STATE OF MICHIGAN

COURT OF APPEALS

SAMIR K. JAMIL, M.D. and SANA JAMIL,

Plaintiffs/Counterdefendants-Appellants,

v

TBI PROPERTIES, LLC, NIBRAS JAMIL, and JOANNA THOMAS,

Defendants/Counterplaintiffs-Appellees,

and

WLI PROPERTIES, LLC, CUMMINGS, MCCLOREY, DAVIS, & ACHO, PLC, BFS RETAIL & COMMERCIAL OPERATIONS, LLC, and OAKLAND COUNTY TREASURER,

Defendants.

UNPUBLISHED
December 17, 2020

No. 351024
Oakland Circuit Court
LC No. 2017-157646-CH

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's verdict of no cause of action in favor of defendants following a bench trial.[1] Because the trial court failed to address whether the contractual agreements were of any import and supported by consideration independent of an ultimate sale of the business, we vacate the judgment of no cause of action and remand for proceedings consistent with this opinion.

[1] Defendants WLI Properties, LLC, Cummings, McClorey, Davis, & Acho, PLC, BFS Retail & Commercial Operations, LLC, and Oakland County Treasurer were dismissed from the lawsuit prior to trial and are not involved in this appeal.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs Samir Jamil ("Samir") and Sana Jamil ("Sana") are husband and wife. Sana has two brothers, Eugene Thomas ("Eugene") and Walter Jamil ("Walter"). Eugene and Walter are married to defendants Joanna Thomas ("Joanna") and Nibras Jamil ("Nibras"), respectively. Joanna and Nibras are co-owners of defendant TBI Properties, LLC ("TBI"). TBI is a business under which Joanna and Nibras leased a commercial building, owned by TBI, to Samir's company, SNJ Enterprises, Inc. ("SNJ"), for the purpose of running a computer business.

According to plaintiffs, Walter and Eugene approached Samir in 2008 to ask for Samir's assistance with a business venture. Walter and Eugene wanted Samir to open a computer business for them in Samir's name. Plaintiffs asserted that Walter and Eugene could not open the business themselves because they were bankrupt and involved in litigation with an individual named Parvis Daneshgari. In a discussion with Samir, Walter purportedly offered to run the business on the basis of his experience from operating another computer business, Computer Business World, which was sold to Daneshgari and to whom Walter and Eugene owed $2,800,000. Samir claimed that although he would be putting his money into SNJ, his own company, in reality it was a loan to Walter and Eugene. Walter and Eugene promised Samir would be repaid within one to two years.

On the contrary, defendants claimed that Samir approached Walter to discuss Samir's interest in opening a computer business. Samir wanted to pursue the business as an investment opportunity and would employ Walter to manage the business. After discussing the matter with Walter, plaintiffs asked Eugene to also work for the business.

Irrespective of the individual that initiated the formation of the business, Samir formed SNJ in January 2009. Samir funded SNJ by depositing checks drawn from his personal account into an account opened for SNJ. SNJ did business as Computer Direct. Samir was president, secretary, and treasurer of SNJ. Walter was hired as CEO and manager of SNJ. Eugene was hired by SNJ as a full-time sales employee.

In addition to loaning Walter and Eugene money to start Computer Direct, plaintiffs claimed that they made additional loans to Eugene and Walter with the checks written to Joanna. Plaintiffs stated they repeatedly asked Eugene and Walter about repayment of the loans, but were told repayment could not begin until the litigation with Daneshgari was over. After Walter and Eugene lost that litigation, they informed plaintiffs they could no longer repay the loans. Plaintiffs, Walter, Eugene, and defendants allegedly reached an accord that defendants would execute agreements confirming plaintiffs' secured interest in the building owned by TBI as collateral for the loans to Walter and Eugene.

However, defendants asserted that plaintiffs approached Eugene and Walter to see if they wanted to purchase SNJ for $510,000, the amount plaintiffs claimed they invested in the business. Walter and Eugene agreed to buy SNJ, and plaintiffs had their lawyer draft documents to accomplish the sale. Defendants claimed they were told that if they signed the agreements, plaintiffs would transfer SNJ to Walter and Eugene.

Effective December 19, 2014, the parties entered into three agreements ("Agreements"), sent to defendants by plaintiffs' attorney. First, the parties executed a promissory note ("Promissory Note") for $510,000 plus interest. The Promissory Note recited consideration as "FOR VALUE RECEIVED." Second, the parties entered into a security agreement ("Security Agreement"), under which plaintiffs acquired a security interest in TBI. Defendants represented under the Security Agreement that defendants are the "sole owner of all of the Collateral and shall have good and marketable title to it free and clear of any and all liens, encumbrances, and interests of others."

Lastly, the parties entered into a letter agreement ("Letter Agreement") under which plaintiffs agreed "not to cause a recording of the Note or the Security Agreement in the absence of a default by Borrower." In addition, plaintiffs agreed to release defendants from the Promissory Note and Security Agreement if the Building is sold under the Security Agreement, the net proceeds from the sale are at least $300,000, and defendants execute a new promissory note for the balance of the amount owed.

Plaintiffs claimed that after the execution of the Agreements, they investigated if there were any liens on the Building and discovered three liens totaling $430,000. Defendants dispute this assertion, claiming plaintiffs knew before execution of the Agreements that there were liens on the Building.

As a result of the liens and other problems plaintiffs claimed to have with Walter and Eugene, plaintiffs decided to close Computer Direct. Plaintiffs claim that defendants refused to repay the alleged loan after they closed the business.

On March 3, 2017, plaintiffs filed a complaint against defendants. As relevant here, plaintiffs alleged two counts of breach of contract (for the Promissory Note and Security Agreement), one count for claim and delivery, one count of judicial foreclosure, one count alleging illegal corporate distributions, and one count of accounting from corporate insiders. Defendants answered the complaint and asserted a counterclaim.

A three-day bench trial was held. With respect to plaintiffs' claims for breach of contract, the trial court determined that mere recitation of consideration in a contract was insufficient. The trial court rejected plaintiffs' argument that the money invested in SNJ was a loan and, instead, found the agreement to be for the sale of SNJ to defendants. Thus, because plaintiffs closed and sold SNJ before the deadline of May 1, 2015, when defendants were to pay the purchase price, the Promissory Note and Security Agreement lacked consideration because the business, i.e., the consideration, ceased to exist. Accordingly, the trial court entered verdicts of no cause of action on plaintiffs' claims for breach of contract.

II. APPLICABLE LAW

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses."

Seifeddine v Jaber, 327 Mich App 514, 516; 934 NW2d 64 (2019) (quotation marks and citation omitted).

In addition, "[t]he existence and interpretation of a contract are questions of law reviewed de novo." *Id*. (quotation marks and citation omitted). "In ascertaining the meaning of a contract, [this Court] give[s] the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Typically, courts may not admit parol evidence "to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). However, "our Supreme Court has specifically held that '[w]hile the consideration expressed in a written instrument is *prima facie* to be taken as the actual consideration, the rule is well settled by abundant authority that parol evidence is admissible to show that the true consideration was . . . different from that expressed.' " *In re Rudell Estate*, 286 Mich App 391, 410; 780 NW2d 884 (2009), quoting *Stotts v Stotts*, 198 Mich 605, 617; 165 NW 761 (1917). "A promisor's liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73-74; 737 NW2d 332 (2007). Supervening impossibility develops after the contract is formed, and it arises when there is impracticability because of unreasonable difficulty, expense, injury, or loss involved. *Id*. at 74. The closure of a business may render performance impossible. See *Vowels v Arthur Murray Studios, Inc*, 12 Mich App 359, 363; 163 NW2d 35 (1968).

III. ANALYSIS

The trial court found the Agreements were part of a larger agreement between the parties for the sale and purchase of SNJ in exchange for $510,000. In the trial court's view, the Agreements were unenforceable for failure of consideration because plaintiffs closed Computer Direct before May 1, 2015, which was the maturity date of the Promissory Note and, under the larger agreement, the final date defendants could purchase SNJ. In other words, because Computer Direct, the object of the larger agreement ceased to operate, plaintiffs' promise to sell the business to defendants could not be fulfilled and the consideration failed. Plaintiffs dispute the trial court's findings of fact and conclusions of law regarding the core issue of consideration.

"A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015). "The party seeking to enforce a contract bears the burden of proving that the contract exists." *Id*.

"To have consideration there must be a bargained-for exchange." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002). "There must be a benefit on one side, or a detriment suffered, or service done on the other." *Id*. at 238-239 (quotation marks and citation omitted). "Courts do not generally inquire into the sufficiency of consideration." *Id*. at 239. "[A] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Id*. (quotation marks and citation omitted).

Central to the appeal are the factual findings made by the trial court regarding the parties' purported agreement to purchase and sell SNJ. Plaintiffs assert the trial court clearly erred when it found the Agreements to be for the purpose of selling SNJ because the Agreements evidence a

loan, not a sale. Plaintiffs' argument has merit. The Agreements themselves do not reference the larger agreement the trial court found to exist for the sale of SNJ. Thus, on their face, the agreements appear to simply evidence an indebtedness to plaintiffs in the amount of $510,000. Plaintiffs, however, never denied they agreed with defendants, Walter, and Eugene that they would sell SNJ to defendants once plaintiffs' "investment" in SNJ was paid back. The trial court did not clearly err, therefore, in finding the agreement between the parties included the eventual sale of SNJ to defendants.

However, the trial court did not adequately explain the purpose of the Promissory Note and Security Agreement, if the only agreement between the parties was for the purchase and sale of SNJ. By concluding the sale of SNJ to be the only agreement between the parties, the trial court effectively ignored the plain language of the Agreements that clearly evidenced an additional promise by defendants under which they became indebted to plaintiffs. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) ("[C]ourts 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."). The trial court did not explain why defendants became indebted to plaintiffs, including pledging a security interest in TBI, all for the right to purchase SNJ by May 1, 2015.[2] Indeed, the trial court did not address why the letter agreement expressly set forth that the documents would not be recorded in the absence of a default by the borrower.

Thus, while the trial court did not clearly err when it concluded there was an agreement between plaintiffs and defendants for the sale of SNJ, the trial court did not adequately explain how the Agreements fit into the sale agreement. Specifically, by failing to adequately address the purpose of the Security Agreement and Promissory Note, the trial court did not consider whether additional promises and, therefore, additional consideration, supported the Agreements.

The trial court was not permitted to ignore the plain terms of the Promissory Note and Security Agreement evidencing indebtedness and additional agreements between the parties. *Klapp*, 468 Mich at 468. We remand the case to the trial court for additional findings of fact explaining the purpose of the Agreements and whether additional consideration was present. See *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 364; 824 NW2d 609 (2012).

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro

[2] Defendants assert that plaintiffs did not preserve the argument that there were additional sources of consideration by failing to raise it below. However, in actions tried without a jury, "[n]o exception need be taken to a finding or decision" of the trial court to preserve the issue. MCR 2.517(A)(7); see also *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). Thus, plaintiffs have preserved their argument that defendants breached the Agreements even though plaintiffs did not object to the trial court's verdict. See MCR 2.517(A)(7).