

STATE OF MICHIGAN
COURT OF APPEALS

A & E HOLDINGS, INC., a/k/a AIRLINES
PARKING, INC., WENDELL FLYNN, and
MARGARET FLYNN,

UNPUBLISHED
February 25, 2003

Plaintiffs/Counterdefendants/Cross-
Defendants/Counter Cross-
Plaintiffs-Appellants,

v

No. 242777
Wayne Circuit Court
LC No. 97-722962-CZ

CONSUMERS PETROLEUM PROFIT
SHARING TRUST, a/k/a C & F
ADMINISTRATIVE TRUST, CONSUMERS
PETROLEUM EMPLOYEES RETIREMENT
TRUST, C & F HOLDING CORPORATION, C &
F LIQUIDATING TRUST, WILLIAM
FELDMAN, and DOREEN CARROLL, Personal
Representative of the Estate of FRANK
CARROLL,

Defendants/Counterplaintiffs/Cross-
Defendants-Appellees,

and

VENOY WICK DEVELOPMENT ASSOCIATES,
L.L.C.,

Intervening Cross-Plaintiff/Counter
Cross-Defendant-Appellee.

A & E HOLDINGS, INC., a/k/a AIRLINES
PARKING, INC., WENDELL FLYNN, and
MARGARET FLYNN,

Plaintiffs-Appellants,

v

No. 242778
Wayne Circuit Court

CONSUMERS PETROLEUM PROFIT
SHARING TRUST, a/k/a C & F
ADMINISTRATIVE TRUST, CONSUMERS
PETROLEUM EMPLOYEES RETIREMENT
TRUST, C & F HOLDING CORPORATION, C &
F LIQUIDATING TRUST, DOREEN CARROLL,
Personal Representative of the Estate of FRANK J.
CARROLL, and WILLIAM FELDMAN,

LC No. 99-907466-CZ

Defendants-Appellees.

WILLIAM FELDMAN and DOREEN
CARROLL, Personal Representative of the Estate
of FRANK J. CARROLL,

Plaintiffs-Appellees,

v

AIRLINES PARKING, INC., a/k/a A & E
HOLDINGS, INC., WENDELL C. FLYNN, and
MARGARET A. FLYNN,

No. 244078
Wayne Circuit Court
LC No. 01-104576-CK

Defendants-Appellants.

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In these consolidated appeals involving a dispute over rights to more than three hundred acres of property in the city of Romulus, appellants, Wendell and Margaret Flynn and their corporation, A & E Holdings, Inc. (formerly known as Airlines Parking, Inc. [“API”]) [hereafter collectively referred to as “appellants” or individually by name],¹ appeal as of right in Docket Nos. 242777 and 242778 from the trial court’s order disposing of all claims in favor of appellees in two lower court cases in which appellants sought relief stemming from a December 1996 option agreement. Appellants appeal as of right in Docket No. 244078 from the trial court’s order, which granted summary disposition in favor of two appellees, Frank Carroll (through Doreen Carroll, the personal representative of his estate) and William Feldman, for \$2,845,537.90, plus interest, on their claim in a third lower court case against appellants to collect a debt owed under a December 1996 amended and restated promissory note. We affirm.

¹ We note that Wendell Flynn died while the instant appeal was pending. For purposes of our opinion, the decedent and Margaret Flynn are referred to as the “Flynnns.”

I. Facts and Proceedings

Underlying the three cases before us are agreements executed in December 1996 to establish API's option rights for certain property in Romulus, which C&F appellees² acquired pursuant to a sheriff's deed in foreclosure proceedings that divested API of title, and to amend and restate a promissory note for a preexisting debt (hereafter referred to as the "API Note"), which was owed by API to two C&F appellees (Carroll and Feldman) and guaranteed by the Flynn.³ The API Note specified:

WHEREAS, BORROWER has elected to repay Six Hundred Thousand and No/100 Dollars (\$600,000) of the unpaid principal amount of the debt evidenced by the Prior Note, and in connection therewith Borrower has requested and Lender has agreed to (1) amend and restate the Prior Note to reflect, among other things, an extension of the maturity date until December 31, 1998, and certain adjustments to the interest rate as provided in the Prior Note, all subject to the terms and conditions hereinafter set forth and (i) amend and restate the guaranty pursuant to an Amended and Restated Guaranty executed by Wendell C. Flynn and Margaret A. Flynn (the "Amended and Restated Guaranty").

Another document entitled "Modification Agreement" concerning the API Note contained an integration clause that the "Amended and Restated Note, the Amended and Restated Guaranty, the Mortgage or the Option Agreement, or any other written agreements relating to the foregoing, which together, represent a complete integration of all prior and contemporaneous agreements and understandings" At the same time, the "Modification Agreement" provided that the API Note, "shall constitute one complete instrument and is hereby acknowledged to be in full force and effect." The stated reason in the "Modification Agreement" for amending the note between the "borrower" (API) and "lender" (Carroll and Feldman) was:

WHEREAS, the Borrower desires to transfer certain real property and other assets comprising two parking facilities located in Romulus, Michigan, commonly know as "Airlines Parking" and "Express Parking" (the "Parking Facilities") to A&E Parking Limited Partnership, a newly formed Delaware limited partnership (the "New Partnership"), which intends to borrow up to \$22,250,000, from Bloomfield Acceptance Company ("BAC"), secured by a first

² "C&F appellees" collectively refers to Frank Carroll, through Doreen Carroll, the personal representative of his estate ("Carroll"), William Feldman ("Feldman"), and various entities associated with these individuals, Consumers Petroleum Employees Retirement Trust ("CPE"), Consumers Petroleum Profit Sharing Trust ("CPP"), C & F Administrative Trust, C & F Holding Corporation, and C & F Liquidating Trust, which allegedly acquired original or successor interests in the Romulus property that is the subject of this appeal. The specific C&F appellees that executed the option agreement, as sellers, were CPE, CPP, C&F Holding Corporation, Carroll and Feldman.

³ Although there was some ambiguity in the record concerning the property that was the subject of the API Note, as initially developed for appellants' first case filed in 1997, we note that the trial court determined during later proceedings that the property underlying the API Note was not the Romulus property, but rather property located in Plymouth.

mortgage lien and other security interests in the Parking Facilities transferred to the New Partnership (the "BAC Loan");

* * *

WHEREAS in order to consummate the BAC Loan, Borrower has requested, and Lender has agreed to (i) amend and restate the Note in the form attached hereto as Exhibit B to reflect, among other things, an extension of the stated maturity date of the Note until December 31, 1998, and certain adjustments to the interest rate as provided in the Note, all subject to the terms and conditions hereinafter set forth and (ii) amend and restate the Guaranty in the form attached hereto as Exhibit C; and

WHEREAS, in connection with providing the foregoing modifications and amending and restating the Note, Borrower and Lender have entered into that certain Option Agreement, dated of even date herewith (the "Option Agreement"), pursuant to which Lender has granted to Borrower an option to purchase certain real property described in the Option Agreement.

The option itself granted by C&F appellees to API within the "Option Agreement" required that API purchase the Romulus property, "at any time prior to December 31, 1998, provided certain conditions are satisfied as set forth herein" The "Option Agreement" also provided for API to deposit \$600,000 on December 20, 1996, "to be credited against the purchase price if the transaction is closed or forfeited to Seller as liquidating damages if the option is not exercised as provided for herein or the sale is not consummated. The Deposit proceeds shall be used to pay the accrued property taxes currently due which are a lien against the property." A rider to the "Option Agreement" provided that the "obligees" (appellants), "shall jointly and severally agree to pay an amount equal to all property taxes and assessments accruing during the Option period. Obligees shall pay such amounts to Seller as additional consideration for the option." The rider also contained a clause (hereafter referred to as the "right-of-first-refusal" clause), which permitted C&F appellees to accept a bona fide offer for the Romulus property provided that API was given an opportunity to equal such bona fide offer.

In June 1996, C&F appellees entered into an agreement entitled "purchase agreement" with DeMattia Investments, L.L.C. ("DeMattia") for the Romulus property. In July 1997, appellants filed the first of the three cases before us (hereafter "1997 case"), seeking reformation of the "Option Agreement," based on alleged fraud, so as to delete the right-of-first-refusal clause. C&F appellees filed a counterclaim, seeking, among other things, a declaration of the parties' contract rights. The trial court determined that the right-of-first refusal clause was valid. In its July 10, 1998, judgment, the trial court declared that appellants had no interest in the Romulus property and that a lis pendens filed by appellants should be extinguished. In a later July 31, 1998, order, the trial court denied appellants' motion to amend their complaint to add a claim based on the DeMattia "purchase agreement" not being a bona fide offer.

In March 1999, appellants filed the second of the three cases before us (hereafter "1999 case"). Appellants alleged that the right-of-first-refusal clause in the "Option Agreement" was not triggered by the DeMattia offer because it was not a bona fide offer. Appellants also alleged that the option granted to API was executed, with a scheduling closing date on October 2, 1998,

but that C&F appellees refused to attend the closing. Appellants sought specific performance of the option clause in the “Option Agreement.” In June 1999, the trial court granted summary disposition in favor of C&F appellees based on the doctrine of res judicata.

In a prior consolidated appeal decided by this Court with regard to the 1997 case and 1999 case, this Court upheld the trial court’s decision regarding appellants’ fraud claim, but reversed the trial court’s denial of appellants’ motion to amend their complaint in the 1997 case and remanded for further proceedings consistent with the opinion. This Court declined to address appellants’ claim concerning the doctrine of res judicata in the 1999 case in light of its resolution of the 1997 case. *A & E Holding, Inc v Consumers Petroleum Profit Sharing Trust*, unpublished opinion per curiam of the Court of Appeals, issued June 8, 2001 (Docket Nos. 214874, 220990).

On remand, Venoy Wick Development, L.L.C. (“Venoy Wick”) intervened in the 1997 case, seeking, among other relief, a declaratory judgment regarding its rights to the Romulus property. Venoy Wick claimed title to the Romulus property based on its purchase of the Romulus property from C&F appellees while the prior consolidated appeal in the 1997 case and 1999 case was pending before this Court. The trial court granted summary disposition and declaratory relief in favor of Venoy Wick, finding that Venoy Wick was entitled to the Romulus property because Venoy Wick purchased the Romulus property in reliance on the July 10, 1998, judgment and appellants failed to obtain a stay of execution during the prior appeal to this Court. The trial court also ruled in favor of C&F appellees with regard to breach of contract claims pursued by appellants on remand, consolidating the 1997 case and 1999 case for purposes of its July 1, 2002, final order to dispose of all claims in these cases.

The third case before us (hereafter “2001 case”) was commenced by one of the C&F appellees, Feldman, in February 2001 to collect the debt owed under the API Note to Carroll and Feldman from appellants based on API’s failure to timely pay the API Note as required by its terms and the Flynn’s breach of their guaranty agreement. Feldman also sought to have Carroll made a plaintiff in the action. On July 22, 2002, the trial court entered judgment in favor of Carroll and Feldman for \$2,845,537.90, plus interest at the default rate, as defined in the API Note.

II. Breach of the “Option Agreement” (1997 Case)

The threshold question that we must decide in reviewing appellants’ claims with regard to the 1997 case is the second issue raised by appellants on appeal concerning whether the trial court correctly rejected appellants’ claim that C&F appellees breached the “Option Agreement.” Absent such a breach, appellants have no basis for relief under the “Option Agreement” relative to either C&F appellees or Venoy Wick, as the successor to C&F appellees’ legal title to the Romulus property.

We have reviewed the trial court’s ruling de novo under the standards for summary disposition under MCR 2.116(C)(10). *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 337. The affidavits, pleadings, depositions, admissions and other documentary evidence are considered in a light most favorable to the nonmoving party in determining if any material facts exists for trial. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the

proffered evidence does not establish a genuine issue on any material fact, the moving party is entitled to judgment a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Upon de novo review, we find no basis for disturbing the trial court's rulings concerning either the 1997 or 1998 breach of contract theory argued by appellants.

A. Appellants' 1997 Breach of Contract Theory

With regard to appellants' 1997 anticipatory breach of contract theory, we reject appellants' claim that the trial court was bound by this Court's opinion in the prior appeal to find that C&F appellees anticipatorily breached the "Option Agreement" in 1997 in connection with the DeMattia offer. In general, the law of the case doctrine is a discretionary doctrine that expresses the practice of courts generally, but is not a limit on their power. *Freeman v DEC In'l, Inc*, 212 Mich App 34, 37; 536 NW2d 815 (1995). Although not inflexible, the doctrine normally applies regardless of the correctness of the prior decision. *Id.* at 38. The doctrine provides that an appellate court will not decide a legal question differently in a subsequent appeal where the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). "The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court." *Id.* at 260. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). However, the doctrine applies only to issues actually decided, implicitly or explicitly, in the prior appeal. *Grievance Administrator, supra* at 260. Stated otherwise, the "doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision." *Webb, supra* at 209.

The only legal issue actually decided by this Court in the prior appeal in arriving at its decision that the trial court abused its discretion in denying appellants' motion to amend the complaint in the 1997 case was that the "purchase agreement" offered by DeMattia did not trigger the right-of-first-refusal clause because it was a mere offer to enter into a contract. Based on this determination, this Court determined that appellants were not required to match the terms of the offer and "[f]or that reason, plaintiffs' [appellants'] requested amendment to the complaint would not be futile because it would not merely restate the allegations already pleaded." Regardless of the correctness of the prior opinion, this Court did not, expressly or implicitly, pass on any legal issue concerning whether C&F appellees breached the "Option Agreement" in determining that an amendment would not be futile. Hence, the trial court was not bound by this Court's prior opinion to find any breach of contract on the part of C&F appellees, let alone the specific anticipatory breach of the "Option Agreement" claimed by appellants.

We are also unpersuaded that appellants have shown any contractual basis for proceeding against C&F appellees based on the theory that C&F appellees anticipatorily breached the option clause in the "Option Agreement" in 1997 through their attempt to exercise the right-of-first refusal clause. Our primary goal when construing the "Option Agreement," as with other contracts, is to honor the parties' intent. *Rasheed v Chrysler Corp*, 445 Mich 109; 127; 517 NW2d 19 (1994). A contract that is clear and unambiguous is construed as a matter of law. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). A contract that is unclear or susceptible of multiple meanings is interpreted as a question of fact. *Id.* at 323.

In the case at bar, appellants have not shown that that the “Option Agreement” is susceptible to an interpretation that supports their theory of anticipatory breach. Although the option and right-of-first-refusal clauses are part of an integrated agreement, that is, a writing that constitutes a complete expression of the parties’ agreement, *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), it is well settled that contract terms are severable, depending on the intent of the parties embodied by their agreement. *Lansing v Lansing Twp*, 356 Mich 641; 656-657; 97 NW2d 804 (1959): Our Supreme Court stated in *Lansing*, *supra* at 658:

As a general rule, a contract is entire when, by its terms, nature and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and is severable when, in its nature and purpose, it is susceptible of division and apportionment.

The singleness or apportionability of the consideration appears to be the principal test. The question is ordinarily determined by inquiring whether the contract embraces one or more subject matters, whether the obligation is due at the same time to the same person, and whether the consideration is entire or apportioned. If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject thereof may consist of several distinct and wholly independent items. 12 Am Jur Contracts. § 317, pp 872, 873.

Here, the option and right-of-first-refusal clauses were plainly related in the sense that both clauses could not be exercised and were supported by the same consideration, but constitute distinct types of agreements. See *Brauer v Hobbs*, 151 Mich App 769, 776; 391 NW2d 482 (1986). The right-of-first-refusal clause imposed a duty on C&F appellees to exercise this clause by giving notice of a bona fide offer to API, while the option clause imposed a duty on API to exercise its option by providing the specified notice regarding its acceptance of the offer. “An option is a mere offer that may ripen into a binding bilateral contract upon a seasonable acceptance of the terms recited therein.” *Bowkus v Lange*, 196 Mich App 455, 460; 494 NW2d 461 (1992), *rev’d on other grounds* 441 Mich 930 (1993). As a general rule, a bilateral contract is a necessary element to invoke the doctrine of anticipatory breach:

Under the doctrine of anticipatory breach, if a party to a contract, prior to the time of performance, unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance. *Jackson v American Can Co, Inc*, 485 F Supp 370, 375 (WD Mich, 1980). As a general rule, the doctrine will only apply to bilateral contracts, those which embody mutual and interdependent conditions and obligations. *Jackson, supra*, pp 374-375; 11 Williston on Contracts (3d ed), § 1326, p 146. [*Brauer, supra* at 776.]

We conclude that the failed attempt of C&F appellees to exercise the right-of-first-refusal clause in 1997 cannot be reasonably construed as an anticipatory breach of the option clause. As a matter of law, the doctrine of anticipatory breach did not apply because API did not accept the offer, as set forth in the option clause in the “Option Agreement,” and, hence, had no bilateral option agreement to enforce.

B. Appellants' 1998 Breach of Contract Theory

Unlike appellants' 1997 breach of contract theory, we note that the trial court was presented with evidence that API undertook to fulfill its duty under the option clause in September 1998 by giving notice of its intent to exercise the option and scheduling the requisite closing. We further note that the evidence established that C&F appellees gave written notice of their intent not to attend the closing scheduled by appellants for the sale of the Romulus property. "In determining whether an anticipatory breach has occurred, it is the party's intention manifested by acts and words that is controlling . . ." *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992). Because there was evidence that C&F appellees refused to perform, that is, that C&F appellees would not close on the sale of the Romulus property, the dispositive question before us, for purposes of determining if appellants had factual support for a breach of contract claim against C&F appellees, is whether C&F appellees had a duty to close.

Upon de novo review pursuant to the standards in MCR 2.116(C)(10), *Spiek, supra*, we uphold the trial court's determination that the C&F appellees had no duty to close because API did not fulfill a condition precedent to C&F appellees' performance. A "condition precedent" is

a fact or event which the parties intend must exist or take place before there is a right to performance. A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. If the condition is not fulfilled, the right to enforce the contract does not come into existence. Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract [*Knox v Knox*, 337 Mich 109, 118-119; 59 NW2d 108 (1953), quoting *Lach v Cahill*, 138 Conn 418; 85 A2d 481 (1951). Internal citations omitted.]

In the case at bar, the "Option Agreement" contained an express condition precedent to C&F appellees' performance:

4. Conditions Precedent to Closing. Seller shall be obligated to close the sale of the Land, *provided the API Note is liquidated according to its terms*, including without limitation a principal payment on or before December 20, 1996 of Six Hundred Thousand (\$600,000) Dollars and a payment of One Million (\$1,000,000) Dollars plus interest of an amount equal to 10% per annum of One Million (\$1,000,000) Dollars from December 18, 1996 to the date of payment upon closing of the sale pursuant to this Option. [Emphasis added.]

Although we agree with appellants' position that the "Option Agreement" contemplated that the API Note could be paid at time of the closing, the fact or condition that the parties to the "Option Agreement" clearly intended take place before C&F appellees were obligated to close was that the API Note be liquidated according to its terms. Under the plain and unambiguous terms of the API Note, the API Note had a maturity date of December 31, 1998, but that:

This Note may be prepaid in whole or in part at any time during the term hereof without fee, charge, premium, or penalty. If, prior to December 31, 1998,

Borrower has prepaid at least One Million Dollars (\$1,000,000) of the Outstanding Principal Balance and has paid all accrued and unpaid interest on the \$2,400,000 principal balance owing under the Note, this Note shall be discharged in full. . . .

We find the above prepayment provision consistent with the provision in the “Option Agreement” establishing payment of the API Note as a condition precedent to C&F appellees’ obligation to close the sale of the Romulus property, but reject appellants’ claim that C&F appellees’ refusal to attend the scheduled closing excused their obligation to liquidate the API Note according to its terms.

Even reading the several agreements referred to in the “Modification Agreement” together as part of a single integrated agreement, *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998), and *UAW-GM Human Resource Center, supra* at 492, we find it clear that the obligation of API, along with its guarantors (the Flynns), to liquidate the API Note according to its terms was severable from the “Option Agreement” and would continue regardless of whether C&F appellees agreed to attend a properly scheduled closing under the “Option Agreement.” The subject matter of the API Note, its payment terms, and the fact that the API Note had its own stated consideration that the “borrower” (API) repay \$600,000 of the unpaid principal amount of the preexisting debt in exchange for the “lender” (Carroll and Feldman) amending and restating the prior note, establish that the API Note was susceptible to severance from the “Option Agreement.” *Lansing, supra* at 658. C&F appellees’ refusal to attend the closing, thus, did not excuse API’s obligation to liquidate the API Note as a condition precedent to C&F appellees’ performance. Given the undisputed fact that the API Note was unpaid on its maturity date of December 31, 1998, it follows, as a matter of law, that the condition precedent in the “Option Agreement” was not satisfied and was incapable of being fulfilled by API.

We also reject appellants’ claim that API’s performance could be excused on the ground that they tried to tender payment, but were prevented from doing so by C&F appellees’ refusal to attend the scheduled closing in October 1998 for the Romulus property. As the party having the burden of proof on this issue, it was incumbent on appellants to at least set forth specific facts showing a genuine issue of material fact for trial on this issue in the trial court. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). We find that appellants failed to meet their burden to show a genuine issue of material fact.

C&F appellees’ attendance at the scheduled closing was not a condition for API to tender payment for the API Note. As previously discussed, the API Note was a severable obligation from the “Option Agreement” that API had the privilege of prepaying at any time. API’s payment of the API Note was material to the “Option Agreement” only because it was the condition precedent for C&F appellees’ obligation to close.

Further, API failed to show that C&F appellees’ conduct prevented, hindered or rendered its fulfillment of the condition precedent impossible. See *Stanton v Dachille*, 186 Mich App 247, 258; 463 NW2d 479 (1990). At most, one could say that API’s own chosen method for trying to fulfill the condition precedent, namely, to obtain financing for the API Note that was dependent on a closing for the Romulus property taking place, hindered its performance. Had the parties intended that payment of the API Note be conditioned on the transfer of a deed for the Romulus property at the closing, rather than as a condition precedent to C&F appellees’ obligation to close

the sale of the Romulus property as set forth in ¶ 4 of the “Option Agreement,” they could have expressed this intent in their agreement. A court may not rewrite the plain and unambiguous language of a contract under the guise of contract interpretation. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991).

Hence, even assuming for purposes of our review that API had enough funds to pay the API Note at the scheduled closing, this was insufficient, as a matter of law, to satisfy the condition precedent that the API Note be liquidated according to its terms. At best, it amounted to an offer to pay the API Note. Cf. *Flynn v Korneffel*, 451 Mich 186; 547 NW2d 249 (1996) (placing redemption money into escrow did not satisfy payment required for statutory redemption; tender must be unconditional). For this reason, and given the lack of any factual support for the proposition that the pertinent C&F appellees, Carroll and Feldman, would have refused to accept a payment for the API Note, had a proper tender of payment been made by API or its guarantors, we uphold the trial court’s determination that C&F appellees were not obligated to close the sale of the Romulus property and, hence, did not breach the “Option Agreement.”

Alternatively, we would uphold the trial court’s decision because appellants’ attempt to exercise the option clause in the “Option Agreement” occurred during the time that the trial court’s July 10, 1998, judgment was unstayed. Pursuant to MCR 7.209(A),⁴ appellants’ prior appeal to this Court in the 1997 case, thus, did not affect the enforceability of the trial court’s judgment. *Bass v Combs*, 238 Mich App 16, 24; 604 NW2d 727 (1999). Because the trial court had, in effect, ruled that API had no contractual right to exercise the option clause in the “Option Agreement,” and C&F appellees had sought declaratory relief, C&F appellees could justifiably rely on the trial court’s ruling to guide its future conduct. Although the trial court did not order injunctive relief, “[t]he purpose of a declaratory judgment is to enable parties to obtain an adjudication of their rights before actual injuries or losses have occurred.” *Detroit Base Coalition for the Human Rights of the Handicapped v Dep’t of Social Services*, 431 Mich 172, 191; 428 NW2d 335 (1988). There must be an actual controversy in the sense that the declaratory judgment is “necessary to guide a plaintiff’s future conduct in order to preserve his legal rights.” *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978).

We note that appellants and, in particular, API, could have protected their claimed legal right to exercise the option by obtaining a stay and then undertaking to exercise the option clause of the “Option Agreement” before it was set to expire on December 31, 1998. However, appellants could not use the trial court’s unstayed July 10, 1998, judgment to gain an advantage over C&F appellants. Cf. *Troy v Holcomb*, 362 Mich 163; 169; 106 NW2d 762 (1961) (defendants could not rely on their operation of a sawmill to establish a nonconforming use for zoning purposes where a decree enjoined the use of the premises for a sawmill; the proper course of action, if the defendants believed that the reason for the decree was no longer valid, would have been to seek modification of the injunction). Because appellants had no legal duty to perform while the July 10, 1998, judgment was unstayed, we conclude that appellants’

⁴ MCR 7.209(A)(1) states, “[a]n appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders.”

undertaking in September 1998 to exercise the option was insufficient, as a matter of law, to establish an actionable breach of contract claim against C&F appellees.

C. Conclusion

In sum, we affirm the trial court's decision in the 1997 case because C&F appellees were entitled to judgment as a matter of law on both breach of contract theories pursued by appellants. In view thereof, we find it unnecessary to address C&F appellees' and Venoy Wick's alternative ground for affirmation stemming from an alleged ineffective attempt by appellants to exercise the option clause of the "Option Agreement" in 1997. Our resolution of appellants' contract claim against C&F appellees renders appellants' claim against Venoy Wick, as the successor to C&F appellees' legal title, moot. Hence, we decline to address appellants' claim that Venoy Wick took the Romulus property subject to their claims against C&F appellees because Venoy Wick had actual notice of the prior appeals in the 1997 case and 1999 case. Finally, we have not addressed the trial court's disposition of the 1999 case in the proceedings below because this question is insufficiently briefed by appellants. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

III. Breach of the API Note (2001 case)

Next, we have considered appellants' challenge to the trial court's monetary judgment on the API Note in favor of two of the C&F appellees, Carroll and Feldman, in the 2001 case. Again, we have reviewed the trial court's decision de novo under the standards for MCR 2.116(C)(10). *Spiek, supra*. Based on our determination in the prior issue that the API Note constituted a severable contract from the "Option Agreement," we find no basis for disturbing the judgment. In fact, we note that appellants' attorney conceded in the proceedings below that the API Note would have to be paid if there was no attempt to exercise the option clause in the "Option Agreement." We find appellants' position on appeal that payment could be excused if C&F appellees breached the "Option Agreement" unreasonably and contrary to the clear and unambiguous language in the parties' contract. In any event, for reasons discussed in the prior issue, appellants' challenge to the monetary judgment for the API Note fails, as a matter of law, on the alternative ground that the C&F appellees did not breach the "Option Agreement."

IV. Real Estate Taxes

We decline to consider appellants' claim that the trial court, at a minimum, should have granted a setoff or refund of \$163,808.45 in real estate taxes to prevent unjust enrichment because it is insufficiently briefed by appellants with no citation to supporting authority or the record. A party may not merely announce a position and leave it to this Court to discover and rationalize its basis. *Eldred, supra* at 150.

Affirmed.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter