

STATE OF MICHIGAN
COURT OF APPEALS

AMERICAN RECYCLING CENTER, INC. and
LARRY L. FISHER, JR.,

UNPUBLISHED
May 20, 2010

Plaintiffs/Counter-Defendants-
Appellants,

v

UNIQUE SURFACING, LLC. and TIMOTHY L.
FISHER, SR.,

No. 289538
Bay Circuit Court
LC No. 07-003646-CK

Defendants/Counter-Plaintiffs-
Appellees.

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs/counter-defendants appeal as of right the trial court's judgment in favor of defendants/counter-plaintiffs after a bench trial.¹ The trial court found that defendants had breached an obligation to pay plaintiffs \$26,116.34 on two promissory notes, and that plaintiffs breached an obligation to provide defendants with materials to perform repairs on flooring installation projects, causing \$39,971.09 in damages. Including interest, the trial court awarded a final judgment of \$15,863.30 to defendants. Because the trial court did not err in construing Appendix A to the sales agreement by utilizing extrinsic evidence, did not err in reforming the contract based on mutual mistake, and did not err in failing to award attorney fees to plaintiffs, we affirm.

Plaintiff Larry Fisher solely owned American Recycling, which was a manufacturer and supplier of recycled rubber materials. Larry and his brother, defendant Tim Fisher, also operated

¹ In the interests of efficiency and clarity, we refer to plaintiffs/counter-defendants Larry Fisher and American Recycling Center, Inc. (American Recycling) as "plaintiffs" and defendants/counter-plaintiffs Tim Fisher and Unique Surfacing, L.L.C. (Unique Surfacing) as "defendants" throughout this opinion, unless otherwise stated.

Unique Surfacing as equal members. Unique Surfacing installed rubber floors for recreational and equine use and was a customer of American Recycling.

In December 2004, Larry and Tim executed an agreement for Tim to buy Larry's portion of Unique Surfacing. The agreement provided that Tim would pay \$50,000 for the business, including two \$10,000 promissory notes due on October 31, 2006 and October 31, 2007. Tim did not pay on the notes. As a defense, Tim maintained that Larry had breached other provisions of the contract. The agreement provided that American Recycling would provide materials for Unique Surfacing in order to complete six existing warranty repair projects that were listed in an appendix to the agreement entitled "Appendix A." Defendants sent invoices for the materials used for the individual repair projects in September 2005 and October 2005, maintaining that plaintiffs refused to provide the required materials at the time of repair. Plaintiffs filed a complaint alleging breach of the promissory notes and seeking declaratory relief that it did not have to reimburse defendants for the cost of materials for repair projects because defendants obtained them from other suppliers in breach of the agreement. Defendants filed a counter-claim that plaintiffs breached the agreement by refusing to provide the materials required for the repairs and by not transferring the trademark/trade name Equi-Turf to defendants as provided in the agreement.

Plaintiffs argue on appeal that the trial court erred by considering parol evidence that was extrinsic to the purchase agreement, by reforming Appendix A to the agreement by finding that a mutual mistake existed, and by finding that defendants had successfully proven a defense to plaintiffs' breach of contract claim. The interpretation of a contract is a question of law reviewed de novo on appeal. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). This Court reviews de novo the trial court's decision to grant equitable relief, but we will not reverse or modify the judgment unless convinced that we would have reached a different result had we occupied the position of the trial court. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394; 729 NW2d 277 (2006).

Plaintiffs specifically contend that the plain language of the agreement between the parties prohibited the trial court from considering evidence of negotiations or agreements that occurred prior to the written agreement that was not contained in the agreement. Generally, "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Hamade v Sunoco Inc (R & M)*, 271 Mich App 145, 166; 721 NW2d 233 (2006), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). The rule recognizes that parol agreements are nearly always merged into the subsequent writing, and the rationale for the rule is that it provides stability to written contracts by preventing parties from avoiding obligations by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing. *Hamade*, 271 Mich App at 166-167.

Paragraph 3. b. of the parties' written agreement is as follows:

Unique/Tim remains responsible for all warranty claims which arise from work performed prior to, and hereafter, by Unique with an exception of any claims that may be the result of a "proven" materials defect. If it is found to be a materials defect, proper procedures against any supplier will be the responsibility

of Tim or Unique. A project list (See Appendix A) of existing repairs required will be handled as normal, with American Recycling Center, Inc providing materials and Unique providing the labor. All other projects including the listed (once repaired), as well as future projects will be warranted exclusively by Tim and Unique.

The agreement further provides in paragraph 3. c. that plaintiffs were released from liability on claims from “work performed or in his [Larry’s] duties for Unique.”

Appendix A was attached to the agreement when it was signed, and states in its entirety:

<u>Project name</u>	<u>Estimated sq.ft.</u>
Melvin Lebo	6 stalls, 864 sq.ft.
Adele Yunck	Dog agility area, approx 10,000 sq.ft.
Lori Iscaro	???
Matt Rorabough	Aisleway, ????
Rood & Riddle	Procedure area, needs grit
Dale Cash	1 stall, 144 sq.ft.

A prerequisite to the application of the parol evidence rule is a finding that the parties intended the contract to be a complete expression of their agreement concerning the matters covered. *Farm Credit Services of Michigan’s Heartland, PCA v Weldon*, 232 Mich App 662, 669; 591 NW2d 438 (1998). Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it pertains to the threshold question of whether the written instrument is such an integrated agreement. *Id.* Where there is a dispute, the parties’ intent must be ascertained and the agreement enforced according to that intent. *SSC Assoc Ltd Partnership v General Retirement Sys of City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995).

In the instant case, the agreement contains some evidence of the parties’ intention for the document to contain their entire agreement because it includes a sentence on the last page that reads, “Tim agrees that he is not relying on any verbal or written representation whatsoever except as expressly set forth in this agreement.” Where the parties include an express integration or merger clause within the agreement, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete and, therefore, while “partially integrated” parol evidence is necessary for the filling of gaps. *Hamade*, 271 Mich App at 169. The trial court determined that Appendix A was ambiguous and decided to hear parol evidence presumably to determine the parties’ intent. At trial, Tim said that when Larry showed him Appendix A to the agreement, the two verbally agreed to change Rood and Riddle on the list to Hagyard, Davidson, and McGee (HDM), and Tim signed the agreement based on this promise. Larry believed that the first time Tim mentioned HDM to him was six months after the agreement was signed and stated that he was in New Orleans when the agreement was signed.

Therefore, we conclude that there was a dispute about whether the parties intended Appendix A to be a final expression of the parties' written agreement, and it was permissible for the trial court to hear parol evidence to determine whether this was the case.

Additionally, a written agreement may be explained by parol or extrinsic evidence when it is expressed in short and incomplete terms, is fairly susceptible to two interpretations, or where the language employed is vague, uncertain, obscure, or ambiguous, and where the words of the contract must be applied to facts ascertainable only by extrinsic evidence. *Klapp v United Ins Group Agency, Inc (Before Remand)*, 468 Mich 459, 470; 663 NW2d 447 (2003). Here, Appendix A was facially incomplete because the repairs required for some of the listed projects were not at all determined and other repairs were only vaguely described. Half of the projects had an estimated square footage for repair and the other half did not provide even an estimate. While there was testimony that the price for repair was based on the square footage and the amount of materials used, there was no estimation of price or amount of materials required in Appendix A, and thus it is impossible to accurately estimate a price based on the information contained solely in Appendix A. Additionally, the agreement itself contains a non-specific reference that Appendix A repairs would be "handled as normal" with Unique Surfacing providing labor and American Recycling providing materials. "Handled as normal" is itself a direct reference to the prior dealing of the parties, and information extrinsic to the agreement would be necessarily required to describe the repair process beyond division of responsibilities.

The trial court found that Appendix A was ambiguous and admitted parol evidence. "A contract is ambiguous when its words may be reasonably understood in different ways[.]" *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006), or where contractual provisions are capable of conflicting interpretations. *Klapp*, 468 Mich at 467. Evaluating relevant extrinsic evidence to interpret ambiguous contract language does not violate the parol evidence rule. *Id.* at 470. Here, the agreement may have been better described as incomplete, rather than having conflicting interpretations. Nonetheless, parol evidence is admissible to establish the full agreement of the parties when the document purporting to express their intent is incomplete. *In re Skotzke Estate*, 216 Mich App at 251-252. See also *Klapp*, 468 Mich at 470. Under the circumstances, the trial court properly allowed the parties to present substantial extrinsic evidence concerning all of the projects listed in Appendix A, much of it elicited by plaintiffs, in order to clarify disputed matters such as price, quantity, and materials provided for different repair projects. *Hamade*, 271 Mich App at 169.

Plaintiffs next argue that the trial court erred in reforming Appendix A based on a finding of mutual mistake. At trial, both Tim and Larry testified that they discussed Appendix A and that Larry prepared it. Tim stated that Rood and Riddle Veterinary Clinic in Lexington, Kentucky, and Hagyard, Davidson, and McGee (HDM) were less than five miles apart. Tim also stated that both he and Larry knew that Rood and Riddle did not require a repair but that HDM required the type of repair that was listed for Rood and Riddle in Appendix A. Tim said that Rood and Riddle did not even have a "procedure area," which was the area for repair stated in Appendix A. Tim testified that when Larry showed him Appendix A, the two verbally agreed to change the repair project listed as Rood and Riddle on the list to HDM. Tim stated that he signed the agreement based on this promise. Defendants alleged that Appendix A should be reformed because it contained a mistake, and was the product of fraudulent inducement or breach of promise.

Plaintiffs argue on appeal that the trial court should not have reformed Appendix A to include HDM and exclude Rood and Riddle. A court of equity has the power to reform a contract to make it conform to the agreement actually made. *Casey*, 273 Mich App at 398. However, courts must proceed with the utmost caution in exercising jurisdiction to reform written agreements. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). In order to obtain reformation to reflect the parties true intent, a party must prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence, to show the writing does not express the true intent of the parties. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998).

“A contractual mistake ‘is a belief that is not in accord with the facts.’” *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982) (quotation omitted). “[R]escission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties.” *Id.* at 29. This Court will not reform a contract if the instrument is drawn as intended. *Olsen*, 213 Mich App at 29. Here, the trial court found clear evidence of mutual mistake in Appendix A because Rood and Riddle’s inclusion and HDM’s exclusion was not in accord with the facts, and Appendix A did not represent the true intent of the parties. The trial court found that the parties’ testimony established that only necessary warranty repair projects were to be included in Appendix A, and that no repair was required at Rood and Riddle but was required at nearby HDM.

While it appears that the parties were aware of the inclusion of Rood and Riddle, and the exclusion of HDM in Appendix A, the trial court was not in error in finding this a mutual mistake. According to the parties’ agreement at 3.b., “A project list (See Appendix A) of existing repairs required will be handled as normal.” Thus, Appendix A was intended to list existing projects that required repair. Tim stated that both parties were aware that Rood and Riddle did not require repair, and that Larry had visited HDM and determined that it required the repairs that were listed next to Rood and Riddle in Appendix A. Plaintiffs did not contradict this testimony. Again, the record stated that Rood and Riddle did not even have a “procedure area,” which was listed as requiring repair. Therefore, it is evident that both parties intended to include HDM, rather than Rood and Riddle, as the project that required the repairs that were listed next to Rood and Riddle. The belief expressed in Appendix A regarding Rood and Riddle was not in accordance with the facts, and it regarded a basic assumption of the agreement – the repair projects for which plaintiff was required to provide materials. Thus the trial court did not err in reforming the contract to reflect the intention of the parties. *Lenawee*, 417 Mich at 29; *Casey*, 273 Mich App at 398.

Plaintiffs next argue that the trial court was in error in finding that defendants had established an affirmative defense to the trial court’s finding that defendants breached the agreement by not paying on the promissory notes. Plaintiffs further contend that the trial court erred by denying attorney fees that it incurred attempting to collect payment on the promissory notes. Plaintiffs first maintain that there was no factual basis for the trial court to find that the HDM dispute was a factor which provided Tim justification to refuse to pick up materials that Larry had procured for repair jobs listed in Appendix A. However, the trial court’s opinion does not associate plaintiffs’ failure to supply the HDM repair materials as justification to refuse to pick up materials for the other repair projects. The trial court’s finding that plaintiffs refused to

supply the materials was clearly based on plaintiffs' requirement that Tim sign its warranty repair closure agreement proposal in order to pick up the materials and Tim's unwillingness to do so. The record factually supports this finding.

