

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH M. BAYAGICH and ROBIN T.
BAYAGICH,

UNPUBLISHED
May 15, 2007

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 273642
Oakland Circuit Court
LC No. 2002-043281-AS

ROSE TOWNSHIP,

Defendant/Cross-Defendant,

and

JAMES W. JAIKENS,

Defendant/Cross-Plaintiff-
Appellant/Cross-Appellee.

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant James Jaikins (“defendant”) appeals by right, and plaintiffs Joseph and Robin Bayagich (“plaintiffs”) cross-appeal by right, the trial court order granting partial summary disposition in favor of plaintiffs and partial summary disposition in favor of defendant. Among other things, the order allowed rescission of the parties’ purchase agreement and deed, directed defendant to refund the purchase price of certain real property to plaintiffs, and directed plaintiffs to reconvey that property to defendant. We affirm in part, vacate in part, and remand for entry of a corrected order concerning the accrual of interest.

I. Facts

In August 2001, plaintiffs entered into an agreement (“purchase agreement”) to purchase a certain parcel of real property (“parcel 2”) from defendant for \$292,500.00. Parcel 2, located in Rose Township, was one of several proposed smaller parcels that would result from the division of defendant’s 118-acre parent parcel. Under the purchase agreement, defendant agreed to seek and obtain Rose Township’s consent to split his 118-acre parent parcel into the proposed resulting parcels. Defendant also agreed under the purchase agreement to construct an access road leading to parcel 2 according to Rose Township’s specifications. Defendant agreed that he

would seek township approval of the land division application and install the access road at his own expense.

After executing the purchase agreement, plaintiffs met with representatives of Rose Township who allegedly stated that they would approve the proposed land split provided that defendant properly completed the land division application and access road. In reliance on this representation, plaintiffs closed in November 2001. Defendant delivered a warranty deed, conveying parcel 2 to plaintiffs in fee simple absolute. The warranty deed also conveyed to plaintiffs a 66-foot-wide easement for ingress, egress, and utilities.

Plaintiffs filed this action in August 2002, alleging that defendant had breached the terms and conditions of the purchase agreement by failing to obtain Rose Township's approval of the land division application and by failing to complete the access road. Plaintiffs' complaint sought both legal and equitable remedies for defendant's alleged breach of the agreement. Plaintiffs also asserted a claim of fraud against defendant. With respect to Rose Township, plaintiffs alleged that by failing to approve the land division application, by failing to issue a tax-identification number for parcel 2, and by failing to issue a private driveway permit, the township had taken their private property without just compensation and had violated their substantive due process rights. Plaintiffs also sought mandamus to compel Rose Township to approve the land division application and to issue tax-identification numbers.¹

In November 2002, defendant filed a cross-complaint against Rose Township. The cross-complaint noted that defendant had already commenced his own lawsuit against Rose Township in 2001.² Defendant's cross-complaint alleged that the township's actions had prevented plaintiffs from obtaining a tax-identification number for parcel 2 and from receiving a building permit to construct a home on parcel 2. Defendant asserted a claim of tortious interference with

¹ Plaintiffs' claims against Rose Township were dismissed by stipulation of the parties in May 2006. Accordingly, Rose Township is not a party to this appeal.

² Defendant sued Rose Township in Oakland Circuit Case No. 2001-033837-AS. He asserted that the township, relying on its land division ordinance, had imposed conditions on his land division application and private road application that were unreasonable and inconsistent with state law. Among other things, defendant sought to compel Rose Township to approve his land division application and private road application, and to issue tax-identification numbers for the resulting parcels. Defendant also challenged Rose Township's actions on constitutional grounds, asserting that the township had taken his private property without just compensation and that the township's land division ordinance was violative of substantive due process. On appeal, we affirmed the trial court, holding that the township was lawfully entitled to impose greater and more-restrictive conditions on defendant's land division application than those imposed under the Land Division Act (LDA), MCL 560.101 *et seq.* *Jaikins v Rose Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2006 (Docket No. 264695). We determined that Rose Township had been entitled under the LDA and under its own ordinance to deny defendant's land division application because the application was never "completed." *Id.* We also upheld the trial court's dismissal of defendant's constitutional challenges. *Id.*

contractual relations. He also claimed that Rose Township would be liable to indemnify him for any judgment that plaintiffs ultimately obtained against him.

In December 2002, Rose Township moved for summary disposition of defendant's cross-complaint on a number of grounds, and in March 2003, the trial court granted Rose Township's motion, dismissing with prejudice all cross-claims against the township.

Also in December 2002, defendant filed a motion seeking a writ of mandamus to compel Rose Township to issue a tax-identification number for parcel 2. Plaintiffs concurred in defendant's motion. Rose Township responded that, among other things, the motion for mandamus was improper because Oakland Circuit Case No. 2001-033837-AS was already pending, which contained a similar request for mandamus relief. The trial court denied defendant's motion for mandamus relief.

In June 2003, plaintiffs moved for summary disposition of their claims against defendant. Plaintiffs argued that defendant's breach of the purchase agreement entitled them to rescind the agreement, and that the only issue remaining to be decided was the amount of incidental or consequential damages caused by defendant's breach. Plaintiffs specifically requested that the trial court (1) "rescind the Purchase Agreement between Plaintiffs and defendant Jaikins," (2) "order Jaikins to tender back to Plaintiffs the purchase price of \$292,500," and (3) "order a trial specifically to determine damages due and owing to Plaintiffs as a result of Defendant Jaikins[s] breach of the Purchase Agreement."

In July 2003, defendant filed a second motion for mandamus relief. Plaintiffs again concurred in the motion, and the trial court again denied the motion.

In January 2004, Rose Township filed a motion for summary disposition with respect to plaintiffs' claims against it. Among other things, Rose Township noted that the issue of mandamus to compel issuance of tax-identification numbers was already pending before a different circuit judge in Case No. 2001-033837-AS. Rose Township also asserted that it was not required to approve the land split or issue a tax-identification number for parcel 2 because neither the land division application nor the access road had been completed. It further asserted that plaintiffs' constitutional claims against the township were factually insufficient to justify recovery.

In June 2004, defendant filed a third motion for mandamus relief against Rose Township. Defendant asserted that there had been a change in circumstances as the private access road had been completed since the previous motion for mandamus was filed. Plaintiffs once again concurred in the motion. After a lengthy evidentiary hearing and supplemental briefing on the issue, the trial court denied the motion.

In December 2004, plaintiffs renewed their motion for summary disposition with respect to their claims against defendant. They again sought rescission of the purchase agreement and warranty deed, a return of the purchase price of \$292,500, and any incidental or consequential damages that had been occasioned by defendant's breach of the agreement. In March 2005, defendant responded by filing a cross-motion for summary disposition. Among other things, defendant argued that he had completed the land division application and access road in accordance with the terms of the purchase agreement and that Rose Township was wrongfully

withholding its approval of the split. Accordingly, he contended that he was not in breach of the purchase agreement and that judgment should be rendered in his favor.

The trial court granted in part plaintiffs' motion for summary disposition, and also granted in part defendant's motion for summary disposition. The court granted rescission of the purchase agreement and deed, directed defendant to refund the purchase price of parcel 2 to plaintiffs, and directed plaintiffs to reconvey parcel 2 to defendant. The court also dismissed plaintiffs' claims for fraud and specific performance.³ The court ordered further briefing on the question whether plaintiffs were entitled to incidental or consequential damages in addition to the refund of the purchase price.

In March 2006, the trial court awarded plaintiffs five percent interest from the date of closing until the date of its order granting rescission. The court also awarded plaintiffs incidental damages in the amount of \$1,900. The trial court's earlier orders became final in May 2006, when the court dismissed the remaining claims against Rose Township by stipulation of the parties and closed the case.

II. The Purchase Agreement

Plaintiffs argue that the trial court properly granted rescission of the purchase agreement and deed, and correctly ordered plaintiffs to reconvey parcel 2 to defendant in exchange for a refund of the purchase price. In response, defendant argues that there were insufficient grounds for rescission in this case. In the alternative, defendant argues that by proceeding to close under the agreement, plaintiffs waived the conditions precedent requiring approval of the land division application and completion of the access road.

A. Standards of Review

We review de novo the trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Issues of contract interpretation present questions of law, which we also review de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). In interpreting a contract, our primary obligation is to discern and effectuate the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law," and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Id.* Finally, rescission is an equitable remedy. *Dehring v Northern Michigan Exploration Co, Inc*, 104 Mich App 300, 306; 304 NW2d 560 (1981). We review de novo the trial court's decision whether to grant equitable relief. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995).

B. Conditions Precedent

³ The court ruled that the claim seeking specific performance was moot in light of its decision to grant rescission of the purchase agreement.

As an initial matter, it is necessary to understand the nature of the contractual provisions at issue in this case. Specifically, we must determine whether or not the relevant provisions of the purchase agreement constituted conditions precedent. We begin by looking to the pertinent language of the agreement itself.

In addition to a description of parcel 2 and numerous boilerplate provisions preprinted on the front and back of the document, the parties' purchase agreement plainly set forth several additional provisions purporting to condition the parties' contractual obligations:

THE UNDERSIGNED hereby offers and agrees to purchase . . . [parcel 2], together with all improvements and appurtenances, if any, now in or on the premises . . . and to pay therefor the sum of Two Hundred Ninety[-]Two Thousand Five Hundred Dollars (\$292,500.00) subject to the existing building and use restrictions, easements of record and zoning ordinances, if any, providing said restrictions, easements and zoning ordinances do not unreasonably restrict the Purchaser's intended use of the property, upon the following conditions:

* * *

ADDITIONAL CONDITIONS, if any: (Use reverse side if needed)

SUBJECT TO THE FOLLOWING: . . . 3. TO TOWNSHIP[']S APPROVAL OF SPLIT PRIOR TO CLOSING AT SELLER[']S EXPENSE. 4. SELLER TO INSTALL ROAD TO ACCESS SITE ACCORDING TO TOWNSHIP[']S SPECIFICATIONS AT SELLER[']S EXPENSE. 5. SELLER TO PROVIDE UNDERGROUND UTILITIES TO THE SITE AT SELLER[']S EXPENSE.

A condition precedent is a fact or event that must take place before there is a right to performance under a contract. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999). Conditions precedent are disfavored, and our courts will not construe ambiguous contractual provisions as conditions precedent. *Id.* Nevertheless, when the clear and unambiguous language of a contract indicates that the parties intended a particular term to constitute a condition precedent, the courts will enforce it as such. See, e.g., *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006). "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; 59 NW2d 108 (1953). Here, the contractual provisions at issue are all listed directly under the heading "ADDITIONAL CONDITIONS." Moreover, the parties concede on appeal that the above-quoted provisions were intended to operate as conditions precedent in this case. Based on the clear expression of the parties' intent, we conclude that the above-quoted provisions of the purchase agreement were conditions precedent.

C. Breach of Contract

Plaintiffs argue that the trial court properly granted rescission of the purchase agreement based on defendant's breach. Thus, we must determine whether defendant in fact breached the contract in the first instance. It is apparent that defendant did not completely "breach" the

purchase agreement in the traditional sense of that word. Indeed, he performed his main obligation under the contract by delivering a warranty deed and conveying parcel 2 to plaintiffs. However, defendant did breach at least two of the conditions precedent by failing to obtain Rose Township's approval of the land division application and by failing to timely construct the access road according to the township's specifications. The satisfaction of both of these conditions was uniquely in defendant's control.

Nonperformance of a condition precedent generally does not constitute a breach of the contract because a condition precedent, as distinguished from a promise, typically creates no separate right or duty apart from the contract. 23 Williston, Contracts (4th ed), § 63:6, p 450; see also *Knox, supra* at 118. But occasionally one party's nonperformance of a condition precedent will constitute a breach of the contract itself. 2 Restatement Contracts 2d, § 225, p 165; 23 Williston, Contracts (4th ed), § 63:6, p 450. This may occur when one party has specifically agreed to personally satisfy the condition precedent in question. 2 Restatement Contracts 2d, § 225, comment d, illustration 7, p 168. In such cases the party is obliged not only to perform under the contract, but also to perform the condition, and his failure to do so is not only a breach of the condition, but also of the contract itself. *Id.* Failure to satisfy a condition precedent may also be deemed a breach of the contract when performance of the condition was within the exclusive control of one of the parties. 23 Williston, Contracts (4th ed), § 63:6, pp 450-451. In such cases, the party who undertakes to perform the condition precedent "must use 'reasonable efforts' to bring the event to pass." *Id.*; 15 Williston, Contracts (4th ed), § 48:1, p 553. In the present case, defendant personally undertook and separately promised to obtain Rose Township's approval of the land division application and to construct the access road according to the township's specifications. Consequently, we conclude that defendant did in fact breach the contract by failing to satisfy these conditions.

Rescission may be appropriate in cases involving a complete failure to perform under a contract, i.e. a substantial breach. *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933); *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 13-14; 708 NW2d 778 (2005). However, there was no showing of a substantial breach or that defendant *completely failed* to perform his obligations under the agreement in this case. As noted above, defendant did substantially perform by conveying title to parcel 2. Moreover, it appears that defendant believed in good faith at the time he signed the purchase agreement that he had satisfied the conditions precedent by properly completing the land division application and by building the private access road to Rose Township's specifications. Although defendant later learned that he had not properly completed the land division application or the access road, this fact does not undo defendant's earlier good-faith attempt to satisfy the conditions precedent. Because defendant's nonperformance of the conditions precedent was not absolute and perhaps even unintentional, we cannot conclude that defendant's nonperformance of the conditions constituted a substantial breach of the contract.

A party's mere failure to perform adequately under the terms of a contract lies only in breach of contract, and does not support the equitable remedy of rescission. *Abbate v Shelden Land Co*, 303 Mich 657, 665-666; 7 NW2d 97 (1942). "[T]he remedy of rescission is a harsh one and cannot be invoked merely for the purpose of escaping what subsequently develops to have been a bad bargain[.]" *Warren v Hugo Scherer Estate*, 272 Mich 254, 256; 261 NW 319 (1935). Plaintiffs were not entitled to rescind the purchase agreement based on defendant's mere

failure to adequately perform under the terms of the agreement. Defendant's insubstantial breach of the purchase agreement was insufficient to warrant the harsh remedy of rescission. *Abbate, supra* at 665-666; *Adell Broadcasting, supra* at 13-14.

D. Mutual Mistake

However, this is not to say that rescission was not justified on a different ground. "Equity has jurisdiction where complete protection and relief requires the cancellation of written instruments, the rescission of a transaction, or other specific relief of equitable character." *First Baptist Church of Dearborn v Solner*, 341 Mich 209, 217; 67 NW2d 252 (1954) (citations omitted). It is well settled that the equitable remedy of rescission will lie in cases involving mutual mistake. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26; 331 NW2d 203 (1982); *Garb-Ko, Inc v Lansing-Lewis Services, Inc*, 167 Mich App 779, 782; 423 NW2d 355 (1988).⁴ Rescission is warranted "when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties." *Messerly, supra* at 29.

In *Messerly*, "all of the parties to th[e] contract erroneously assumed that the property transferred by the vendors to the vendees was suitable for human habitation and could be utilized to generate rental income." *Id.* at 30. There, the vendor and vendee entered into a contract whereby the vendee agreed to purchase a parcel of real estate for use as rental property. *Id.* at 20. Some time after the parties executed their agreement, it was discovered that the property's sewage system was inadequate and that the parcel was unfit for human habitation. *Id.* at 21. Our Supreme Court ruled that the parties had entered into the purchase agreement under a mutual mistake of fact, incorrectly believing that the parcel would be suitable for use as income-generating rental property. *Id.* at 26-29. "The fact that [the property] could not be used for human habitation deprived the property of its income-earning potential and rendered it less valuable." *Id.* at 29. The *Messerly* Court concluded that the parties' mutual mistake had therefore affected "the very essence of the consideration," and that "[t]he thing sold and bought . . . had in fact no existence." *Id.*, quoting *Sherwood v Walker*, 66 Mich 568; 33 NW 919 (1887).

Similarly, in *Sherwood*, the famous "barren cow" case, the parties agreed to the sale and purchase of a cow. The parties believed that the cow was barren and would not breed. *Sherwood, supra* at 568-569. However, after the contract of sale had already been executed, the parties discovered that the cow was with calf. *Id.* As our Supreme Court stated, "[B]oth parties supposed this cow was barren and would not breed, and she was sold by the pound for an

⁴ Rescission will also lie in cases involving unconscionable conduct, fraud, or innocent misrepresentation. *O'Conner v Bamm*, 335 Mich 438, 444; 56 NW2d 250 (1953); *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995). Rescission is further warranted in cases of unilateral mistake induced by fraud. *Windham v Morris*, 370 Mich 188, 193; 121 NW2d 479 (1963). However, Michigan courts do not permit rescission on the grounds of frustration of purpose or impracticability. See *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 132-134; 676 NW2d 633 (2003).

insignificant sum as compared with her real value if a breeder.” *Id.* at 576. Upon noting that “the mistake or misapprehension of the parties went to the whole substance of the agreement,” the *Sherwood* Court allowed rescission of the contract. *Id.* at 577-578.

Turning back to the case at bar, defendant argues that plaintiffs simply “received what they bargained for.” He asserts that plaintiffs were fully aware at the time of contracting that Rose Township had not yet approved the land division application. He also asserts that plaintiffs were aware that there was no guarantee that the application would be approved.

We agree with defendant’s assertions that neither party had reason to believe *for certain* that the land split would be finalized. Nevertheless, we perceive that both plaintiffs and defendant honestly believed that the land division application would move forward and that it would be timely approved. In other words, the parties were operating under a mutual misapprehension of fact that went to the very heart of their bargain. *Sherwood, supra* at 577. It is beyond serious dispute that both defendant and plaintiffs believed when they executed the purchase agreement that the township would ultimately approve the land division. Plaintiffs had expressed their intention to build a home on parcel 2, and knew full well that they would not be permitted to do so until the land split was finalized and a tax-identification number was issued. Defendant had proposed the division of his 118-acre parent parcel largely as a source of revenue, planning to sell the resulting parcels to purchasers like plaintiffs. He also knew that his plan could not move forward until the land division application was approved.

In short, the parties simply would not have entered into the purchase agreement had they not honestly believed that the township would timely approve the proposed land split. Like the parties in *Sherwood*, who discovered only after the contract of sale was effected that the cow was pregnant, and like the parties in *Messerly*, who discovered only after their contract was signed that the property was unfit for human habitation, the parties in the present case did not discover until after the purchase agreement was executed that the land division application would not be approved and that parcel 2 would not be adequate for plaintiffs’ intended residential use. This mutual mistake “went to the whole substance of the agreement,” *Sherwood, supra* at 577, and rescission of the purchase agreement was therefore appropriate, *id.*; *Britton v Parkin*, 176 Mich App 395, 397; 438 NW2d 919 (1989) (“[i]f in the sound discretion of the trial court a mutual mistake has been made, rescission is a proper remedy”). It has never been in serious factual dispute that the parties entertained a mutual mistake of fact at the time of contracting. Therefore, albeit for a different reason, the trial court properly granted summary disposition on plaintiffs’ contract claim and ordered rescission of the agreement.

In granting equitable relief, the court looks to the whole situation, and grants or withholds relief as dictated by good conscience. *McFerren v B & B Investment Group (After Remand)*, 253 Mich App 517, 522; 655 NW2d 779 (2002). The objective of rescission is to return the parties to their status quo. *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995). Rescission necessarily involves an element of restitution because it is based on the idea that the parties should be restored to their pre-contract positions. See *id.*

“To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have

occupied if no such contract had ever been made. . . . [T]he idea of rescission involves the additional and distinguishing element of a restoration of the status quo.” [*Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938) (citation omitted).]

Having concluded that rescission was a proper remedy in this case, the trial court ordered defendant to refund the purchase price of parcel 2 to plaintiffs, ordered plaintiffs to reconvey parcel 2 to defendant, and ordered rescission of the warranty deed by which the property was transferred. The trial court did equity by restoring the parties to their status quo in this manner. *McFerren*, *supra* at 522; *Britton*, *supra* at 399. We perceive no error in the trial court’s remedy.

E. Fraud

We wish to make clear that plaintiffs failed to present sufficient evidence of actionable fraud or intentional misrepresentation by defendant in this case, and that the trial court properly granted summary disposition for defendant with respect to plaintiffs’ fraud claim. In order to prove fraudulent misrepresentation or common-law fraud, a plaintiff must show that

(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

The elements of silent fraud are identical to those of common-law fraud, except that the misrepresentation supporting a claim of silent fraud is based on the actor’s suppression of a material fact that he was legally bound to disclose, rather than on an affirmative representation. *Id.* at 28-29.

There was simply no evidence presented below from which reasonable jurors could have concluded that defendant fraudulently concealed the existence of Oakland Circuit Case No. 2001-033837-AS in an effort to induce plaintiffs to sign the purchase agreement. Further, no reasonable juror could have concluded that defendant intentionally sought to conceal or hide the fact that Rose Township had not approved the land division application at the time the purchase agreement was executed. We reiterate that plaintiffs were aware at the time they signed the agreement that Rose Township had not yet approved the land split. “[T]here can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.” *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). Finally, we are unconvinced by plaintiffs’ assertion that defendant lied to induce them into signing the agreement, and that he never actually intended to complete the application process or the access road in the first instance. Reasonable minds could not have accepted this argument on the basis of the evidence actually introduced. The trial court did not err in granting summary disposition for defendant on plaintiffs’ fraud claim.

F. Waiver of Conditions Precedent

Lastly, defendant argues that by proceeding to close on the purchase of parcel 2, even though the conditions precedent had not been fulfilled, plaintiffs waived the conditions and effectively excused defendant's nonperformance of them. It is true that the party for whose benefit a condition is created may generally waive that condition, even absent contractual language to that effect. 13 Williston, Contracts (4th ed), § 39:17, pp 568-569; see also *Jones v United States*, 96 US 24, 28; 24 L Ed 644 (1877). Specifically, as defendant contends, courts in some jurisdictions have ruled that a party waives the nonperformance of a condition precedent by continuing to perform or receive performance under the contract notwithstanding the condition's nonoccurrence. 8 Corbin, Contracts (1999 revision), § 40.4, p 533.

However, “[w]aiver, when used in connection with the required performance of a condition, has its usual meaning of a voluntary relinquishment of a known right.” 17A Am Jur 2d, Contracts, § 638, p 596. Albeit in a different context, our Supreme Court has held that “[a] true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right.” *Kelly v Allegan Co Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969). It necessarily follows that a waiver cannot be effectuated through conduct that does not express the intent to relinquish a known right, and a waiver can never be inferred from mere silence. *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). Similarly, although “parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause,” “[m]ere knowing silence generally cannot constitute waiver.” *Quality Products, supra* at 364-365 (emphasis in original). A waiver will not be found absent some evidence that the parties to a contract mutually agreed to waive the provision at issue. *Id.* Also of importance here, the burden of proving a waiver is usually on the party asserting the waiver. *Burke v City of River Rouge*, 240 Mich 12, 14; 215 NW 18 (1927). On the facts of this case, defendant has not shown that plaintiffs waived the conditions precedent by proceeding to close under the purchase agreement. At no time did plaintiffs voluntarily express a clear intent to relinquish their contractual rights, and we may not infer a waiver of the conditions precedent from plaintiffs’ silent conduct, even if that conduct was knowing. *Quality Products, supra* at 364-365.

III. Interest on Refunded Purchase Price

Defendant argues that the trial court erred by granting interest on the refunded purchase price from the date of plaintiffs’ closing until the date of the order granting rescission. Defendant asserts that the interest should not have begun accruing until plaintiffs requested rescission by way of their motion for summary disposition. Plaintiff responds that the trial court’s order was correct. We conclude that interest properly began to accrue at the time plaintiffs filed this action.

A. Standard of Review

We review *de novo* an award of interest pursuant to MCL 600.6013. *Olson v Olson*, 273 Mich App 347, 349; 729 NW2d 908 (2007). However, we review an award of interest in equity for an abuse of discretion. *Id.* An award of interest under MCL 438.7 is similarly discretionary. *Cataldo v Winshall, Inc*, 3 Mich App 290, 295-296; 142 NW2d 28 (1966).

B. Interest

Having sought and received equitable relief, plaintiffs were not entitled to interest pursuant to MCL 600.6013, which applies only to “money judgments” at law. *McPeak v McPeak*, 233 Mich App 483, 497; 593 NW2d 180 (1999); *Giannetti v Cornillie (On Remand)*, 209 Mich App 96, 101; 530 NW2d 121 (1995). Further, although MCL 438.7 applies to the award of interest in contract disputes, it pertains to awards of post-judgment interest only. *Nat’l Union Fire Ins Co v Richman*, 205 Mich App 162, 166-167; 517 NW2d 278 (1994). Thus, neither of these interest statutes is applicable in this case.

But we conclude that the trial court correctly awarded prejudgment interest under its equitable powers. An award of interest in equity lies in the sound discretion of the trial court. Because interest on an award of restitution is granted solely pursuant to the court’s equitable powers, any factor used “must be one that is fair, equitable, and just under the circumstances of the case.” *Thomas v Thomas*, 176 Mich App 90, 92; 439 NW2d 270 (1989). The interest rate must operate neither as a windfall nor as a punitive measure. *Id.* The lawful rate of interest between individuals is fixed at five percent unless otherwise agreed in writing. MCL 438.31; *Thomas, supra* at 93. We therefore conclude that the five-percent interest rate chosen by the trial court was presumptively fair, and perceive no abuse of discretion in the trial court’s decision to award interest at that rate in this matter. *Olson, supra* at 349.

However, we conclude that interest should not have begun to accrue until plaintiffs filed this action. In equitable actions wherein a contract is rescinded, interest generally begins to accrue at the time a refund of the consideration is demanded. *Vowels v Arthur Murray Studios*, 12 Mich App 359, 363-364; 163 NW2d 35 (1968); *Kraus v Arthur Murray Studios*, 2 Mich App 130, 133; 138 NW2d 512 (1965). However, when no particular date of demand appears on the record, interest properly begins to accrue at the time of filing. *Vowels, supra* at 363-364; *Kraus, supra* at 133. In this case, contrary to defendant’s argument, there was no specific date on which plaintiffs demanded a refund of the purchase price. We acknowledge that plaintiffs asked for rescission in their motion for summary disposition. However, plaintiffs’ complaint sought both legal and equitable relief under the contract, and it is perfectly arguable that plaintiffs had demanded a refund of the price before the summary disposition motion was ever filed. Accordingly, the interest awarded in this case first began to accrue on August 23, 2002, the date plaintiffs filed their complaint in this matter. *Vowels, supra* at 363-364; *Kraus, supra* at 133. We remand for entry of an appropriate order indicating this corrected interest accrual date.

IV. Conclusion

We affirm the trial court’s order granting partial summary disposition in favor of plaintiffs and partial summary disposition in favor of defendant. The trial court properly granted rescission of the purchase agreement and warranty deed, ordered defendant to refund the purchase price to plaintiffs, and ordered plaintiffs to reconvey the property to defendant. Nor did the trial court err in dismissing plaintiffs’ claims for specific performance and fraud.

We affirm the trial court’s award of five-percent interest on the refund of the purchase price. However, we vacate the trial court’s order with respect to the interest accrual date, and remand for entry of an appropriate order indicating the corrected accrual date of August 23, 2002.

Finally, we note that plaintiffs have purported to raise certain new arguments in their reply brief. Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief. MCR 7.212(G); *Check Reporting Services, Inc v Michigan Nat'l Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991).

In light of our conclusions above, we decline to address the parties' remaining arguments on appeal. Affirmed in part, vacated in part, and remanded for entry of a corrected order concerning the accrual of interest. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Stephen L. Borrello