STATE OF MICHIGAN

COURT OF APPEALS

CROWN MOTORS LTD,

Plaintiff/Counter-Defendant-Appellee,

v

RODENHOUSE PROPERTY MANAGEMENT LLC,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
December 17, 2020

No. 352116
Ottawa Circuit Court
LC No. 19-005632-CB

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

The trial court granted summary disposition in favor plaintiff pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) no genuine issue of material fact on plaintiff's claim, and defendant's counterclaim, for breach of contract.[1] In so doing, the trial court granted plaintiff's request for specific performance. The trial court also declined both parties' request for declaratory judgment. Defendant now appeals and we affirm.

The trial court filed a very detailed opinion with an extensive discussion of the underlying facts of this case. Accordingly, we do not need to restate those facts in detail. Briefly, the parties entered into a commercial lease in which plaintiff leased property in Holland from defendant and upon which it operated a car lot. The lease was effective from August 1, 2016, through July 31, 2019. At issue here is a provision in the lease that granted plaintiff an option to purchase the property at any time during the lease term. In relevant part, the lease provided as follows:

[1] The trial court also denied defendant's motion for summary disposition under MCR 2.116(I)(2) (the trial court may grant summary disposition to the non-moving party if it appears that they are entitled to judgment in their favor). Defendant does not challenge on appeal the grant of summary disposition under (C)(8) on defendant's counterclaim.

6.1 Tenant's Option to Purchase.

(a) During the Term, Landlord grants Tenant the option to purchase all or any portion of the Project (the "Option Property"), on the terms hereinafter set forth (the "Option"). If Tenant elects to exercise the Option, Tenant will provide written notice to Landlord and the parties shall negotiate the purchase price and other terms of the proposed sale and to enter into a real estate purchase agreement memorializing all such agreements (the "Purchase Agreement").

(b) If the parties cannot agree on a purchase price within thirty (30) days after delivery of Tenant's notice to exercise the Option, Tenant may, at its sole expense, retain a licensed appraiser and provide a valuation of the Option Property to Landlord within thirty (30) days of the parties not being able to agree on a purchase price. If Landlord disagrees with such valuation, Landlord shall, at its own expense, hire a second licensed appraiser to value the Option Property, such appraisal to be conducted within twenty (20) days of delivery of the first appraisal to Landlord. If the two appraisals result in differing valuations, the parties can either mutually agree on a purchase price or retain a third licensed appraiser, the cost of which shall be split equally between Landlord and Tenant, and the purchase price payable for the Option Property will be the average of the three appraisals

Prior to the expiration of the lease, plaintiff notified defendant of its intent to exercise the purchase option. Defendant responded by stating that it did not believe that that option was valid as it was not supported by consideration, but that it was willing to negotiate for a sale of the property. Meanwhile, plaintiff had obtained an appraisal of the property, with a valuation of $310,000 and defendant obtained an appraisal for $675,000. Defendant, however, indicated that it believed that both appraisals were too low and offered to sell the property to plaintiff for $1,043,000. Plaintiff rejected that offer. While both parties indicated a willingness to obtain a third, neutral appraisal, defendant indicated that it was open to further negotiations, but that it was not doing so under the option clause of the lease. Plaintiff thereafter filed this action.

As stated above, the parties filed motions for summary disposition. The trial court determined that the lease contained a valid option clause that plaintiff was entitled to enforce. The trial court ordered the parties to obtain a third appraisal, and directed that the sale price would be the average of that appraisal, plaintiff's appraisal of $310,000 and defendant's appraisal of $675,000. According to defendant's brief, the third-party neutral appraisal set the value at $450,000, resulting in a sale price of $478,333.33.

We review a trial court's decision granting summary disposition de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition under MCR 2.116(C)(10) is appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and giving the opposing party the benefit of any reasonable doubt, there is no genuine issue of material fact upon which reasonable minds might differ. *Id.* In interpreting a contract, we give the language of the contract its plain and ordinary meaning and, if the language is unambiguous, we enforce the contract as written. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

Defendant first argues that the option clause is unenforceable because there was no fixed price clause. We disagree. Defendant is correct that an option contract must set forth all the essential terms, *Vacuum Oil Co v Waldo*, 289 Mich 316, 323; 286 NW 630 (1939), and that consideration is an essential term, *Zurcher v Herveat*, 238 Mich App 267, 295; 605 NW2d 329 (1999). We disagree with defendant that this compels a requirement that the amount of consideration be explicitly fixed in the contract. Rather, we agree with the trial court that it is sufficient if the contract has a fixed method of determining the sale price, which the option clause in this case did. Specifically, if the parties could not mutually agree upon a price and rejected each other's appraisal, a third, neutral appraisal would be obtained and the sale price would be the average of the three. As previously mentioned, this method clearly obtained a sale price in this case of $478,333,33.

Simply put, it was sufficient that the contract provided for a method of fixing the sale price if the parties could not agree on one. Defendant does additionally argue that providing a method is inadequate because there was not a meeting of the minds on the price for the property. But there was a meeting of the minds on how to establish the price, which is sufficient.

Defendant also argues that the trial court improperly placed too much weight on the use of the word "option" in section 6, particularly in the header. Defendant also takes exception to the trial court's pointing out that it was defendant who drafted the contract. But we agree with the trial court's observation that if defendant did not intend to create an option, it would not have used that word several times in the contract. Indeed, defendant complains that the trial court "gave the term 'option' its particular legal meaning as opposed to the understanding of the parties to the lease." Yet defendant fails to present any persuasive argument that the parties intended, in a legal document, to give the word anything other than its "particular legal meaning."

Defendant next argues that the parties never intended the average of the three appraisals to set the purchase price. In support of this argument, defendant points to the deposition testimony of plaintiff's general manager, Bradley Siegers, wherein he stated that if the price were too high, no one would buy the property. This argument is irrelevant. At most, this comment would suggest that it was Siegers' belief that if the third appraisal came in too high, plaintiff may have backed out of the purchase. That might raise the issue whether, once plaintiff invoked the option it could nevertheless revoke its decision or if it was obligated to complete the purchase. But, since that hypothetical did not happen, we need not address it. More importantly, Siegers' opinion on whether plaintiff would have backed out of the purchase in such a case has no control over this matter. The relevant inquiry is not Siegers' opinion, but the language of the contract. Indeed, had defendant's hypothetical scenario occurred, we might well be faced with a different lawsuit—one brought by defendant against plaintiff for breach of contract.[2] But either in the hypothetical case

[2] Defendant makes an ancillary argument that the use of the word "may" in section 6.1(b), which says that if the parties could not agree on a price, plaintiff "may" obtain an appraisal, suggests that plaintiff had an ability at that point to merely drop the matter and not pursue exercising the option any further. Again, this represents a hypothetical that we need not answer. But more importantly, even if defendant's interpretation is correct, that does not affect the outcome of the case before us.

or in this real case, the answer lies in the language of the contract. And in this real case, that answer is that the parties agreed that the sale price would be the average of the three appraisals, be it too high, too low, or just right.[3]

Defendant also argues that section 6.1(b) creates an escape point after both parties have obtained their appraisals and neither accepts the other's appraisal. The contracts provide at that point "the parties can either mutually agree on a purchase price or retain a third licensed appraiser . . .", with the second option leading to the averaging of the three appraisals. Defendant suggests that the use of the word "can" indicates a permissive action and, therefore, provide a point at which either party may choose to end the process. We disagree. The use of the word "can" with two options does not suggest a third option—to do nothing and end the process. Rather, it is permissive to the extent that it offers the parties to choose between the offered options. That is, it defines what the parties have an ability to do.[4] And the options set forth make a great deal of sense. After obtaining two appraisals, those appraisals provide guidance to the parties to further negotiate a price. And those negotiations might result in an agreement. But if not, then the second option—the third appraiser and averaging of appraisals—is available. Indeed, the parties could also recognize that further negotiations would be futile and immediately proceed with the second option.[5]

Moreover, defendant argues that these "exit points" to avoid completing the purchase indicates a lack of a mutuality of obligation, a necessary element for a valid contract. Setting aside our conclusion that the word "can" does not create an "exit point" as defendant argues, any existence of an "exit point" does not indicate a lack of mutuality of obligation. As our Supreme Court explained in *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980), "[t]he enforceability of a contract depends . . . on consideration and not mutuality of obligation." See also *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005). Clearly, this contract was supported by consideration on both sides.

Defendant next argues that plaintiff did not comply with the option clause because it was, in fact, Siegers who was trying to exercise the option, not plaintiff, and the option belonged to plaintiff, not Siegers. There is no doubt that Siegers had some interest in owning the property and had even engaged in some discussions with defendant prior to plaintiff exercising the option. But that is irrelevant. Ultimately, it is plaintiff who exercised the option and it is plaintiff who brought this action in order to enforce its option. We are not aware of any evidence that plaintiff has at any time disavowed the attempt to exercise the option in its name.[6] Indeed, even if defendant were

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[3] Indeed, for what it is worth, we note that the ultimate sale price was very close to the appraisal delivered by the third-party neutral appraiser.

[4] See "can," Merriam-Webster's Collegiate Dictionary, 11th ed.

[5] And this case presents a good example where further negotiation would be unlikely to reach an agreement inasmuch as defendant was not even willing to accept its own appraisal.

[6] Defendant argues that plaintiff has presented no evidence that Siegers has authority, actual or apparent, to act as plaintiff's agent in exercising the option. But neither has defendant definitely

to establish that there was an agreement between plaintiff and Siegers to immediately sell the property to Siegers upon completion of the sale from defendant to plaintiff, it would make no difference. Plaintiff has the option to purchase the property. Plaintiff is exercising that option. Why plaintiff chooses to exercise it and what plaintiff does with the property after doing so is of no consequence.

Defendant next argues that plaintiff failed to comply with the terms of section 6.1(b) by failing to negotiate for 30 days after giving notice of its intent to exercise the option. The trial court concluded that, while the parties could negotiate for up to 30 days, negotiating for the entire 30 days was not mandatory. The trial court further noted that it was, in fact, defendant who refused to negotiate when it declared that the option clause was invalid and that it would only negotiate "outside" the option clause. Indeed, even after obtaining its own appraisal, defendant insisted upon a price over 50% higher than the appraisal. If there was any bad faith in the negotiations, it would seem to belong to defendant, not plaintiff. In any event, there were negotiations such as it was.

Defendant's final argument is that the trial court exceeded its authority by adding four additional terms to the contract. See *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (a court cannot modify unambiguous contracts). We disagree. This argument is rooted in the trial court's directions to the parties on how to proceed with implementing the specific performance ordered by the court. The first "additional" term is the directive for the parties to agree upon a "Certified General Appraiser" to conduct the third-party neutral appraisal. The lease refers to the parties using a "licensed appraiser." While this is different language, defendant has not convinced us that it is a meaningful difference. Ultimately, the parties agreed upon a licensed appraiser.

The second "additional" term is that the appraiser must be located in Kent or Ottawa counties. The contract does not limit the geographical area that the appraiser must come from. Given that the intent was for the third appraiser to be neutral and the parties' demonstrated inability to agree on much in this transaction, we do not find it unreasonable for the trial court to provide guidance in the selection of the third appraiser.[7] First, it does not appear that defendant objected in the trial court to this provision in the trial court's order. Appellate review is limited "to those issues raised and argued in the trial court, and holding all other issues waived . . . ." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). Moreover, given that the trial court had to fashion a remedy, we do not view this as changing the contract to add an additional term. And, for that matter, defendant does not suggest an appraiser outside of Kent or Ottawa counties that it would have wanted to use and to which plaintiff would have agreed.

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established that Siegers lacks that authority. Ultimately, upon completion of this transaction, plaintiff owns the property.

[7] In fact, the trial court suggested two names for the third appraiser, but the parties agreed upon someone different. Indeed, we are somewhat surprised that the parties were able to agree upon an appraiser and that the trial court did not have to impose a selection.

The third "additional" term is "the appraisal shall state the market value of the land with its physical improvements and structures, as valued as a location for operation of a business. . . ." Given that this is the subject matter of the option, we fail to see how this would constitute an additional term. Defendant seems to be thinking that plaintiff is also purchasing its own business from defendant, not just the land and structures. Indeed, that is reflected in defendant's final claim of an "additional" term, namely the directive that the appraisal "shall not include the value of Crown's or any other business at that location in the value of the property." Again, because only the land and structures are involved, this is not an additional term.

Affirmed. Plaintiff may tax costs.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Deborah A. Servitto