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CLERK OF THE APPELLATE COURT
CASE NUMBER: 117103

No. 17-117103-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

HM of Topeka, LLC,

Plaintiff/Appellee,

v.

Indian Country Mini Mart and Carla D. Nissen,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Jackson County, Kansas
The Honorable Gary Nafziger, Judge
District Court Case No. 2006-CV-41

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Oral Argument: 15 minutes

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STATEMENT OF FACTS

1. Plaintiff's statement of fact in paragraph 4 correctly quotes the beginning of Defendant's trial brief, paragraph 55, but the word, "deal" was a scrivener's error and is later described in the same trial brief at paragraph 43, as a "revocation of the negotiations" which is what it was. Brief of Appellant at ¶43. Plaintiff is merely quibbling over semantics.

2. Plaintiff's statement of fact paragraph 5 is argumentative and taken out of the context in that his attorney's had sent revised and new agreements, including a revision of the underlying Contract, during the purported "closing period" and there were too many material issues to resolve so he filed suit. Moreover, Plaintiff relies on its own testimony from its sole owner, Hummer, to support this proposition that Defendants failed to close. In reality, the evidence is that there was at least a closing scheduled in August (after Plaintiff filed suit), as evidenced by a letter from the title examining attorney, Kyle Mead, concerning Plaintiff's desire to "square off the tract and intent to buy all of Seller's property...as 'shown on the survey markup Buyer has provided...**Contract closing is set for August.**" (Emphasis added.) See Brief of Appellant at ¶39.

3. Plaintiff's statement of fact paragraphs 6 through 15 are not relevant to the issue on appeal and were not part of the District Court's judgment of specific performance.

4. Moreover, Plaintiff's paragraphs 9 through 13 improperly reference information that Plaintiff's counsel was directed to seal and that is subject to a protective order. Further, much of the information is not supported by the record (see Plaintiff's paragraphs 11-14).

5. Paragraph 6 through 15, however, do support the argument that this contract cannot be closed and that specific performance is not a viable remedy under the circumstances, if any remedy other than dismissal was warranted.

6. Plaintiff's paragraph 24 contains Plaintiff's opinion. The purpose of Defendant's SOF paragraphs 25-40 is to illustrate (1) that material terms had not been negotiated and (2) that the parties clearly did not enter into a contract because they were still negotiating such terms.

7. Defendants' Statement of Fact paragraphs 43 and 44 show that Hummer believed the contract did not contain many additional terms that were material to Hummer in order for him to purchase the mini mart.

8. Defendant's SOF paragraph 46 shows that Defendant's attorney believed that the contract term had expired, presumably advising Defendant's of the same, and that Defendants were only continuing to negotiate with Plaintiff under threat of being sued. Paragraph 47 shows that there were numerous outstanding issues needed including an accurate legal description.

9. Defendant's SOF paragraph 47 explains that Defendants were still willing to negotiate concerning the sale of the business. Why would Defendants' attorney represent this and why would Plaintiff's attorney continue negotiating if the parties thought they had a valid contract?

10. There is no citation to the record of testimony by Defendants that there was an actual closing date of May 30 or 31, 2006 scheduled. Hummer testified about this, but no Defendants did.

11. Defendant's paragraphs 50 through 53, especially paragraph 53, indicate that at one time Plaintiff did not believe it had entered into a valid contract and wanted a new round of contracts, until Plaintiff changed its mind and filed suit.

12. Defendant's paragraph 55 explains that Plaintiff's owner, Hummer, was not ready, willing, and able to close because one of the requirements by his financier was that he had an executed lease for the mini mart, and no lease was ever agreed upon and executed by Carla Nissen.

13. Defendant's SOF paragraph 60 explains why the contract at issue was incomplete and why the parties had continued to negotiate even after signing it. It further explains that material terms

necessary for Nissen to agree to sell the mini mart, in which Nissen owned the real property in its entirety, were unresolved.

14. Defendant's SOF paragraph 61 explains that she did not believe Plaintiff could pay the price to purchase the mini mart and that the contract did not contain material terms and had ambiguous terms that may or may not affect her residence led her to believe it was not valid and could not be enforced if it was.

15. Plaintiff's SOF paragraph 32 is not relevant to the issue on appeal.

ARGUMENT AND AUTHORITIES

Plaintiff's response focuses almost entirely on upholding the District Court's decision that the Agreement for Purchase at issue in this case (hereinafter "Purchase Agreement") was not ambiguous, and on a new issue which was not preserved on appeal, nor is there a cross-appeal--that Defendant breached their duty of good faith and fair dealing in performing their part of the purported contract at issue. Since Plaintiff did not preserve this issue for appeal (the District Court did not rule one way or another on this issue), the Court of Appeals should disregard it. (Appellee Brief at p. 8). Further, Plaintiff's background section contains unsubstantiated facts which are not supported by the record on appeal. For example, Plaintiff claims that Hummer received a loan commitment for a loan to purchase the Mini Mart from Valley View Bank but there is no citation to the record. Since there is no verified evidence of this allegation, the Court must disregard it. (Appellee Brief at p. 9). Plaintiff also claims Mr. Hummer and Mr. Aldis scheduled the closing for May 30, 2006 but cites to Hummer's own self-serving testimony to support this claim. (Appellee Brief at p. 9). While there was some deposition testimony about a phone call before closing, it is not clear at all what had been understood by the parties during that phone conversation.

Plaintiff correctly points out that this Court determined that the parties had not closed the deal in April, May or June of 2006 (Appellee Brief at p. 9), but continued to negotiate it. See *HM of Topeka, LLC v. Indian Country Mini Mart,* 44 Kan. App. 2d 297, 236 P.3d 535 (2010). The Court should take note of this law of the case in finding that a contract was never formed, and that even if it was, it contained ambiguous terms that were still being worked out between the parties.

Most importantly, Plaintiff has no argument against the court's error in summarily ruling against Defendants at the pretrial conference without giving it notice, without scheduling a summary judgment brief schedule, and without allowing questions of fact to be presented to the trier of fact. (Appellee's Brief at p. 10). Instead, Plaintiff focused on jumping ahead to the issue of ambiguity.

Plaintiff heavy handedly argues that there are no ambiguous terms or conditions contained in the contract. But what Plaintiff carefully avoids is that even before the issue of ambiguity can be raised, all elements of a contract must exist. Here, the judge avoided the first prong of the analysis by ignoring factual evidence that, viewed in the light most favorable to the party against whom summary judgment is sought, showed (1) there was no meeting of the minds as to material terms of the contract and (2) Plaintiff was not ready, willing and able to perform the contract within a reasonable time frame, here 45 days.

Even though Plaintiff's attorney proffered evidence that he had financing, Plaintiff failed to provide direct evidence to the Court or cite to any record to support Plaintiff's proffers of evidence that Hummer had obtained financing despite knowing that a previous deal with Hummer had fell through because he could not obtain financing. This raises a real question of fact for the jury. The only evidence available to the court was testimony from Nissen and Roger Aldis stating that they were never informed Plaintiff was willing to close, had financing, or could obtain

financing without a lease for the mini mart (since Plaintiff planned to buy it to run a Tex-Mex restaurant). Defendants' SOF ¶¶ 55, 57-59.

1. The District Court's decision to issue judgment of specific performance is reviewed under the same standards as summary judgment on appeal.

Plaintiff seems to be arguing that the district court did not rule summarily and that the proper standard of revue here is whether the district court abused its discretion. Brief of Appellee at 14. However, when a court issues summary judgment on its own merit, which is what happened here, the same conditions present for summary judgment must be present and the appellate court's standard of review is the same as if it were reviewing the district court's decision to grant a motion for summary judgment. If reasonable minds could differ as to the conclusions drawn from the evidence, here that there was no meeting of the minds as to material terms and that Hummer/Plaintiff was not ready or able to purchase the property, judgment must be denied. *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009). A court should be cautious in granting summary judgment when resolution of the dispositive issue "necessitates a determination of the state of mind of one or both of the parties." *M. West, Inc. v. Oak Park Mall,* LLC, 44 Kan. App. 2d 35, 234 P.3d 833 (2010)(quoting *Brennan v. Kunzle*, 37 Kan. App.2d 365, 37, 154 P.3d 109 *rev. denied* 284 Kan. 945 (2007)). When the evidence pertaining to the existence of a contract or the content of the contract's terms is conflicting or permits more than one inference, a question of fact is presented. *M. West, Inc. v. Oak Park Mall, L.L.C.*, 44 Kan. App 2d 35 (2010). Only where there are undisputed facts, does a question of law arise. *Id.*

2. The parties' intent to enter into a final purchase agreement and whether Plaintiff could perform are disputed questions of fact for a jury.

Here there are disputed facts about the parties' intent with the purchase agreement of the mini mart. Nissen and Aldis testified that they thought Hummer was trying to use it to obtain financing and other necessary details would need to be worked out to complete a purchase. Brief of Appellant at ¶¶ 2, 11-12, 14-15. It makes sense that Nissen and Aldis would believe that the contract was not final because the previous deal with Hummer fell through due to financing. One of the requirements for closing with Plaintiff's financier was to have an executed lease for the mini mart. No lease was ever executed. Brief of Appellant at ¶ 55. The parties continued negotiating into May and June as evidenced by the correspondence between their lawyers concerning new and varied terms to the purchase agreement and other contracts. Brief of Appellant at ¶¶ 45-54; *HM of Topeka, LLC*, 44 Kan. App. 2d at 299. Defendant's attorney wrote that even though he thought the agreement had expired, his client was still willing to negotiate and that there were many unresolved issues regarding details of the transaction including, legal descriptions, wastewater lagoon system permit and/or approval, specific easement language for a shared usage of the lagoon and or rights, specific terms of the lease and/or inventory calculations, lender funding issues, shared water meter and maintenance of water lines. Brief of Appellant at ¶ 47. Plaintiff's lawyer wrote back suggesting the issues of insurance and the water meter needed to be decided and he commented that he left many areas of these agreements blank but he is attaching the proposed documents. Brief of Appellant at 50. Defendants' attorney replied that other issues like rent, terms of the lease needed to be decided and that the newly revised agreement of purchase and sale "reveals certain seller obligations that did not exist before..." *Id.* at ¶ 52.

Plaintiff's arguments that Defendants did not act in good faith are meritless because the parties continued to engage in negotiations after the contract expired. Plaintiff's argument that the original agreement was formed and able to be performed is also disingenuous because Plaintiff prepared a revised agreement for purchase and sale and added material terms in the revised agreement and prepared a host of other contracts that were originally anticipated. The truth is that a jury could infer that the contract at issue was a contract to make a contract. This issue was examined in *Oak Park Mall*.

Citing Corbin on Contracts § 2.8, pp. 133-34 (1993), the *Oak Park Mall* court noted that agreements binding parties to make another agreement are possible but in order for the agreement to be binding all essential terms that are to be incorporated in the document must have been expressed. "If the documents or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called 'contract to make a contract' is not a contract at all." *Oak Park Mall, LLC*, 44 Kan. App. 2d at 51. The Court of Appeals found that the material terms of the assignment were agreed upon by both parties but language in the assignment indicated that it was not intended to create a binding contract so jurors could come to a different conclusion, ultimately finding that this was a question of fact for a jury, not for summary judgment. In making this conclusion, the court stated it looked at the written terms, the parties' later communications, and a letter sent by one party requesting approval of the proposed assignment.

Plaintiff argues that the court cannot look outside the four corners of the contract, but this rule of contract construction is applicable only when deciding issues of ambiguity not formation. Here, while there is not express written intent to not be bound by the contract, the parties conduct and communication before and after the contract expired present a question of fact for the jury to

decide about whether the contract was formed at all. This Court realized that when parties have considered and settled the details of a proposed agreement, there is still a difficult question of fact whether the parties have the understanding that neither party is to be bound until they execute a formal written document.

In *Oak Park Mall, LLC*, the Court considered Corbin on Contracts § 2.9, p. 144 for the following guidance:

> One of the most common illustrations of preliminary negotiation that is totally inoperative is one where the parties consider the details of a proposed agreement, perhaps settling them one by one, with the understanding during this process that he agreement is to be embodied in a formal written document and that neither party is to be bound until they execute this document....Often it is a difficult question of fact whether the parties have this understanding. There are very many decision holding both ways. These decisions should not necessarily be regarded as conflicting, even though it may be hard to reconcile some of them on the fats that are reported to use in the appellate reports. *It is a question of fact that the courts are deciding, not a question of law; and the facts of each case are numerous and not identical with those of any other case. In very many cases the question may properly be left to a jury.*" (Emphasis in original).

Id. at 52. The court ultimately determined that material fact issues exist as to the parties' intent to be bound by the written correspondence between them. The difference here is merely that the original agreement was titled "agreement" instead of proposal, but that is a red herring. The parties used an old agreement for Plaintiff to obtain financing because that is why their past negotiations had faltered, and they fully intended to memorialize final terms in a revised purchase and sale agreement and complimentary contracts, which is exactly what the parties started to do until Plaintiff thought Defendant was unwilling to agree to *his* proposed terms and filed suit on the original proposal that was executed by both parties.

Plaintiff's owner testified that he wanted to purchase areas of the property that were not in the original legal description so that he would have access to gasoline storage tanks (Brief of Appellant at ¶ 37) On or about May 30, 2006 (the date Plaintiff alleges was the closing date),

Hummer and his attorney were still trying to determine a solution to the water line problem with the mini mart and Nissen's residence, because the water meter fed both properties. (Brief of Appellant at ¶39). Plaintiff's owner later testified that if the mini mart did not have its own water meter and could not get water, he would not go through with the transaction. (Brief of Appellant at ¶ 30). Plaintiff's owner also stated that if the property he was purchasing could not be accessed through the shared driveway, he would not want it and that this (along with whether the propane tank served the property) was a "very critical important issue." (Brief of Appellant at ¶¶ 31-33.)

Clearly, these were material terms to Plaintiff at the time the agreement arose. Plaintiff cannot now claim these are ancillary issues that are commonly worked out in all real estate purchases. (Brief of Appellee at 36). Plaintiff's arguments that he made arrangements to handle these issues after closing is not supported by the record and should be disregarded. *Id.*

Also on May 30, the same date Plaintiff claims closing was scheduled (remember this testimony came from Hummer's deposition, not Aldis or Nissen), Plaintiff's attorney wrote to Aldis enclosing for the first time an easement concerning the lagoon, a deed, a bill of sale and a seller's affidavit, but none were signed. (Brief of Appellant at ¶40). Not only is this evidence that Defendant did not lack good faith since Plaintiff was still negotiating terms, it also shows that Plaintiff was not ready, willing and able to close on May 30. If Plaintiff was ready to close, he would have sent those important documents before closing so that Defendant could review them as those documents were required at closing per the express terms of the Purchase Agreement ¶ 3.

Even assuming a contract was formed, which it was not, presenting Defendant with four new contracts to sign on the purported date of closing is evidence that Plaintiff prevented performance in not allowing reasonable time for Defendant to review these new agreements before Plaintiff decided to file suit. *See Oak Park Mall, LLC*, 44 Kan. App. 2d at 53, noting the legal

principal of bilateral contracts is that there is not only an implied condition for parties to cooperate in performance if cooperation is necessary to achieve the goals of the agreement, but also an implied condition to not prevent performance or make it impossible for the other party to perform. But that question must wait because it is not an issue preserved on appeal and a jury must first determine if a contract was formed.

Plaintiff argues that Defendants failed to provide a title report (Brief of Appellee at p. 24), but during the pretrial hearing Defendants proffered that they had provided a title report two years earlier (having been in negotiations with Plaintiff since that time) (R. IV at 13:3-9). The Purchase Agreement at issue does not require a new title report (Plaintiff's Addendum ¶4), only that one was provided. A title report was provided in 2004, but a new title report was not issued within the 45 day closing period, nor was one requested because the buyer did not have an issue with title. (Vol. IV at 13:10-22.) Again, there is a question of fact as to whether Plaintiff was able to obtain suitable financing for the purchase and whether he had 1.45 million in **cash** as the Agreement requires. (Plaintiff's Addendum at ¶¶ 2(a) and 11). Plaintiff is using a smoke and mirrors approach to flip the table on Defendants by pretending that title mattered in 2006, even though he could waive clear title and enforce the contract, and even though he had a relatively new title report.

3. The Purchase Agreement also lacked material terms.

Plaintiff's argument that he could use commercial disposal equipment to service the mini mart in lieu of no permanent access to the lagoon located on Nissen's residential property, means that the lagoon access is a material and substantial issue to purchasing a mini mart. (Brief of Appellee at 29) To run a business which employs people and serves food to the public, the law requires access to a bathroom and handwashing station. *See* 29 CFR 1910.141(c)(1)(i) (under OSHA, a toilet room is defined as a room maintained within or on the premises of any place of

employment, containing toilet facilities for use by employees. OSHA requires one toilet per 15 employees.); *cf.* K.A.R. 4-28-8 adopting the Kansas Food Code published by the division of food safety and lodging of the Kansas Department of Agriculture on July 1, 2012, §6-402.11 and 5-203.12 (requiring food establishments to have at least one toilet).

In negotiating the sale, one of the reasons Hummer wanted to purchase the mini mart was to add a Tex Mex restaurant to it. Hummer was then going to hire Nissen to run the restaurant. To do this, Kansas law requires a restroom and washing station. Aldis testified that he understood the purpose of the agreement was to present something to the bank to see if Hummer could get financing. Aldis said that the agreement "didn't necessarily reflect all of our conversations with Tex Mex Express," which was the operational aspect of the parties' deal. (Brief of Appellant, SOF ¶12). Aldis also testified that he and Hummer were aware of the lagoon issue but did not want to spend the money to iron out the agreements in writing if Hummer could not get a loan. (Brief of Appellant, SOF ¶14). Aldis testified that "we thought this was step number one. If we don't accomplish step number one there is not really a step number two...." (Brief of Appellant, SOF ¶¶16-17). Sinks and toilets have to dispose of sewage and water somewhere and a lagoon is critical to that system. Based on Kansas and Federal laws regulating restrooms and the parties' negotiations, it's disingenuous for Plaintiff to now pretend like the lagoon issue is not material. The parties never contemplated to perform the Purchase Agreement as it was originally written. It was only intended to help Plaintiff obtain financing and then the parties intended to work out the remaining material terms. Boiled down, this at least presents an issue for a trial of fact to decide before getting to the issue of ambiguity.

Defendant does not need to respond to Plaintiff's arguments about good faith or Plaintiff's improper disclosure of some of the confidential and protected terms of an agreement between

Defendant and the Kansas Department of Revenue contained in pages 32-33 of Appellee's brief. Those arguments are not relevant to the issues on appeal and were not properly preserved by Plaintiff anyway. Plaintiff has been directed by the district court not to disclose the details of the agreement between Defendant and KDOR but has totally lacked regard to that court order.

SUMMARY

Questions of fact remain concerning whether Plaintiff was able to pay 1.45 million in cash within the 45 day term of the closing period and whether the agreement contained all material terms intended by the parties at the time of negotiation in 2006. The District's Court errored when it implicitly decided these questions of fact by skipping ahead and ruling that the contract was not ambiguous and ordering specific performance on its own motion and *without giving Defendants the opportunity to present all the facts to a trier of the facts.* The court errored when it determined disputed questions of fact concerning the contract formation issues at the pretrial conference phase of this case.

CONCLUSION

This Court should reverse the District Court's order of specific performance for the reasons provided above and in the Brief of the Appellant, and order a trial proceed on the issue of contract formation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Reply Brief of Appellant was electronically mailed on this 29th day of June, 2017 addressed to:

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