). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). While the nonbreaching party may not recover speculative damages, mathematical certainty is not required. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005).

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selling the homes "for a price greater than the costs of acquiring and refurbishing them." She also averred that one could only speculate whether any revenue or proceeds would be generated by a resale of the properties, given the distressed neighborhoods and depressed property values. Fields' affidavit suggests that all proceeds from a sale were to be retained by defendant, while Morris's affidavit suggests limitations on the amount retained.

On appeal, defendant first contends that the trial court erred with respect to the damage award. As noted above, because defendant now focuses only on lost revenues in relation to sales of the homes that never occurred because of the breach, supposedly totaling $144,375, as opposed to the initial claim below for $122,385 (contract price minus payments made), that will be the only claim that we shall address. The somewhat conflicting affidavits of affiants Fields and Morris do appear to agree that proceeds from the sale or resale of a refurbished home could flow to defendant. They conflict, however, in that Morris indicated that only profits could be realized (sale price minus costs of initial purchase and rehabilitation), which suggests that sale proceeds equal to the costs had to be returned, while Fields indicated, consistent with defendant's argument, that the full amount of the sales proceeds is kept by defendant. Interestingly, if HUD money, channeled through plaintiff, is used to originally purchase and refurbish the homes and to cover defendant's administrative costs, allowing defendant to keep all proceeds on resale results in that entire amount being profit to defendant because no costs were ultimately incurred by defendant.

We find it unnecessary to determine the extent of damages available to a nonprofit corporation under Michigan law because, assuming defendant could recover as damages any of the proceeds that might have been realized from the sale of the homes, there is a dearth of evidence and argument on the subject. Fields' affidavit makes no reference to the particulars regarding the nature of the properties, the types of homes on the properties, the market value of the properties, the likelihood of resale, or any other information from which we could derive a determination of damages, regardless of whether defendant could keep the entire amount of the proceeds or only an amount representing sales price minus costs. Defendant apparently handed the trial court a document showing that each home would resell for $48,125, but the document is not contained in the lower court record, nor attached to defendant's appellate brief.[2] We cannot ascertain the nature of this document and the basis for the claimed value. Defendant does not point to any trial testimony in support of the damage amount requested. Moreover, defendant's appellate brief sheds no light on the matter, simply making a vague reference to the hearing transcript, without any discussion or explanation whatsoever regarding the alleged proof. On this record and argument, we are not prepared to conclude that defendant is entitled to $144,375 in damages or that reversal is warranted; speculation is rampant. Although defendant requests a remand for an evidentiary hearing in the alternative, there was nothing preventing it from attaching appropriate proofs or documentation to the briefs in the first instance, as it did with Fields' affidavit. Furthermore, defendant never requested an evidentiary hearing below, and there was an underlying bench trial.

Defendant's second argument on appeal is that the trial court erred in holding that no 2004-2005 contract existed between the parties. We disagree.

The existence and interpretation of a contract are questions of law, which we review de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). In order

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[2] This reflects defendant's last minute shift from one damage argument to a new one that defendant had not briefed for the trial court.

for a contract to be formed, there must be mutual assent or a "meeting of the minds" on the essential terms of the agreement. *Id.* at 453. This is judged according to an objective standard, looking to the express words and visible acts of the parties. *Id*. at 454. The burden of proof is on the proponent of the contract, and there is no presumption in favor of contract validity. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992).

The grant process that precedes the execution of a contract between plaintiff and a sub-recipient such as defendant is lengthy, complex, and involves several steps. While city employees presented Fields with a contract to sign, the evidence clearly showed that many contingencies remained at the time of her execution of the contract, including the release of funds by HUD and the approval of the contract by high-level city officials. Although funds were later released by HUD, there was no evidence that the city ever approved the contract. Under the circumstances, plaintiff's presentation of documents to Fields did not constitute a manifestation of assent to be bound to the terms of that document. Consequently, there is no basis on which to conclude that the parties entered into a 2004-2005 contract.

Defendant's third argument on appeal is that the trial court abused its discretion in failing to award defendant attorney fees under MCR 2.313(C) and MCL 600.2591. We disagree. In light of the conflicting evidence at trial, plaintiff's failure to admit that it had told defendant that there would be a work stoppage did not support sanctions under MCR 2.313(C), where plaintiff had reasonable grounds to believe that it might prevail on the matter, had other good reasons for failing to admit, MCR 2.313(C)(3) and (4), and where proof at trial to the contrary did not make the denial unreasonable, *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 457; 540 NW2d 696 (1995). Further, sanctions based on frivolousness under MCL 600.2591 were not appropriate in this case. Defendant essentially argues that it is appropriate to sanction plaintiff because the trial court ultimately found for defendant. However, "merely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position." *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). Reversal is unwarranted on the record presented.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette