STATE OF MICHIGAN

COURT OF APPEALS

CAPITAL 1 COMMERCIAL GROUP, INC., GREG EDGECOMB, and JACK GHANNAM,

Plaintiffs-Appellants,

v

PATRICK TORTORA,

Defendant-Appellee.

UNPUBLISHED
May 22, 2007

No. 274542
Oakland Circuit Court
LC No. 2006-075550-CZ

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs, Capital 1 Commercial Group, Inc. ("Capital 1"), its president Greg Edgecomb, and its sales representative, Jack Ghannam, appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 2004, defendant entered into a listing agreement with Capital 1, a commercial real estate broker, for the purpose of selling his laundromat and dry cleaning business and the real estate on which it was situated. Vincent Sapienza subsequently agreed to purchase the business and entered into a purchase agreement with defendant, but the agreement was never consummated.

Thereafter, in 2005, defendant, and plaintiffs Edgecomb and Ghannam, signed a document entitled "Preliminary Understanding Regarding Laundromat Project." The document set forth a detailed plan in which defendant, Edgecomb, and Ghannan would become equal shareholders in a newly formed business entity that would purchase, improve, and sell the business, using Capital 1 as their real estate agent. The plan was never carried out, however, and defendant ultimately listed the business with a different agent.

Plaintiffs subsequently brought this action for breach of the listing agreement, alleging entitlement to a commission because they furnished a ready, willing, and able buyer for the business property, but that defendant wrongfully refused to complete the sale with Sapienza. Plaintiffs also brought a second count alleging that defendant breached a joint venture agreement, which was based on defendant's failure to follow through with the "Preliminary

Understanding Regarding Laundromat Project." The trial court granted defendant's motion for summary disposition and dismissed both claims pursuant to MCR 2.116(C)(10).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed, supra*. The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of any material fact. *Id.*

We turn first to plaintiffs' argument that the trial court erred in dismissing their claim for breach of the listing agreement. We note that only Capital 1 was a party to the listing agreement and, therefore, only Capital 1 has standing to bring this claim. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24-25; 592 NW2d 379 (1998).

It is well settled that when a real estate broker furnishes a buyer for property who is ready, willing, and able to purchase the seller's property according to the parties' terms, the broker is entitled to the commission provided by the listing agreement, and the seller may not avoid payment of the commission by wrongfully refusing to complete the sale. *Advance Realty Co v Spanos,* 348 Mich 464, 468-469; 83 NW2d 342 (1957).

Here, the trial court determined that Sapienza was not a ready, willing, and able buyer because he failed to attend the scheduled closing. It is undisputed that Sapienza failed to attend the scheduled closing. However, the submitted evidence indicates that Sapienza declined to complete the sale because it was his position that defendant had defaulted under the terms of the purchase agreement through "continued and repeated attempt[s] to contract the benefits [sic] from the purchase as well as conceal the performance of the Laundromat." Sapienza accused defendant of failing to provide information on the business's financial performance, and being unable to deliver certain items of equipment in working order, contrary to the terms of the purchase agreement. Plaintiff Edgecomb also submitted an affidavit in which he averred that Sapienza was prepared to complete the sale in accordance with the terms of the purchase agreement, but that defendant sought to modify material terms of the agreement and that the sale failed when Sapienza would not agree to defendant's proposed modifications. We do not here address or decide the question of whether Capital 1 is entitled to the commission; the question before us is simply whether sufficient evidence was submitted to the trial court to raise a genuine issue of material fact. We find that there is sufficient evidence to raise a question as to whether defendant was in default and wrongfully caused the sale to fail, and whether Sapienza was otherwise ready, willing, and able to complete the sale under the terms of the purchase agreement. Therefore, the trial court erred in dismissing Capital 1's claim for breach of the listing agreement.

Plaintiffs Edgecomb and Ghannam also argue that the trial court erred in dismissing their claim for breach of a joint venture agreement. Plaintiffs argue that the "preliminary understanding" document was an enforceable "memorandum of understanding," or a contract to enter into a contract in the future, and not merely an expression of intent to do something in the future. The essential elements of a valid contract are: (1) parties competent to contract, (2)

proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). A contract to make a subsequent contract is valid and enforceable if it contains all essential terms. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). Here, the preliminary agreement does not contain any expression of mutuality of agreement and mutuality of obligation. The agreement sets forth a detailed plan for a joint venture operation, but it contains no language obligating the signers to carry out that plan. Edgecomb and Ghannam failed to supply any evidence that the parties agreed to obligate themselves to carry out the plan. Rather, they merely stated in their affidavits that they "understood" the agreement to be a "fully executed and binding agreement." Plaintiffs failed to establish a genuine issue of material question regarding the enforceability of the "preliminary agreement" document.

Plaintiffs Edgecomb and Ghannam alternatively argue that they are entitled to relief under a promissory estoppel theory.[1] To prevail on a theory of promissory estoppel, plaintiffs must show: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Marrero v McDonnell Douglas Capital Corp,* 200 Mich App 438, 442; 505 NW2d 275 (1993). Here, neither Edgecomb nor Ghannam stated in their affidavit that defendant made a promise, verbally or in writing; they merely stated that they "understood" the agreement to be binding. Plaintiffs' affidavits also fail to establish the detrimental reliance element of promissory estoppel. Edgecomb stated that he visited the business "for the purpose of rehab and preparation of dry cleaning equipment for sale and made preparations to list and market the subject property," and Ghannam stated that he visited the business "for the purpose of rehab and preparation of dry cleaning equipment for sale and met with independent contractors to remodel the facility." These assertions do not satisfy the third and fourth elements of promissory estoppel. There was no evidence that either Edgecomb or Ghannam were in a materially worse position as a result of engaging in these preliminary activities, or that justice requires enforcement of the joint venture plan. Accordingly, the trial court properly granted summary disposition with respect to the promissory estoppel theory.

In sum, we affirm the trial court's order granting summary disposition for defendant with respect to the claim of breach of a joint venture agreement, but reverse the order with respect to Capital 1's claim for breach of the listing agreement.

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[1] Plaintiffs did not plead a promissory estoppel theory in their complaint, but defendant did challenge the claim on this ground, and the trial court also addressed the issue and granted summary disposition under MCR 2.116(C)(10).

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff