

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PETOSKEY TITLE AGENCY, INC.,

Plaintiff,

and

DANIEL C. DANIEL and CATHY M. DANIEL,

Defendants/Cross-Plaintiffs/Cross-  
Defendants-Appellants,

UNPUBLISHED

April 26, 2012

v

FREMONT G. THOMPSON and MARY K.  
THOMPSON,

Defendants/Cross-  
Defendants/Cross-Plaintiffs-  
Appellees.

No. 300251

Cheboygan Circuit Court

LC No. 09-007935-CK

---

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Appellants appeal the trial court’s order following a bench trial that granted appellees specific performance of a land sale contract and awarded appellees the \$5,000 deposit. For the reasons set forth below, we affirm.

**I. FACTS**

The central disagreement in this case concerns an alleged waiver of a condition precedent in a land sale contract. The property in dispute is a parcel of vacant land at 3056 West US-23 in Beaugrand Township (“the property”), with a Tax ID number of 041-009-400-003-01. In appellees’ property listing—which was provided to appellants via fax on July 13, 2007—the property was described as follows:

158’ on Lake Huron ! This parcel HAS BEEN APPROVED after a perc test by the County Health Department. It will likely be a ‘buildable’ lot, however this cannot be guaranteed as there is not sufficient time before sale day to have this determination made by the Michigan DEQ and the US Army Corp of Engineers.

There ARE wetlands indicators on this property. Shore is rocky. Located about halfway between Cheboygan and Mackinaw City. See the approval letter from the Health Department in the photos section for this parcel.

Appellees' property listing also gave a metes and bounds legal description of the property, which appellees took from (1) the Cheboygan County foreclosure auction listing from 2005, and (2) the quitclaim deed appellees received from the county when they purchased the property on August 16, 2005. The County Treasurer testified that the descriptions contained in their 2005 auction listing were accurate. The metes and bounds description stated:

COM AT INT OF S LI SEC 10 & ELY ROW LI HWY US 23; TH N 46D 47M 30S W ALG SD ROW 1479.40FT TO POB; TH N 46D 47M 30S W 150FT; THN 43D 12M E 404.17FT TO SH OF STRAITS OF MACKINAC; TH S 52D 25M E ALG SD SH 50.24FT; TH S 68D 38M E 107.73FT TH S 42D 12M W 449.11FT TO POB SEC 9 T38N, R2W[.]

Appellees obtained title insurance on the property on August 25, 2005. The initial coverage was for \$100,120, but appellees later received approval to increase the amount of coverage to the full amount of appellants' purchase price. In relevant part, the policy specifically protected against injury resulting from defects in marketability or encumbrances on the title. While the insurance policy referenced the property by the metes and bounds description and its Tax ID number, it contained several exclusions from coverage in Schedule B. Although most of these exclusions concerned matters not applicable here, the policy also excluded: (1) discrepancies regarding boundary lines; (2) area shortages; and (3) damages, including interest, that could have been avoided by an accurate survey or appropriate inquiry.

Appellants, both California residents, expressed interest in purchasing the property to build a single family residence. Appellees entered into a purchase agreement with appellants on August 1, 2007, in which appellants agreed to buy the property for \$150,000, with a \$5,000 down payment. The property was described by (1) its correct address, and (2) "158 FT X 449 FT PARCEL." The agreement, which required appellees to execute and deliver a warranty deed to appellants on closing, contained several notable provisions. Closing would occur on or before September 30, 2007, "subject to availability of bldg permits for lot." Appellants assumed responsibility, subject to the above condition in paragraph 3, to secure "all matters relating to . . . soil borings . . . [and] use permits." The agreement also included an integration clause.

On July 22, 2007, appellants signed the agreement and tendered the \$5,000 deposit to plaintiff for escrow. The same day that the agreement became effective, August 1, 2007, appellants signed a purported waiver of the "septic and building permit" conditions in the agreement and faxed it to plaintiff's realtor, which was also signed and accepted by appellees that day. The waiver retained the existing closing date of September 30, 2007.

Appellants and appellees contested which party was responsible for initiating the waiver; however, appellants claimed that they only agreed to waive the conditions after plaintiff's realtor asked appellants to waive the condition, provided appellants the property listing showing that the county had already approved the land evaluation on the property, which was performed through a percolation test, and gave appellants a copy of the approval letter from the county. Daniel C.

Daniel further testified that he did not perform additional research on the validity of the land evaluation before the closing date because he relied on the realtor's assurances that it was still valid. However, Daniel also admitted that he never filed a building permit with the county. Although Fremont Thompson admitted that he told appellants that the county had approved the land evaluation on the property in 2005, he denied making any other guarantees to appellees regarding a building permit. Thompson also testified that appellants wanted to waive the conditions in order to close early on the property, which was later confirmed by the realtor's testimony. Daniel C. Daniel testified that he would not have waived the conditions if he knew that the land evaluation was invalid.

The relationship between appellants and appellees soured after appellants discovered that the land evaluation might be invalid. Subsequently, appellants visited Michigan in September of 2007 to inspect the property. Daniel C. Daniel testified that, after speaking in person with Kevin Prevost from the county health department on September 25, 2007, he discovered that the land evaluation may not have been valid because of a discrepancy in the property dimensions, and that a new percolation test needed to be performed before the land evaluation would be deemed valid. However, Prevost denied this, testifying that, while he expressed concern over the validity of the land evaluation, an existing approval could only be invalidated by issuing a formal letter from the Department. Because this never occurred, the prior land evaluation always remained valid. Appellants asked appellees to grant the county permission to enter the premises and perform a new percolation test at appellants' cost, but appellees refused. Later, on September 28, 2007, appellants sought to void the agreement.

After a number of negotiations between the parties in an apparent attempt to reach an accord, including what appears to be an identical re-offer to purchase from appellants, the parties reached an impasse. Appellants sent appellees a letter demanding the return of their \$5000 deposit. On November 1, 2007, appellees countered with a claim that appellants were in default of the contract. County officials testified that the confusion about the status of the land evaluation was a result of a typographical error regarding the acreage of the property made during the original evaluation. The county reissued the approval letter to reflect the actual acreage on the property on November 6, 2007. On March 29, 2008, appellees asked plaintiff to file an interpleader action with the court to resolve the parties' contractual dispute. It did so, and appellants and appellees then raised additional issues. After a bench trial, the trial court ordered specific performance of the sales agreement, but ruled that appellants were not required to pay the intervening taxes because appellees failed to mitigate their damages. Appellants now appeal.

## II. STANDARD OF REVIEW

This Court reviews for clear error a trial court's factual findings in a bench trial, and we review de novo its legal conclusions. *Ligon v Detroit*, 276 Mich App 120, 125; 739 NW2d 900 (2007). A factual finding is clearly erroneous if this Court is "left with the definite and firm conviction that a mistake has been made." *Jonkers v Summit Township*, 278 Mich App 263, 265; 747 NW2d 901 (2008). Further, the trial court's interpretation of contractual language is reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1990). Although this Court reviews equitable actions such as specific performance de novo on the record, the ultimate decision rests in the sound discretion of the trial court, based

on the particular facts and circumstances of the case. *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010).

### III. BREACH OF THE LAND SALE AGREEMENT

The goal of contractual construction is to fulfill the intent of the parties, as expressed in the language in the agreement. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). Contractual language that is clear and unambiguous should be given full effect according to its plain meaning unless it violates the law or is in contravention of public policy. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). However, if the language is unclear, undefined or ambiguous, the court may consider extrinsic evidence to determine the parties' intent when ambiguity is present in the agreement. *Shay*, 487 Mich at 667 (citation and quotation omitted). If a party commits a substantial breach of the contract, they cannot maintain an action against the other party for their failure to perform. *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007). A breach is substantial if the nonbreaching party did not receive the benefit that "he or she reasonably expected to receive." *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990).

Appellants raise three arguments in an attempt to show that the agreement was invalid and that, therefore, they did not breach the contract: (1) title to the property was unmarketable, which rendered the contract unenforceable; (2) the legal description in the agreement was inadequate to properly identify the property and constitute a legally binding contract; and (3) the waiver was invalid, so the unsatisfied condition in the agreement suspended appellants' duty to perform and rendered the contract unenforceable. We address each issue in turn.

#### A. MARKETABILITY OF TITLE

Title to property is marketable if it "is one of such character as should assure to the [buyer] the quiet and peaceful enjoyment of the property, which must be free from incumbrance." *Madhavan v Sucher*, 105 Mich App 284, 287-288; 306 NW2d 481 (1981). When a warranty deed is issued to a buyer, it guarantees that the property is free from incumbrances, and obligates the seller to defend and pay for any losses sustained by defects in title. MCL 565.151; *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 503; 686 NW2d 770 (2004).

Appellants failed to establish that the condition of the title invalidated the contract and excused appellants' performance. It is true that the trial court clearly erred by finding that there were no exceptions in the title insurance, because the insurance policy had several exceptions to coverage. However, though appellants allege that there could be unrecorded interests and incumbrances on the property, they do not offer any evidence showing that these supposed interests actually exist. Under the terms of the agreement, appellees were obligated to provide a full warranty deed covering appellants for any losses they incurred from defects in title. Further, appellees were not obligated under the agreement to provide marketable title to appellants, because the agreement stated that "in lieu [of marketable title documents], AT SELLER'S OPTION, an OWNER'S POLICY OF TITLE INSURANCE covering the foregoing in the amount of the purchase price" would be provided to appellants. Appellees complied with this requirement by providing the title insurance.

## B. PROPERTY DESCRIPTION

In a contract for the sale of land, the agreement must meet the following requirements in order to satisfy the statute of frauds: (1) it must be in writing and signed by the parties; and (2) it must sufficiently provide the substance of the contract, which includes: (a) the parties; (b) the price or a means of ascertaining the price; (c) consideration; and (d) an adequate description of the property. *Zurcher v Herveat*, 238 Mich App 267; 277, 282; 605 NW2d 329 (1999). A property description is sufficient so long as it “discloses with sufficient certainty what the intention of the [seller] is with respect to the quantity and location of the land to which reference is made so that its identification is practicable.” *Id.* at 282 (citation and quotation marks omitted). The fact that a property description is partially inaccurate is not sufficient to invalidate the agreement, so long as “in light of the circumstances of possession, ownership, situation of the parties, and their relation to each other and the property . . . it identifies the property.” *Id.* at 294 (citation and quotation marks omitted).

We hold that the property description contained in the agreement was sufficient to identify the property, satisfy the statute of frauds, and render the contract enforceable. As an initial matter, we note that the trial court’s finding that appellants could not have relied on the alleged acreage discrepancy when cancelling the contract is irrelevant because appellants’ knowledge of the discrepancy has no bearing on: (1) whether the parties had a true meeting of the minds when creating the agreement; or (2) whether the agreement satisfied the statute of frauds. Nevertheless, the property descriptions do not contain any inaccuracies. Although appellants claim that the dimensional description is misleading because it implies the property is a perfect rectangle, the agreement did not specify that the property was in that condition. It also did not specifically describe the property by its acreage. Further, the agreement defined the property by its correct address. This alone is sufficient to satisfy the statute of frauds.

We reject appellants’ claim that the trial court incorrectly relied upon the property listing’s metes and bounds description as parol evidence because the trial court was not attempting to supplement the terms of the agreement. Rather, in context, it appears that the court was using it to establish that appellants had or reasonably should have had notice of the actual dimensions of the property and that the property might not be a buildable lot.

## C. VALIDITY OF WAIVER

A condition precedent is a prerequisite event that must be satisfied before a party’s duty to render performance is triggered. *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006). It is separate from a binding promise, because it merely limits or modifies an underlying promise in a contract. *Id.* However, Michigan courts narrowly construe these conditions and will not “read such a requirement into the contract” unless the agreement clearly establishes that the parties intended the term to be a condition precedent. *Id.*

In the agreement, the closing date was to be held on or before September 30, 2007, “subject to” the availability of building permits. This language is sufficient to create an express condition precedent. *Mayor of City of Lansing v Michigan Pub Service Comm*, 470 Mich 154, 160-161; 680 NW2d 840 (2004), overruled in part by *Peterson v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009). However, appellants signed a purported waiver of this condition, which

they were free to do. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364, 374; 666 NW2d 251 (2003). The trial court's factual findings are problematic because, contrary to the trial court's finding, the evidence at the bench trial clearly established that the agreement and the waiver both became effective on August 1, 2007. Unfortunately, the trial court failed to make accurate findings on the chronology of when these documents took effect, and thus we cannot determine from the record which one occurred first. Nevertheless, a remand is unnecessary. The trial court also found that appellants failed to exercise "due diligence" in complying with their contractual obligations. It is clear that the court meant that appellants impliedly waived the condition by their conduct. Every condition precedent contains an implied agreement that the promisor will not hinder satisfaction of the condition. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007). When a promisor prevents the occurrence of the condition, they waive performance of the condition. *Id.* at 131-132. A party can waive the condition by either: (1) affirmatively acting to interfere with performance of the condition; or (2) failing to act as required per the contract. *Id.* at 132. The trial court found that appellants' failure to apply for a building permit or investigate the validity of the land evaluation until September 25 when the closing date was September 30 was a failure to comply with their contractual obligations. The agreement specified that appellants were responsible for acquiring the building permits, even though they could be excused from the agreement if they were unable to procure the permits. While it could be argued that appellees' last minute refusal of entry to the premises was sufficient to prevent appellants from performing under the contract, this was unpersuasive to the trial court in light of the fact that appellants had more than two months to obtain the permits. Based on the record, we hold that the trial court's finding was not clearly erroneous. Because appellants failed to perform their implied agreement to attempt to obtain the building permits, their conduct waived the condition and their failure to close on the deal was a substantial breach of the contract.

Appellants also contend that appellees' misrepresentations to appellants regarding the prior land evaluation were sufficient to undermine the validity of the waiver. "A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). Although appellants argue that an innocent misrepresentation is sufficient to invalidate their waiver, they offer no legal support for this proposition. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Further, the trial court found and the record clearly established that appellees made no misrepresentations, innocent or otherwise, to appellants. The property advertisement received by appellants notified them that the property might not be a buildable lot. The county did perform a percolation test and approved the land evaluation on the property in 2005. This approval has always been valid. Appellants offer no support for the notion that their reliance upon Prevost's inaccurate concerns regarding the status of the property was sufficient to impute a misrepresentation onto appellees. Even if appellants could prove this, the record clearly supports the trial court's findings that appellants' inaction was sufficient to impliedly waive the condition in the agreement, notwithstanding the status of the written waiver.

#### IV. SPECIFIC PERFORMANCE

Because appellants breached the contract, this Court must now determine whether the trial court correctly granted appellees the remedy of specific performance. It is true that equitable remedies are not normally available when there is an equivalent legal remedy available to compensate the nonbreaching party. *Tkachik*, 487 Mich at 45-46. However, because land is a unique good with peculiar value, the usual remedy for breach of a land sale contract is specific performance. *In re Egbert R Smith Trust*, 480 Mich 19, 26; 745 NW2d 754 (2008). If, as here, land is at issue, the trial court may not arbitrarily refuse to grant specific performance of the contract; rather, the court should only deny this remedy under “some showing that to do so would be inequitable.” *Zurcher*, 238 Mich App at 300 (citation and quotation marks omitted). Vendors may also be entitled to specific performance of a land sale contract because “[t]he adequacy of a remedy at law is not a bar to specific performance where the contract involves realty.” *Wilhelm v Denton*, 82 Mich App 453, 444-455; 266 NW2d 845 (1978), citing *Janiszewski v Shank*, 230 Mich 189, 193; 202 NW 949 (1925).

At trial, appellants claimed that it would be inequitable to award appellees specific performance because they: (1) acted with unclean hands; (2) made misrepresentations to appellants; and (3) failed to mitigate their damages. The trial court considered these arguments but found that: (1) appellees made no misrepresentations to appellants; and (2) appellees’ failure to mitigate damages was sufficient to preclude their recovery of costs for the interim taxes. While the court did not specifically address the question of appellees’ alleged unclean hands, it is clear from the record that the court concluded that appellants’ failure to act for more than two months rendered them far more culpable for the breakdown of the agreement than appellees’ brief denial of entry onto the premises. Moreover, it is difficult to see why appellants should not be held to the bargain they made when, in the end, they are receiving exactly that for which they initially contracted. In light of the record and the substantial deference we give to the trial court when making this decision, we hold that the trial court did not abuse its discretion in granting appellees specific performance of the agreement.

#### V. DISPOSITION OF THE \$5,000 DEPOSIT

Appellants also challenge the trial court’s disposition of the \$5,000 deposit by reiterating their prior arguments regarding the enforceability of the agreement. In light of our ruling concerning the trial court’s decision to grant specific performance, we affirm the trial court’s decision to award appellees the \$5,000 deposit.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ David H. Sawyer  
/s/ Henry William Saad