

STATE OF MICHIGAN
COURT OF APPEALS

MAHER JABERO,

Plaintiff/Counterdefendant-
Appellee,

v

HASSAN HARAJLI and HARAJLI
MANAGEMENT & INVESTMENT, INC.,

Defendants/Counterplaintiffs-
Appellants,

and

DROLET FREEMAN COTTON & NORRIS,
P.C.,

Defendant/Counterplaintiff.

UNPUBLISHED

June 15, 2004

No. 243494

Wayne Circuit Court

LC No. 00-007772-CZ

MAHER JABERO,

Plaintiff/Counterdefendant-
Appellant,

v

HASSAN HARAJLI and HARAJLI
MANAGEMENT & INVESTMENT, INC.,

Defendants/Counterplaintiffs-
Appellees,

and

DROLET FREEMAN COTTON & NORRIS,
P.C.,

Defendant/Counterplaintiff.

No. 246737

Wayne Circuit Court

LC No. 00-007772-CZ

Before: Owens, P.J. and Kelly and R.S. Gribbs*, JJ.

PER CURIAM.

Plaintiff entered into an agreement with defendant Hassan Harajli to lease a Sunoco fuel center with an option to purchase. The parties never closed on the transaction. Plaintiff subsequently brought this action to recover a \$50,000 earnest money deposit that he made pursuant to the agreement.¹ Defendant filed a counterclaim, seeking indemnification for his costs and attorney fees associated with this action under an indemnity provision in the parties' agreement. Following a bench trial, the trial court awarded plaintiff judgment of \$57,424.81 on his claim, and awarded defendant nothing on his counterclaim. The court thereafter denied plaintiff's request for case evaluation sanctions. In Docket No. 243494, defendant appeals as of right the trial court's judgment for plaintiff. In Docket No. 246737, plaintiff appeals as of right the trial court's denial of case evaluation sanctions. We affirm the trial court's judgment for plaintiff in Docket No. 243494, but reverse the trial court's denial of case evaluation sanctions in Docket No. 246737, and remand for determination of appropriate sanctions.

I. Docket No. 243494

At trial, the trial court determined that the agreement for plaintiff to acquire the Sunoco fuel center could not be performed because Sunoco did not approve plaintiff as a franchisee. Although the risk that plaintiff would not be approved by Sunoco was not expressly set forth in the agreement, the trial court determined that this was an implied condition precedent and that Sunoco's refusal to approve plaintiff gave rise to an impossibility of performance, thereby requiring rescission of the agreement and entitling plaintiff to a return of his \$50,000 deposit.

On appeal, defendant argues that the trial court erred in its findings and conclusions at trial.² We disagree.

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C)." *Alan Custom Homes, Inc, v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the

¹ Harajli Management & Investment, Inc. ("HMI") and Drolet Freeman Cotton & Norris, P.C., were also named as defendants, but these parties were dismissed before trial.

² Defendant also argues that the trial court erred in denying his pretrial motion for summary disposition of plaintiff's claim. Defendant relies on the same arguments that were developed at trial with regard to this claim. As reflected in our discussion of this issue, we conclude that the motion was properly denied because there were genuine issues of material fact, thereby rendering summary disposition inappropriate. MCR 2.116(C)(10); *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

Defendant first argues that the trial court improperly concluded that plaintiff's performance was impossible. Although the trial court announced that it was applying the rule of supervening impossibility, its findings actually comport with the closely related doctrine of frustration of purpose. This Court recently discussed the frustration of purpose doctrine in *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133-135; 676 NW2d 633 (2003):

The doctrines of frustration of purpose and supervening impossibility/impracticability are related excuses for nonperformance of contractual obligations and are governed by similar principles. Frustration of purpose is generally asserted where "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." Under this doctrine, however, there is not anything actually impeding either party's ability to perform.

While the frustration of purpose doctrine has yet to be considered by the Michigan Supreme Court, this Court discussed the doctrine in *Molnar v Molnar* [110 Mich App 622; 313 NW2d 171 (1981)]. In *Molnar*, the doctrine was utilized in connection with a property settlement in a divorce case that required the husband to pay partial mortgage payments on the home where his ex-wife and minor son lived. When the child passed away before his eighteenth birthday, a panel of this Court held that the father could discontinue the partial payments to his ex-wife because they were intended for the minor child's benefit. According to *Molnar*, the changed circumstances fundamentally altered the parties' positions and frustrated the purpose for which the property settlement was entered.

Before a party may avail itself of the doctrine of frustration of purpose, the following conditions must be present:

"(1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him." [*Molnar, supra* at 626.]

As noted in the Second Restatement of Contracts, "[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." Further, "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." [Footnotes omitted.]

Defendant argues that it was not impossible for plaintiff to perform even if he was not approved as a Sunoco franchisee. Under the frustration of purpose doctrine, however, a party's ability to perform is not relevant. Instead, the inquiry must focus on whether the plaintiff's

purpose in making the contract was affected by an event that made the agreement virtually worthless to him. Here, the agreement expressly recites that plaintiff desired to acquire defendant's interest in the business as a going concern, which could only occur if Sunoco approved plaintiff as a franchisee. Plaintiff's failure to receive approval from Sunoco was sufficient to show a frustration of purpose.

Defendant argues that the trial court erroneously awarded a judgment for plaintiff because plaintiff was not entitled to seek affirmative relief. It is true that a party cannot rely on the doctrine of frustration of purpose to seek specific performance of an agreement. See *Fraver v North Carolina Farm Bureau Mut Ins Co*, 69 NC App 733, 737-738; 318 SE2d 340 (1984) ("[T]he doctrine of frustration of purpose operates to excuse performance of a contract, not compel performance by the other party as sued for by plaintiffs and plaintiff-intervenors in this case. Secondly, the doctrine does not apply if the parties have in their contract allocated the risk involved in the frustrating event.") The frustration of purpose doctrine excuses performance and cannot be used to compel performance. But this does not preclude a claim for restitution of benefits conferred. As Judge White observed in her dissenting opinion in *Liggett Restaurant Group, supra* at 142 n 2, quoting the Restatement of Contracts 2d:

A party whose duty of performance does not arise or is discharged as a result of . . . frustration of purpose . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance. [3 Restatement Contracts, 2d, § 377, p 224.]

In this case, plaintiff was not seeking to compel performance of any of defendant's obligations under the agreement, but rather restitution, i.e., return of his earnest money deposit, on account that his performance under the agreement was excused. Under these circumstances, plaintiff was entitled to receive back any benefits conferred upon defendant by plaintiff's partial performance.

We reject defendant's claim that plaintiff was not entitled to relief because he assumed the risk that he might not be approved by Sunoco as a franchisee. Although plaintiff was obligated to apply for approval, the agreement is silent as to which party was assuming the risk that Sunoco might not approve plaintiff as a franchisee. The trial court found that plaintiff's approval by Sunoco was an implied condition because the lease required plaintiff to assume an existing gasoline supply agreement that defendant had with Sunoco. Moreover, the agreement provided that defendant would transfer the business as a going concern, and he was obligated to obtain Sunoco's approval for the transaction. The trial court did not clearly err in finding that the parties did not allocate which party would assume the risk that plaintiff might not be approved as a franchisee.

Defendant further argues that plaintiff was at fault for not obtaining Sunoco's approval as a franchisee. Plaintiff was required to complete and submit an application in order to be approved as a franchisee. Although plaintiff submitted an application, it was not fully completed. Defendant therefore argues that Sunoco was unable to approve plaintiff as a franchisee due to plaintiff's fault in failing to submit a complete application.

The trial court rejected this argument because it found that plaintiff was never informed that he needed to provide additional information in order for his application to be considered. Evidence at trial indicated that Sunoco only dealt with the parties through defendant. There was

evidence that Sunoco contacted defendant, advising him that it needed more information about plaintiff in order to evaluate the transfer of the business. The court found that defendant did not advise plaintiff that he needed to provide additional information before his application could be approved. In light of these findings, which defendant does not challenge as clearly erroneous, the trial court did not err in rejecting defendant's argument that fault on the part of plaintiff barred him from recovering his deposit.

Defendant also argues that the parties could have amended their agreement to allow plaintiff to perform even if he was not approved by Sunoco to operate this franchise. We find no merit to this argument. The parties' rights and obligations must be evaluated in light of the agreement as it stood. Regardless of whether the parties could have amended their agreement, neither plaintiff nor defendant were obligated to do so.

Defendant next argues that the trial court erred in finding no merit to his counterclaim. We disagree.

Defendant filed a counterclaim for indemnification, relying on an indemnity provision in the parties' lease agreement. Because the trial court rescinded the agreement, the entire agreement was of no further force or effect. A rescission of a contract is not merely a release; the contract is annulled from the beginning and the parties are restored to the positions they would have occupied if there had been no contract. *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003); *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995). Thus, the trial court properly found that defendant was not entitled to rely on the indemnity provision in the rescinded contract.

II. Docket No. 246737

Plaintiff argues that the trial court erred in denying his motion for case evaluation sanctions. We agree.

The trial court erred in determining that plaintiff was not entitled to case evaluation sanctions because the legal theory upon which he prevailed at trial was not the same theory that was argued before the case evaluation panel. As our Supreme Court held in *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 556-557; 640 NW2d 256 (2002), there is no basis in the case evaluation court rule, MCR 2.403(M), for allowing a party to avoid case evaluation sanctions by showing that less than all issues were submitted to case evaluation.

Plaintiff received a case evaluation award of \$47,500 on his claim, and defendant was awarded \$20,000 on his counterclaim. Thus, the aggregate value of the awards is a net award of \$27,500 for plaintiff. Because the trial court's judgment reflects that plaintiff improved his position at trial by more than ten percent, he was entitled to sanctions. MCR 2.403(O)(3). We reject defendant's argument that plaintiff did not improve his position because the case evaluation award was against defendant and HMI jointly and severally. Although HMI was subsequently dismissed from this case, defendant is still liable for sanctions.

Plaintiff also argues that the trial court properly denied HMI's motion for case evaluation sanctions against plaintiff. Because plaintiff was not aggrieved by the trial court's decision to

deny HMI's motion, we need not address this issue. See *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).

In Docket No. 243494, we affirm the judgment for plaintiff. In Docket No. 246737, we reverse the trial court's order denying plaintiff's motion for case evaluation sanctions and remand for a determination of sanctions. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gibbs