STATE OF MICHIGAN

COURT OF APPEALS

GRAND/SAKWA PROPERTIES, INC.,

Plaintiff-Appellant,

v

CITY OF TROY,

Defendant-Appellee.

UNPUBLISHED
May 2, 2013

No. 307242
Oakland Circuit Court
LC No. 1999-012144-CH

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, Grand/Sakwa Properties, Inc., appeals the trial court's judgment for defendant, city of Troy. For the reasons set forth below, we reverse.

I. FACTS AND PROCEEDINGS

Grand/Sakwa owns approximately 77 acres of land in Troy near the southwest corner of Maple Road and Coolidge Highway. In 1999, Grand/Sakwa sought to develop the parcel as a shopping mall and condominium complex, but the property was zoned for light industrial use. Grand/Sakwa sued Troy to compel the necessary rezoning and permission to develop its parcel. The parties settled that litigation by way of a consent judgment dated June 2, 2000.[1] Under the terms of the consent judgment, Grand/Sakwa could construct a "mixed use development" according to a plan which included 300 condominiums and 600,000 square feet of leasable retail space. In exchange, Grand/Sakwa agreed to pay a special assessment for improvements to the adjoining roads and to deed 2.7 acres of the parcel to Troy on the condition that Troy would develop the land for use as a transportation center, which the parties anticipated would include a 24,000 square foot building. The transportation center parcel is located next to the railroad right-of-way on the border between Troy and Birmingham. Paragraph 12 of the consent judgment states:

[1] The original consent judgment was dated May 3, 1999, but was later amended and reissued on June 2, 2000.

> The parties recognize that at some future date the City may desire to construct a transit facility at its sole cost and expense and its associated parking on the Property as depicted on the Conceptual Plan ("Transportation Center"). The area proposed for the Transportation Center may be used as a parking area to service the Commercial Component until and unless the Transportation Center is developed by the City. *If the Transportation Center is not funded by the City within ten (10) years from entry of this Amended Judgment*, or the City elects not to purchase the area as provided for in paragraph 14, *then all right, title and interest of the City in the property designated at the Transportation Center, shall revert to the Plaintiff* pursuant to paragraph 12 for its own use as provided in an approved site plan. [Emphasis added.]

Paragraph 13 of the consent judgment states that Grand/Sakwa would deliver to Troy a warranty deed for the transportation center land granting "fee simple, lien free title to the land . . . to be used by the City for the Transportation Center and *if not used for such purpose, with the deed reservation that it revert to Plaintiff after 10 years as set forth in Paragraph 12* at Plaintiff's option." (Emphasis added). Grand/Sakwa transferred title to the 2.7 acres to Troy through a warranty deed recorded on June 22, 2001. The deed expressly states that "[t]he Property shall automatically revert to the Grantor for its own use if the transportation center is not funded by Grantee by June 2, 2010 pursuant to and in accordance with the Consent Judgment." Neither the consent judgment nor the warranty deed provide a definition of the word "funded."

In 2007, Troy asked Grand/Sakwa to grant it more time to fund the transportation center and proposed an amendment to the consent judgment which would provide:

> E. Due to the financial situation in the State of Michigan, Troy is seeking a five and a half year extension of the time frame to raise the funding for the development of the Transportation Center.

Grand/Sakwa did not agree to the extension of time to 2015 for Troy to fund the transportation center.

In a letter dated May 5, 2010, the acting assistant manager for Troy's Economic and Development Service Department, Mark Miller, sent a letter to Gary Sakwa stating that Troy, in cooperation with the city of Birmingham, funded the transportation center as required by the consent judgment. He outlined the following funding sources for the project: $250,000 from an Energy Efficiency and Conservation LED Demonstration grant through the Michigan Department of Energy, Labor & Economic Growth, an $8,400,000 grant from the Federal Rail Administration (FRA) through the High-Speed InterCity Passenger Rail Program, and a $1,300,000 earmark for Federal Congressional Bus & Bus Facilities through the Federal Transit Administration.

The estimated cost of construction was approximately $10 million. Miller's letter assured Sakwa that the cities of Troy and Birmingham were "moving forward to make the facility a reality" and stated that the facility would provide passenger rail service accessible from both Troy and Birmingham, "a barrier-free non-motorized link between the regional bus terminal Troy and the rail platform in Birmingham" by way of a tunnel under the CN railway line, and

that the existing Birmingham Amtrak stop would be relocated to "the Troy/Birmingham Intermodal Transit Facility,"[2] which would be a "hub in the Detroit Regional Mass Transit plan . . . ."

Grand/Sakwa's counsel responded by letter dated May 13, 2010 which outlined Grand/Sakwa's numerous concerns about creating a regional transportation hub on the 2.7-acre parcel, asserting that during negotiations leading to the consent judgment, Troy represented that the transportation center would serve as a limited-use port for commuter trains running between Detroit and the suburbs. Grand/Sakwa also asked Troy to support its claim of having funded the transportation center:

> Your letter references three "funding sources" for the project. Please confirm that the City of Troy has in fact received all funds referenced in your letter, and that such funds are immediately available for the Transit Center project. Alternatively, if the City has not received all such funds, please indicate when the City will receive the funds; any and all conditions that must be satisfied before such funds will be transferred to the City; and whether the funds have been or will be paid solely to the City of Troy.

On May 19, 2010, counsel for Grand/Sakwa made a Freedom Information Act request for documents showing that Troy received the grant and earmark funds for the project.

In a letter dated June 3, 2010, Grand/Sakwa's counsel informed Troy's counsel of the reversion language contained in paragraphs 12 and 13 of the consent judgment and the automatic reverter clause in the warranty deed. Referring to the May 5, 2010 letter, Grand/Sakwa's counsel wrote:

> We previously received correspondence from the City of Troy suggesting that the City may receive funding for the Transit Center from a variety of sources. Upon investigation and inquiry, it is our understanding that some or all of the funds from such potential "sources" have not been deposited with the City, and that the Transit Center has not been funded. Accordingly, pursuant to the express terms and provisions of both the Consent Judgment and the Warranty Deed delivered to the City, the Transportation Center property automatically reverted to the Grantor on June 3, 2010. To avoid any cloud on title, please cause the City to execute the enclosed Quit Claim Deed conveying all rights, title and interests of the City in and to the Transportation Center parcel to Grand/Sakwa New Holland LLC, and return the same to the undersigned.

Troy did not agree to quitclaim the property back to Grand/Sakwa. In July 2010, Grand/Sakwa filed a motion in the trial court to enforce the consent judgment, arguing that the parcel reverted back to Grand/Sakwa because Troy did not fund the project as required by the

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[2] CN Railroad rejected the planned tunnel and the City of Birmingham decided not to relocate its train station and abandoned the transportation center project in 2011.

consent judgment and deed. Later, on April 1, 2011, Grand/Sakwa moved for summary disposition and to force reversion of the deed. Specifically, Grand/Sakwa argued that, because documents and testimonial evidence showed that the transportation center was not "funded" pursuant to the terms of the consent judgment, Troy must deed the parcel back to Grand/Sakwa. Grand/Sakwa asserted that, under any definition of "funded," Troy did not secure funding for the transportation center and, if the term "funded" is ambiguous, the parties who negotiated the consent judgment, including the former city manager, agree that "funded" meant that, within 10 years, Troy would have all the money necessary to complete the transportation center and that the money would be "immediately available."

In response, Troy argued that the sources of funding outlined in the May 5, 2010 letter were in place. Troy further argued that, even if the bulk of the money was not actually deposited in Troy's accounts, the judgment did not define the scope of the transportation center and Troy certainly had enough money set aside to build "a small Plexiglass shelter" or a paved drop-off area for buses, which would suffice as a "transportation center" under the consent judgment. In reply, Grand/Sakwa observed that Troy failed to present evidence to establish a genuine issue of material fact that the transportation center was "funded." Grand/Sakwa noted that it presented ample evidence that, from the outset, Troy planned to build a large, regional transportation center and that the primary source of funding for the project, the $8.4 million from the federal government, was not actually awarded to Troy.

The trial court denied Grand/Sakwa's motion for summary disposition and, instead, granted judgment in favor of Troy. On the record, the trial judge specifically opined:

> Plaintiff argues the funding requirement meant that the entire amount of funds needed would be, quote, "immediately available," unquote, and plaintiff relies on the affidavit of [former Troy City Manager] James Bacon. However, the contract between the parties is unambiguous and thus extrinsic evidence is not to be considered. The definitions of fund are, quote, "to provide or appropriate a fund or permanent revenue for payment thereof," unquote, and, quote, "to make provision of resources for discharging the interest or principal of," unquote, or, quote, "to provide funds for," unquote. Thus, the project was funded and the arguments to the contrary lack merit and are denied.

On May 31, 2011, the trial judge signed an order denying Grand/Sakwa's motion for summary disposition and granting judgment in favor of Troy. The trial court also denied Grand/Sakwa's motion for reconsideration.

II. ANALYSIS

A. STANDARDS OF REVIEW AND APPLICABLE LAW

The trial court denied Grand/Sakwa's motion pursuant to MCR 2.116(C)(10). This Court reviews a trial court's denial of a motion for summary disposition de novo. *Majestic Golf, LLC v Lake Walden Country Club, Inc*, 297 Mich App 305, 320; 823 NW2d 610 (2012). As this Court further explained in *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 253; 819 NW2d 68 (2012):

> When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dept of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

This case also involves the interpretation of a consent judgment. "Judgments entered pursuant to the agreement of the parties are of the nature of a contract, rather than a judicial order entered against one party." *Massachusetts Indem and Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). Indeed, "'[a] consent judgment is different in nature from a judgment rendered on the merits because it is primarily the act of the parties rather than the considered judgment of the court.'" *Clohset v No Name Corp*, 296 Mich App 525, 539; 824 NW2d 191 (2012), quoting 46 Am Jur 2d, Judgments, § 184, p 528 (2006). At the same time, however, once a consent judgment is entered, it is enforceable as any judgment on the merits. *Trendell v Solomon*, 178 Mich App 365, 368-369; 443 NW2d 509 (1989). With regard to the interpretation of a judgment entered pursuant to the consent of the parties, this Court opined in *Laffin v Laffin*, 280 Mich App 513, 517-518; 760 NW2d 738 (2008):

> A consent judgment is in the nature of a contract, and is to be construed and applied as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage. *Staple v Staple*, 241 Mich App 562, 564; 616 NW2d 219 (2000); *Walker v Walker*, 155 Mich App 405, 406-407; 399 NW2d 541 (1986).

As stated, "[c]ontract language should be given its ordinary and plain meaning." *Michigan Nat Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). Further, if a contract fails to define a term, "a dictionary may be used to determine the ordinary meaning of a word or a phrase." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 292 n 4; 818 NW2d 460 (2012). The reversion language of the warranty deed is also at issue. "A deed is a contract, . . . and the proper interpretation of the language in a deed is therefore reviewed de novo on appeal . . . ." *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009) (citations omitted).

B. DISCUSSION

The parties agree that the consent judgment and deed failed to define the term "funded," and the parties further agree that the term should be given its plain and ordinary meaning. In her ruling from the bench, the trial court did not state from which dictionary she took her definitions of the term "fund." However, her definitions are similar to those found in Webster's Unabridged

Dictionary, which defines "fund" as "a supply of money or pecuniary resources, as for some purpose," a "supply" or "stock," "funds, money immediately available; pecuniary resources," "to provide a fund to pay for some interest or principal of (a debt)," and "to allocate or provide funds for (a program, project, etc.)" *Random House Webster's Unabridged Dictionary* (2d ed, 1998) (emphasis removed).

We hold that Grand/Sakwa presented ample evidence to show that the transportation center was not "funded" as of June 2, 2010, and that Troy failed to establish a genuine issue of material fact that the transportation center was "funded" as of that date. The trial court, without analysis, defined the term "funded" and, with no consideration of the evidence presented, ruled, in a conclusory statement, that the transportation center was funded. This was clearly contrary to the court's obligation under the cited court rule, MCR 2.116(C)(10), to review the evidence submitted and to determine whether there is a genuine issue of material fact for trial.

In any case, we summarily reject Troy's assertion that it could have "funded" a transportation center consisting of a bus shelter or a paved drop-off area. Not only did the parties anticipate in the consent judgment itself that Troy would need land on which to construct a 24,000 square foot building, in the months and years leading up to the 10-year deadline, Troy clearly planned a transportation center of considerable breadth, size, and cost. Indeed, Troy partnered with Birmingham to build a "multi-modal transit center," including an underground tunnel, with a preliminary estimate cost of $8.4 million, and a later estimated cost of nearly $10 million. This is evidenced in the plans, project descriptions, grant requests and witness testimony. Accordingly, Troy's assertion that it was sufficient to show that it could have "funded" another, less costly project on the property is without merit.

There is also no issue of material fact that Troy did not receive, and had no declaration that it would receive, the plainly-necessary grant from the FRA. It was only in August 2009 that the Michigan Department of Transportation (MDOT) applied for grants for various projects through the Federal Rail Administration's High-Speed Intercity Passenger Rail Program, under the American Recovery and Reinvestment Act. Among others, MDOT applied for approximately $8.4 million for the joint transportation center project between Troy and Birmingham. The person who applied for the grants on behalf of Michigan, Therese Cody, unequivocally testified that, even as of December 2010, six months after the 10-year deadline, Troy had not been awarded the federal grant and there was no obligation made by the FRA to Troy for the requested money. Indeed, Troy had not finalized plans or approved the site plan by the deadline, and MDOT was not actively working on the grant for Troy because it was occupied with a higher priority rail project in Battle Creek. Cody further testified that, long after June 2, 2010, Troy had yet to finalize or submit various construction, environmental, maintenance, and financial information required by the FRA for consideration before any obligation or award would be made.

While Troy relies on a letter of January 10, 2010 stating that MDOT's application had been accepted by the FRA, Cody made clear that the letter was by no means an assurance that Troy would actually receive the grant. Moreover, if the FRA decided to go forward with funding the project, the money would be granted to the state, not to the city of Troy. Once granted, Troy would have to enter into a negotiated agreement with MDOT in order to actually receive the funds. No such negotiations took place between Troy and MDOT because no grant was made in

response to MDOT's application for the project. Moreover, according to the FRA, "significant negotiations" were expected to occur prior to any award of funds to the state.

Thus, Troy did not establish a genuine issue of material fact that it complied with the funding requirement in the consent judgment or deed. While it made various attempts to finance the planned project toward the end of the 10-year period, it did not have a supply of money available for the project. Under any of the commonly-understood definitions of the term, the transportation center was not "funded" and, therefore, title to the disputed property reverted to Grand/Sakwa once the June 2, 2010 deadline passed, and Grand/Sakwa was entitled to judgment as a matter of law.

Reversed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro