STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2310

Columbia Development, LP,
Appellant,

vs.

Minneapolis Park and Recreation Board,
Respondent.

Filed July 6, 2010
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-09-41

Scott R. Carlson, DC Law Chartered, Minneapolis, Minnesota (for appellant)

Ann E. Walther, Karin E. Peterson, Rice, Michels & Walther, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

In this real-estate conveyance dispute, appellant developer argues that the district court erred in granting summary judgment in favor of respondent park board after concluding that appellant could not unilaterally waive a buyer contingency and failed to

deliver an executed parking-ramp lease, as provided in the purchase agreement. We affirm.

FACTS

The facts in this matter are undisputed. Respondent Minneapolis Park and Recreation Board owns a strip of property along the Mississippi River acquired through a condemnation proceeding. In October 2002, respondent sought proposals for development of the property and accepted a proposal from appellant Columbia Development, LP (f/k/a Lucky Club, LLC) for the development of a condominium project. On March 17, 2005, the parties entered into a purchase agreement that provided, in part:

> The total purchase price . . . is Two Million, Five Hundred Thousand and No/100 Dollars ($2,500,000.00) . . . [Appellant] shall pay the purchase price as follows:
>
> a. Construction and Lease of Parking Ramp. [Appellant] shall bear the cost of constructing a parking ramp on or about the Property ("Parking Ramp"). Such ramp shall be constructed in accordance with specifications and plans to be agreed by [the parties]. The Parking Ramp shall contain between 65 and 85 parking spaces. [Appellant] also agrees to lease the Parking Ramp to [respondent] upon the terms and conditions of the Parking Ramp Lease Agreement, a copy of which is attached hereto as Exhibit B ("Parking Ramp Lease"). The Parties agree to allocate Seven Hundred Fifty Thousand and No/100 Dollars ($750,000.00) of the Purchase Price to the Parking Ramp Lease.
>
> b. Earnest Money. $40,000.00 payable upon removal of [respondent's] contingencies set out in Section 15.
>
> c. Cash. One Million Seven Hundred Fifty Thousand and No/100 Dollars ($1,750,000.00) cash on the date of Closing.

According to the agreement, appellant was required at closing to, among other things, tender the purchase price and deliver an executed parking-ramp lease. The agreement also included buyer and seller contingencies. Buyer contingencies included, among other things, that:

> [Appellant] shall have secured approval of all required governmental bodies or agencies, with jurisdiction over the Property, the necessary zoning changes and historic designation or preservation consents, if any. . . . [Appellant] shall promptly endeavor to secure such approval. If [appellant] has not made reasonable progress to secure the governmental approvals herein described within sixty (60) days from the Effective Date [March 17, 2005], or if [appellant] has not secured such governmental approvals within twenty-four (24) months of [March 17, 2005], [respondent] may terminate this Purchase Agreement by written notice to [appellant] in accordance with Section 20 hereof.

On March 5, 2007, the City of Minneapolis sent notice of the city's completion of the Environmental Assessment Worksheet (EAW) for appellant's proposed project. The EAW provided that appellant was required to apply for at least 13 different permits from various state and city governmental agencies. Appellant informed respondent that it was contemplating waiving the buyer contingencies. Respondent replied that the sale would not occur without approval from governmental agencies. Appellant responded by stating that it was waiving the buyer contingencies. On March 15, 2007, appellant appeared for the closing; respondent did not appear and refused to close the sale. On October 22, 2008, respondent notified appellant that it had 30 days in order to obtain the necessary governmental approvals. Appellant failed to apply for or secure governmental approvals; thus, on December 17, 2008, respondent voted to terminate the purchase agreement.

Appellant brought a breach-of-contract claim. The parties moved for summary judgment. Following a hearing, the district court granted respondent's motion, concluding that appellant could not unilaterally waive the governmental-approvals contingency because it affected both parties, and that appellant failed to deliver an executed parking-ramp lease as required by the purchase agreement because there was no parking ramp on the property and an unconstructed building cannot be leased. This appeal follows.

D E C I S I O N

When reviewing a grant of summary judgment, we determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). The parties agree that there are no genuine issues of material fact. The issue is whether the district court erred in its application of the law.

Waiver

Appellant first argues that the district court erred in determining that appellant could not unilaterally waive the governmental-approvals contingency, claiming that it

was a contingency that solely benefited appellant and could be waived by appellant without affecting the enforceability of the purchase agreement.

"[A] party may waive a condition precedent to his own performance of a contractual duty, when such condition precedent exists for his sole benefit and protection, and compel performance by the other party who has no interest in the performance or nonperformance of such condition." *Miracle Constr. Co. v. Miller*, 251 Minn. 320, 326, 87 N.W.2d 665, 670 (1958). Appellant relies on a Wisconsin case in support of its argument that it properly waived a contingency that existed solely for appellant's benefit and protection.

In *Godfrey Co. v. Crawford*, the condition waived was that the parties' contract would become void absent rezoning of the property by a specific date. 126 N.W.2d 495, 496 (Wis. 1964). The zoning change was for the protection of the buyer, and the buyer waived the deadline prior to the date by which the condition needed to be met. *Id.* The Wisconsin Supreme Court concluded that the buyer could waive the condition *prior* to the specified date because the seller had no "protectable interest" in the zoning change; rather, the seller's interest was in knowing, on the specified date, that one of two things would be true: either (1) the buyer would be bound to pay the purchase price or (2) the contract would be void, freeing the seller to sell to someone else. *Id.* at 497-98. The court's reasoning implies that the buyer could not have waived the condition *after* the specified date because, at that point, both parties had an interest in whether the condition was satisfied and the buyer's waiver at that point would have been unfair to the seller.

The district court chose not to adopt the reasoning of *Godfrey* because it involved a strict case-for-land transaction. Additionally, the court in *Godfrey* indicated that after the specified date, the seller would have an interest in the zoning-change condition. Here, respondent had an interest in the governmental approvals because without necessary approvals, there was no guarantee that appellant would be able to construct a parking ramp. If unable to construct a parking ramp, appellant could not lease the spaces to respondent as required as part of the purchase price. Therefore, respondent had a "protectable interest" in the governmental approvals.

In *Hanson v. Moeller*, this court held that a buyer could not waive a condition precedent that benefited both parties. 376 N.W.2d 220, 225 (Minn. App. 1985). In *Hanson*, Moeller entered into purchase agreements with the Hansons for the sale of three of Moeller's properties. *Id.* at 221. The purchase agreements included a financing contingency, stating that the Hansons would obtain a second mortgage by a certain date. *Id.* Moeller decided not to proceed with the closing because the Hansons did not meet the financing contingency by the specified date. *Id.* at 222. This court determined that the Hansons alone could not waive the financing contingency because it benefited both parties and Moeller did not waive the contingency. *Id.* at 225. While the parties agreed in *Hanson* that the contingency benefitted both parties, it was a contingency regarding how the purchase would be funded. Here, governmental approvals affected whether a parking ramp could be constructed and the parking ramp was part of the purchase price.

Additionally, there is no ambiguity in the purchase agreement that appellant must tender the purchase price at closing. Appellant was not able to tender the purchase price

at closing because the approvals necessary for the construction of the parking ramp were not secured. The parking-ramp lease was part of the purchase price; thus, appellant was not able to tender the purchase price at closing. Further, it is stated in the buyer-contingency section of the purchase agreement that if appellant failed to secure necessary governmental approvals two years from March 17, 2005, respondent may terminate the purchase agreement. Respondent voted to terminate the purchase agreement on December 17, 2008, at which time appellant still had not secured governmental approvals. The district court did not err in concluding that the contingency benefited both parties and could not be waived solely by appellant.

Parking-Ramp Lease

Appellant also argues that the district court erred in determining that appellant failed to deliver a parking-ramp lease at closing as provided by the purchase agreement. Appellant argues that it delivered an executed parking-ramp lease as an attachment to the purchase agreement. Respondent counters that the draft parking-ramp lease is not a valid lease and that it was never executed by respondent.

The district court determined that the parking-ramp lease was not an effective lease because there was no parking ramp on the property and an unconstructed building cannot be leased. The district court relied on *Ry. Express Agency, Inc. v. Comm'r of Taxation*, in which the Minnesota Supreme Court stated that "an agreement to lease, conditioned on completion of the building, [] under wellsettled principles of landlord-tenant law, does not convey an interest in the property." 307 Minn. 245, 249, 239 N.W.2d 245, 247 (1976).

In that case, Railway Express Agency (REA) entered into a lease agreement with a development company in November 1968. *Id.* at 246, 239 N.W.2d at 246. The development company was to "construct a terminal building on the property and equip it with a conveyor system according to REA's specifications." *Id.* at 247, 239 N.W.2d at 246. Commencement of the lease term depended on completion of the terminal, which occurred in July 1969. *Id.* The county assessor levied a tax on the property in January 1969, which REA paid; REA also paid a gross-earnings tax on the property and claimed that both payments resulted in double taxation. *Id.* The issue on appeal was whether REA had a leasehold interest in the property on the date of the assessment. *Id.* The court considered whether the parties intended a present leasehold interest at the date the agreement was executed (November 1968) or the commencement of the term (July 1969). *Id.* at 247-48, 239 N.W.2d at 246-47. The court reasoned that the building was the reason for the agreement, REA's obligations under the agreement were conditioned on the completion of the facility, and that it was clear from the parties' intentions that no leasehold estate would come into existence until a building was constructed and ready for occupancy; therefore, REA did not have an interest in the property on the assessment date. *Id.* at 249, 239 N.W.2d at 247-48.

Here, the parking-ramp lease was to be executed at closing. The lease agreement states that it will be "[e]xceuted as of the date and year first above written." But the lease agreement does not include a date or a year. Based on *REA*, a lease interest comes into existence when a building is constructed and ready for occupancy. Even though the parties here did not intend for an entire parking ramp to be constructed by closing, at the

very least, the governmental approvals would have shown that the parking ramp *could* be built. If appellant had appeared for the closing with the necessary governmental approvals, the parties could have included dates for the commencement and completion of construction. But appellant failed to secure governmental approvals; therefore, there was no guarantee that a parking ramp could be constructed.

Additionally, the word "execute" means "[t]o perform or complete (a contract or duty)." *Black's Law Dictionary* 649 (9th ed. 2009). The word "executed" means "([o]f a document) that has been signed" or "[t]hat has been done, given, or performed." *Id.* at 650. "A contract is frequently said to be *executed* when the document has been signed, or has been signed, sealed, and delivered. Further, [an] executed contract is frequently meant [to mean] one that has been fully performed by both parties." *Id.*; *Olson v. Penkert*, 252 Minn. 334, 347 n.6, 90 N.W.2d 193, 203 n.6 (1958) (stating that the word executed, when applied to a contract, "includes delivery and implies complete contract"). There was not an executed parking-ramp lease because the lease is not complete. The lease includes no effective date, no date regarding commencement or completion of the parking ramp, and necessary governmental approvals were lacking. Therefore, the district court did not err in granting respondent's motion for summary judgment.

Affirmed.