As the trial court pointed out, the warranty repair closure agreement proposal did not mention the HDM project. The warranty repair closure agreement proposal did require defendants to sign and agree that they had received all materials requested for the Adele Yunk repair project, which was a point of strong disagreement, in order to pick up the materials that were available for the other repair projects, not including HDM. Further, Tim explained that he did not pick up the materials for the remaining repair jobs from Larry because Larry also wanted Tim to sign an agreement stating that Larry had supplied the Adele Yunk repair materials. There was no error in the trial court's findings that plaintiffs breached their promise to supply the materials for the repair projects in Appendix A.

A provision for the collection of attorney fees and costs of collection on the notes was included in the promissory notes in the event that Tim did not pay the promissory notes. The trial court's opinion stated that the court denied the attorney fees for "the reasons set forth above" after finding plaintiffs had breached the agreement by failing to provide materials for the repairs listed in Appendix A and breached the agreement by failing to provide the Equi-Turf Trademark/Tradename to defendants.² The trial court also found that Tim had established a valid affirmative defense to plaintiffs' breach of promissory note action, so plaintiffs were not entitled to recover attorney fees incurred to collect on the notes. The trial court found that defendants asserted a "set-off" affirmative defense.

Plaintiffs argue that defendants did not plead an affirmative defense of "setoff," and it was therefore waived according to MCR 2.111(F). Defendants did plead an "affirmative matter" that plaintiffs breached the agreement in its answer to plaintiffs' complaint, and counter claimed that plaintiffs breached the contract by failing to provide the Equi-Turf trademark and not supplying products for the repair projects.

The trial court appeared to categorize the setoff as an affirmative defense, i.e.; "a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000). However, the court also referred to the setoff here as a remedy when two parties owe money to each other. See *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). Unless specifically authorized by statute in a particular instance, setoff is a matter in equity that is an appropriate method of satisfying judgments. *Mahesh v Mills*, 237 Mich App 359, 361-362; 602 NW2d 618 (1999).

² Tim agreed to purchase the Equi-Turf trademark and trade name from Larry for \$35,000. Even though Larry completed his payments in March 2005, Larry had not provided the trademark as of the trial in August 2008.

The trial court found that defendants were entitled to setoff the amount of money Tim owed Larry on the promissory notes because Larry breached the contract. The trial court analyzed at length whether plaintiffs and defendants breached the contract, and then concluded by calculating the amount each party was damaged. The trial court then applied the principals of setoff by finding that “the amount awarded to [p]laintiff is deducted from [d]efendants’ monetary damages.” It appears that the trial court interchanged its setoff remedy with defendants’ breach of contract defense by stating that defendants’ affirmative defense was “setoff.” However, the court based its holding on its analysis of breach of contract allegations and determined that both parties breached. Consequently, the trial court did find that defendants had established a breach of the agreement, which was an affirmative defense that defendant pled. As a result, we conclude that the trial court was not required to find that defendant’s had waived their right to setoff because they did not specifically list it as an affirmative defense.

Regarding plaintiffs’ attorney fees, because the trial court found that plaintiffs had breached the agreement in two ways, it was permissible for the court not to require defendants to pay the cost of collections that plaintiff incurred through attorney fees. “[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.” *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). Here, Larry breached the December 2004 agreement in March 2005 when he failed to provide the Equi-Turf Trademark to Tim on his full payment for it. Further, Tim had completed the warranty repair projects with materials he provided by October 2005. The first promissory note was required to be paid October 2006. It was lawful for the trial court to hold that defendants had successfully proven their defense that the contract had been breached by plaintiffs, and accordingly that defendants were excused from their obligation to pay attorney fees to plaintiffs.

Affirmed. Costs to defendants.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio