

## STATE OF MICHIGAN

## SIXTEENTH JUDICIAL CIRCUIT COURT

S&V PROPERTIES, LLC,  
Plaintiff,

vs.

Case No. 18-3826-CB

MCAT PROPERTIES, LLC,  
Defendant.  
\_\_\_\_\_ /OPINION AND ORDER

Defendant MCAT Properties, LLC ("MCAT") filed a motion for summary disposition under MCR 2.116(C)(8). Plaintiff S&V Properties, LLC ("S&V") also seeks summary disposition under MCR 2.116(I)(2).

## I. Factual and Procedural Background

This case arises out of an agreement to purchase commercial real estate. The parties entered into a conditional purchase agreement for realty in the Shelby Corporate Park which was not yet approved or developed. Answer ¶5. Plaintiff S&V was the purchaser; Defendant MCAT was the seller.

On December 23, 2016, S&V deposited \$25,000 in earnest money with ATA National Title Group, according to the terms of the Purchase Agreement. Answer ¶9. The parties amended and extended the purchase agreement several times. On March 22, 2017, S&V entered into a first Amendment to the Purchase Agreement with MCAT. Answer ¶10, Complaint Exhibit 2. On July 29, 2017, the parties entered into a second Amendment to the Purchase Agreement. Answer ¶13, Complaint Exhibit 3. The parties entered a 3<sup>rd</sup> Amendment to the Purchase Agreement with an effective date of November 30, 2017 ("3<sup>rd</sup> Amendment"). Answer ¶14, Complaint Exhibit 4. MCAT did

not satisfy certain contingencies within the Purchase Agreement and states that it tendered back the deposit but S&V refused to accept it as satisfaction of the agreement.

Plaintiff S&V alleges that the Purchase Agreement and amendments obligated MCAT to deliver the property with all utilities but that MCAT decided not to do so. On October 2, 2018, S&V filed a three-count Complaint alleging: count I, declaratory judgment; count II, breach of contract; and count III, specific performance.

## II. Standard of Review

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

## III. Arguments

Defendant MCAT argues that S&V bases its breach of contract and specific performance claims on mere closing conditions. Those conditions, according to MCAT, permit S&V to refuse to close the purchase but do not create affirmative obligations on the part of MCAT. MCAT maintains that the Purchase Agreement provides specific

remedies for failure to satisfy the conditions which only permit S&V to waive the condition or terminate the contract.

Plaintiff S&V responds that MCAT repudiated the contract by failing to construct sanitary sewers. S&V maintains that the Purchase Agreement obligates MCAT to perform the closing conditions in Paragraph 16 and that Paragraph 8 of the Purchase Agreement gives S&V the right to “enforce the terms” of the Agreement. According to S&V, Paragraph 16 are not conditions precedent because the parties did not label the paragraph as such. S&V also seeks summary disposition under MCR 2.116(1)(2).

#### IV. Law and Analysis

In order to establish a breach of contract, a plaintiff must establish “(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach.” *Miller-Davis Co v Ahrens Construction, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

“Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement.” *Universal Underwriters Ins Co v Kneeland*, 464 Mich. 491, 496; 628 NW2d 491 (2001). Michigan courts examine “the language of the contract according to its plain and ordinary meaning.” *Miller–Davis Co v Ahrens Const., Inc.*, 495 Mich. 161, 172; 848 NW2d 95 (2014). “If the contractual

language is unambiguous, courts must interpret and enforce the contract as written.” *In re Egbert R. Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

In the present case, the relevant portions of the “Offer to Purchase Real Estate: Cash” (“Purchase Agreement”) state:

8. DEFAULT BY SELLER: In the event of the default by the Seller of any terms herein, the Purchaser shall receive an immediate refund of his entire deposit in full termination of this Agreement or elect to enforce the terms thereof.

\* \* \*

16. PURCHASER’S CONTINGENCIES: In addition to Purchaser’s rights in Paragraph 6 above, *Purchaser’s obligations to perform this Offer shall be subject to the satisfaction of the following contingencies* within one hundred twenty (120) days of Purchaser’s Receipt of Accepted Offer. *In the event the following contingencies are not satisfied, Purchaser may, at its sole discretion, either waive such contingencies or terminate this Offer.* In the event Purchaser, in its reasonable discretion, is not satisfied that the contingencies have been satisfied, notice shall be sent to Seller . . . and all deposit monies will be returned to Purchaser . . . with no further liability due to either party from the other.

\* \* \*

B. Utilities, Easements, Zoning, Regulations and Condo Requirements:

1. Purchaser, in its sole discretion, must be satisfied that all utilities required by Purchaser . . . are available and adequate on a timely basis to service the intended purpose for which the property is purchased.

\* \* \*

17. CONDITIONS PRECEDENT: It is a condition precedent to Purchaser’s obligation to close that the Property is subject to no public utility or other easements, which will unreasonably interfere with Purchaser’s use thereof . . .

Complaint Exhibit 1, emphasis added.

Much of the controversy in the present case turns on whether MCAT had an affirmative obligation to perform the terms in Paragraph 16 or whether those contingencies are conditions precedent to S&V’s performance. “A ‘condition precedent’ is a fact or event that the parties intend must take place before there is a right to

performance.” *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999) citation omitted. “A condition precedent is distinguished from a promise in that it *creates no right or duty in itself*, but is merely a limiting or modifying factor.” *Id* emphasis added. “If the condition is not satisfied, there is no cause of action for a failure to perform the contract.” *Harbor Park Mkt, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007) citation omitted.

Here, the plain and unambiguous language of Paragraph 16 limits S&V “obligations to perform this Offer” to the “following contingencies . . .” Put differently, S&V’s obligation to perform the Offer depends on MCAT satisfying the terms specified in Paragraph 16(a-c). More particularly, unless MCAT satisfied S&V’s expectations regarding soil, wetlands, environmental hazards, utilities, easements, zoning etc., as spelled out in the subparts of Paragraph 16, S&V, under certain conditions, would be relieved of its obligation to purchase the property.

By the ordinary meaning of its plain terms, Paragraph 16 contains conditions precedent. Specifically, Paragraph 16 articulates facts or events that must occur prior to the existence of a right of performance. S&V argues that Paragraph 16 does not create conditions precedent because Paragraph 17 explicitly uses the label “conditions precedent” while Paragraph 16 does not. However, even if the parties did not label Paragraph 16 as such, it still meets the definition of a condition precedent because the parties agreed that S&V’s obligations to perform are “subject to the satisfaction of the following contingencies . . .” Despite the way the parties labeled the obligations in Paragraph 16, they clearly conditioned S&V’s obligations on MCAT’s satisfaction of the stated conditions. Further, nothing in the Purchase Agreement indicates that the parties

intended to limit their conditions precedent to Paragraph 17 and S&V cited no authority for the proposition that a contract must explicitly label a condition precedent as such.

MCAT argues convincingly that Paragraph 16 contains conditions precedent to S&V's performance.<sup>1</sup> That is, unless MCAT satisfies the terms stated in Paragraph 16(a-c), S&V has no obligation to purchase the property according to the terms of the Purchase Agreement. It is well-settled that conditions precedent create no right or duty in themselves. See *Real Estate One v Heller*, 272 Mich App 174, 180; 724 NW2d 738 (2006). Simply, Paragraph 16 grants S&V the right to avoid performance if MCAT fails to satisfy certain contingencies; it does not grant S&V the right to demand that performance. That is, nothing in Paragraph 16 affirmatively obligates MCAT to perform the stated contingencies.<sup>2</sup>

Even if, assuming *arguendo* the Court were to accept S&V's argument that Paragraph 8 gives S&V the right to enforce the terms of the Purchase Agreement upon default, S&V could not show that MCAT defaulted under the Purchase Agreement if it cannot first show that MCAT had an affirmative, enforceable obligation to perform the terms of Paragraph 16.

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<sup>1</sup> S&V misreads MCAT's condition-precedent argument as stating that Paragraph 16 contains conditions precedent to MCAT's performance. It would make little sense to say that a party must perform as a condition precedent to its own performance.

<sup>2</sup> S&V argues that a party that affirmatively prevents a condition from occurring or refuses to take action under the contract waives enforcement of a condition precedent. See, e.g., *Harbor Park Mkt, Inc v Gronda*, 277 Mich App 126, 132; 743 NW2d 585 (2007). However, MCAT does not seek to enforce a condition precedent against S&V under Paragraph 16. In other words, MCAT is not trying to compel S&V to close the transaction despite having not satisfied the terms of Paragraph 16. Rather, S&V is attempting to convert a condition precedent into an affirmative obligation.

Additionally, by its own terms, Paragraph 16 clearly limits the purchaser's remedy, in the event of failure to satisfy the specified contingencies, to waiver of the contingency or termination of the Offer, "with no further liability due to either party from the other." The terms of Paragraph 16 are clear and unambiguous. Consequently, the Court finds no basis in Paragraph 16 for S&V to maintain a claim for breach of contract or for specific performance arising from the various contingencies in Paragraph 16.

In addition to Paragraph 16, the 3<sup>rd</sup> Amendment did not transform terms of the Purchase Agreement into an affirmative duty to perform the closing conditions. In the 3<sup>rd</sup> Amendment, the parties agreed, in relevant part,

RECITALS

\* \* \*

B. The Contract term provides for satisfaction of certain contingencies within 120 days after the effective date of the Contract (the "Contingency Period") and such contingencies were not satisfied due to the non-recording of a Master Deed. . .

C. Rather than terminate the Contract following expiration of the initial Contingency Period, the parties have elected to continue to be bound by the terms of the Contract for an indefinite period of time while Seller continues to undertake efforts to cause the Master Deed to be approved . . . and completion of all required improvements in connection with the Master Deed.

\* \* \*

NOW THEREFORE, in consideration of the foregoing recitals, which shall be incorporated into and made part of this Third Amendment, the parties hereto agree as follows:

1. Unless otherwise agreed in writing by Seller and Purchaser, the Contract shall bind the Seller and Purchaser for a period of time that shall extend until completion of the following (the "Closing Conditions")

...

\* \* \*

2. At such time as Closing Conditions are completed to the reasonable satisfaction of Purchaser, Purchaser shall close on the purchase of the Property within thirty (30) days thereafter, *subject to the remaining terms of the Contract not affected by the terms herein.*

Third Amendment to Offer to Purchase Real Estate: Cash, Complaint Exhibit 4.

The 3<sup>rd</sup> Amendment recognizes in Recital B that MCAT did not satisfy certain contingencies within the contingency period and that the agreed-upon remedy for such failure was termination of the Agreement. Rather than terminating the Agreement, according to its terms, the parties elected to extend the time frame of the contingency period. The fact that the parties “elected to continue to be bound by the terms” of the Purchase Agreement while MCAT “continues to undertake efforts to cause the Master Deed to be approved” simply modifies the time frame of the Agreement as measured by continuing efforts; it does not state that MCAT now promises to perform the conditions stated in Paragraph 16. To the contrary, S&V had the continuing right to terminate the Purchase Agreement if MCAT did not satisfy the closing conditions. Complaint Exhibit 4, Paragraph 3. The parties further agreed that all other terms and conditions of the Purchase Agreement remained in full force. *Id.* Paragraph 4. Therefore, S&V has identified no basis for its claim for breach of contract or specific performance because it has not identified any enforceable contractual term requiring MCAT to deliver the closing conditions.

Finally, S&V points to the language in Paragraph 6 stating that “under no circumstances shall the Seller be liable for nonperformance by reason of defective title. . . .” , and the absence of similar language regarding the sanitary sewer systems. S&V concludes that MCAT can be liable for nonperformance regarding the sewers because the parties could have, but did not, expressly disclaim such liability. However, MCAT had an affirmative obligation under Paragraph 19 to convey clear title. No such express obligation exists regarding the sanitary sewers and other closing conditions. For these



reasons, S&V has not stated enforceable claims for failure to perform the closing conditions. Accordingly, the Court will grant MCAT's motion for summary disposition and deny S&V's motion under MCR 2.116(I)(2).

V. Conclusion

For the reasons set forth above, MCAT's motion is GRANTED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Date: APR 23 2019

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge