

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

CHESTER ASTEMBORSKI,

Plaintiff,

vs.

Case No. 2013-2348-CK

BRIAN J. KEAN, KEAN ESTATES
PROPERTIES CORP., a Michigan
corporation, and TITLE SOURCE
INC., a Michigan corporation,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for reconsideration of the Court's December 16, 2013 Opinion and Order granting Plaintiff's motion for summary disposition.

Factual and Procedural History

Plaintiff is the sole owner of property located at 38190 Van Dyke, Sterling Heights, MI ("Subject Property"). Defendant Brian Kean ("Defendant Kean") is the sole owner and shareholder of Defendant Kean Estates Properties Corp. ("Defendant KEPC"). In January 2013, Defendant Kean and Plaintiff entered into a purchase agreement for the Subject Property ("Purchase Agreement"). The Purchase Agreement was for a cash sale of the Subject Property, with Defendant KEPC providing 10% of the purchase price down. Pursuant to the Purchase Agreement, Defendant KEPC had until April 1, 2013 to cancel the sale in writing and recover the 10% deposit.

The instant litigation arises out of the parties' dispute as to whether Defendant KEPC properly terminated the Purchase Agreement on or before April 1, 2013. On December 16,

2013, the Court entered its Opinion and Order granting Plaintiff summary disposition. On January 6, 2014, Defendants filed their instant motion for reconsideration. On February 5, 2014, Plaintiff filed his response to the motion as ordered by the Court. Defendants have subsequently filed a reply brief in support of their position.

Standard of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Arguments and Analysis

In support of their motion, Defendants assert that Plaintiff's real estate agent and son-in-law were his agents and were authorized to receive the termination notice at issue. However, even if Defendants' position is correct it does not alter the fact that the Purchase Agreement required termination to be sent in writing to Plaintiff's address in Florida. Specifically, Section 12 of the Purchase Agreement governs notices, and provides:

All notices, deliveries or tenders given or made in connection herewith shall be deemed completed and legally sufficient if mailed or delivered to the perspective party for whom the same is intended at his address herein set forth.

Further, the only address provided for Plaintiff in the Purchase Agreement is in Highland Beach, FL. Moreover, the Purchase Agreement does not state that actual notice or knowledge will supersede the written notice and mailing requirement. “One who signs a contract will not be heard to say when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.” *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999). In this case, the Purchase Agreement clearly sets forth the required method of termination. Defendants failed to avail themselves of that procedure and as a result their attempt to terminate the Purchase Agreement on April 1, 2013 was ineffective regardless of whether Plaintiff’s real estate agent or son-in-law were his agents.

Defendants also contend that the liquidated damages provision is invalid and unenforceable. A liquidated damages provision is an agreement by the parties that fixes the amount of damages in case of a breach of contract, and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998). A liquidated damages provision is appropriate if the actual damages would be uncertain and difficult to ascertain, or would be purely speculative. *Id; Saint Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006). Whether a liquidated damages clause is valid depends on conditions at the time the contract was signed, and not at the time of the breach. *Id.;* *Solomon v Department of State Highways and Transportation*, 131 Mich App 479, 484; 345 NW2d 717 (1984).

