

STATE OF MICHIGAN
COURT OF APPEALS

SAVEWAY FOOD CENTER, INC. and KAJY
PROPERTY ENTERPRISE, LLC,

UNPUBLISHED
June 29, 2010

Plaintiffs-Appellants,

v

No. 290614
Macomb Circuit Court
LC No. 2008-003413-CK

McNICHOLS REAL ESTATE, LLC and JERRY
PATTAH,

Defendants-Appellees.

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants in this dispute involving the sale and purchase of real property. We affirm.

On April 23, 2003, plaintiff Saveway Food Center, Inc., as the purchaser, and defendant McNichols Real Estate, LLC, as the seller, entered into a purchase agreement for the sale and purchase of a parcel of real property at 20900 Gratiot in Eastpointe, Michigan. The terms of the purchase agreement revealed that defendant McNichols was the owner of a larger parcel of property legally described in Exhibit A to the agreement. The purchase agreement provided:

WHEREAS, Seller is the owner of certain real estate commonly known as 20800 and 20900 Gratiot Avenue, which includes two buildings one being known as the former Chatham's building and the other being known as the former K-mart building along with adjoining parking, driveway and entrance-ways. As to the operation of said buildings, the Legal Description of the entire property being attached hereto as Exhibit "A".

The larger parcel owned by defendant McNichols included all of Lots 2, 3, 4, 5, and 8 of the Eastwood Plaza Subdivision, a portion of Lot 7 of the Eastwood Plaza Subdivision, Lot 57 of the Sprenger State Subdivision, and Lots 278 and 279 of the Michael & John Sprenger Subdivision.

After establishing the larger parcel of property owned by defendant McNichols, the purchase agreement describes the portion of the larger parcel to be conveyed to plaintiff Saveway:

WHEREAS, Seller desires to sell all of its interest in the former Chatham's Supermarket Building and the parking areas as highlighted in Red in the attached Exhibit "B" . . .

The highlighted portions of Exhibit B to the purchase agreement indicate that the property to be conveyed to plaintiff Saveway consisted of a portion of Lot 3 of the Eastwood Plaza Subdivision.

The purchase agreement required the seller

to furnish to Purchaser within thirty (30) days of the date hereof, a commitment for a policy of title insurance (the "Title Commitment") . . . The legal description embodied within said Title Commitment shall conform to the certified survey, which Seller shall furnish to Purchaser in accordance with Paragraph 7 of this Agreement.

Paragraph 7 of the purchase agreement required the parties to share the cost of obtaining a current survey that was to show the "legal descriptions for the property to be purchased by Purchaser herein."

The purchase agreement also contains an express integration clause, which states as follows:

23. Entire Agreement. This Agreement, together with all Exhibits attached hereto, embodies the entire Agreement and understanding among the parties relating to the subject matter hereof, and may not be amended, waived, or discharged, except by an instrument in writing, executed by the parties, against which enforcement of such amendment, waiver, or discharge is sought. This Agreement supersedes all prior Agreements and Memoranda. No legal right will accrue to any party named herein and until this Agreement shall be executed and delivered to all parties hereto.

Pursuant to the terms of the purchase agreement, defendant McNichols provided plaintiff Saveway with a commitment for title insurance. The commitment contained the legal description and property identification number of the property to be sold under the purchase agreement as follows:

Part of Lot 3 according to EASTWOOD PLAZA SUBDIVISION recorded in Liber 45 of Plats 31, 32 and 33 of Macomb County, Michigan described as follows: . . .

Tax Item No.: Part of 14-31-352-021

A survey of the larger parcel of property owned by defendant McNichols carved out the parcel of property to be conveyed to plaintiff Saveway as Parcel A. The legal description as to Parcel A on the survey was identical to the legal description contained in the title commitment. A copy of the survey was provided to plaintiff Saveway before the closing.

Plaintiffs filed the complaint in the present case over five years following the closing. Plaintiff Saveway, along with its assignee under the contract, Kajy Property Enterprises, LLC, asserted that they did not receive the entire amount of property that defendants represented was to be sold pursuant to the purchase agreement. Plaintiffs assert that, in addition to the parcel of property that was in fact conveyed by defendant McNichols, they were further entitled to receive Lot 57 of the Sprenger Estates Subdivision, and Lots 279 and 278 of the Michael & John Sprenger Subdivision. There is no dispute that plaintiff Saveway retained an attorney to represent the company in the period leading up to the closing. Plaintiff Saveway alleged in its complaint, however, that its attorney “did not review the accuracy of the legal description of the property because Plaintiffs were specifically told by Defendant Pattah to rely upon the documents as produced by attorney O. William Ward (defendants’ counsel) as accurate.” Plaintiffs alleged that they did not learn that the purchase agreement did not include all of the property they believed they were purchasing until defendants attempted to split the portion of land actually conveyed to plaintiffs from the rest of the larger parcel owned by defendants. They also alleged that they had been paying the property taxes on the disputed parcel. Plaintiffs brought claims of fraudulent misrepresentation, innocent misrepresentation, promissory estoppel, trespass, nuisance in fact, quiet title, and specific performance.

Defendants filed a motion for summary disposition in lieu of an answer on September 25, 2008. Defendants maintained that plaintiffs’ claims were barred by, “among other things, the statute of frauds (MCL 556.108) and the Parol Evidence Rule.” In response, plaintiffs contended that the parol evidence rule does not bar evidence of a latent ambiguity and that the statute of frauds does not bar consideration of extrinsic evidence to supplement the terms of a written agreement.

A hearing was held on defendant’s motion for summary disposition on November 24, 2008, and the trial court took the matter under advisement. A written opinion and order was issued on February 4, 2009. The trial court opined in relevant part:

The Court has examined the documents submitted by the parties. Plaintiff failed to include “Exhibit A, Legal Description”, as referenced in the title insurance policy, although Defendants included it in their Exhibit B. The description sets for the parcel of property Plaintiffs purchased, and reads as follows:

Part of Lot 3 according to EASTWOOD PLAZA SUBDIVISION recorded in . . .

The Sprenger lots in dispute appear attached to the above-reference parcel, but are not in the description of the property sold. There is no ambiguity in the description. Plaintiffs assert that the Purchase Agreement signed by the parties clearly showed that the disputed lots at issue herein were part of the property sale. The Court disagrees, as the Court has thoroughly examined the Purchase Agreement and finds no reference to the Sprenger lots; moreover, Plaintiffs’ own graphic copy indicates the parcel as described above. Further, Plaintiffs assert that Plaintiffs have paid all of the real estate taxes since 2003, and until recently, for the entire land that Plaintiffs had purchased, including the disputed lots, but have failed to include any evidence of same. Once the moving party has met the

initial burden by supporting its position with documentary evidence, the burden shifts to the moving party to establish the existence of a genuine issue of fact.

Plaintiffs' claims as to the Sprenger lots are barred by the Statute of Frauds. As acknowledged by Plaintiffs, a contract for the sale of land must be in writing, and signed by the seller. MCL 566.108. Plaintiffs have not produced a sales agreement which includes the Sprenger lots, because, apparently, none exists.

* * *

As mentioned earlier, the agreement executed between the parties is clear and without ambiguity, therefore parol evidence cannot be entered to support Plaintiffs' position. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. When the language of a contract is clear and unambiguous, the role of the court is limited to determining the intention of the parties from the four corners of the contract and in accordance with normal usage of the English language. It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10).

As articulated above, the legal description of the property attached to the commitment for title insurance is quite clear, without ambiguity, and does not include the Sprenger lots.

The Court agrees with Defendants regarding Plaintiffs' misrepresentation claim. There is no misrepresentation in the agreement itself, and the Court finds it unreasonable at this late date for Plaintiffs to come forward and claim that Defendants misrepresented the particular property that was sold to Plaintiffs. Further, Plaintiffs' own attorney purportedly scoured all documentation prior to closing; and apparently recognized what parcel was being purchased.

In sum, the Court is not convinced that further discovery will change any of the facts as set forth herein. The documents speak for themselves, and it is clear that the Sprenger lots, or the disputed lots in question, were not a part of the purchase agreement. . . . [Citations omitted.]

Plaintiffs first argue that the trial court erred by granting summary disposition in favor of defendants when latent ambiguities existed in the purchase agreement. Although defendants sought summary disposition under both MCR 2.116(C)(8) and (C)(10), the trial court considered evidence outside the pleadings and, therefore, granted summary disposition pursuant to MCR 2.116(C)(10). A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Likewise, whether a contract's terms are ambiguous is a question of law this Court reviews de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

Determining whether there is a genuine issue of material fact regarding the property to be conveyed requires this Court to interpret the purchase agreement. “The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement.” *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). If contractual language is clear and unambiguous, its meaning is a question of law, and courts must interpret and enforce the contract as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). However, if contractual language is ambiguous, its meaning is a question of fact for the jury to decide. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). In resolving an ambiguous contract, the jury may consider relevant extrinsic evidence. *Id.* at 469-470. Extrinsic “evidence is admitted not to add or detract from the writing, but merely to ascertain what the meaning of the parties is.” *Id.* at 470 (citation and quotation marks omitted).

Plaintiff Saveway argued in the trial court that defendants promised to convey the Sprenger lots in addition to the Chatham Supermarket property – in other words, that defendants promised to convey all of the property that they owned. Plaintiff Saveway maintained that it was induced into executing an incomplete agreement by defendants’ representation that all of the property would be conveyed, and by the representation that plaintiff Saveway should rely on the legal description of the property being conveyed as drafted by defendants’ attorney.

Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous. *Schude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). Although the parol evidence rule generally bars the submission of extrinsic evidence, there are exceptions to its application. First, it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered. For this reason, “[e]xtrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an ‘integrated’ agreement.” *NAG Enterprises, Inc v All State Indus, Inc*, 407 Mich 407, 410; 285 NW2d 770 (1979). Despite the rule that a Court will look to parol evidence to determine if a contract is a complete expression of the parties agreement, an exception exists where there is a merger or integration clause. In *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502; 579 NW2d 411 (1998), the Court stated:

[I]f parol evidence were admissible with regard to the threshold issue whether the written agreement was integrated despite the existence of an integration clause, there would be little distinction between contracts that include an integration clause and those that do not. When the parties choose to include an integration clause, they clearly indicate that the written agreement is integrated; accordingly, there is no longer any “threshold issue” whether the agreement is integrated and, correspondingly, no need to resort to parol evidence to resolve this issue. Thus *NAG*, which allows resort to parol evidence to resolve this “threshold issue,” does not control when a contract includes a valid merger clause. [*UAW-GM*, 228 Mich App at 495-496.]

Where the parties have included an express integration or merger clause within the agreement, “it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete ‘on its face’ and, therefore, parol evidence is necessary for the ‘filling of gaps.’ ” *UAW-GM*, 228 Mich App at 502. In the present case, by its unambiguous terms, the purchase agreement represents the “entire agreement” between plaintiff Saveway and defendants and “supersedes all prior Agreements and Memoranda.” The purchase agreement is detailed and complete on its face; therefore, there is no need to fill gaps.

Plaintiffs’ contention that a latent ambiguity warrants consideration of parol evidence is without merit. Essentially, plaintiffs contend that the fact that defendants sought to legally split plaintiffs’ property from the remainder of defendants’ property approximately 5 years after the closing, as well as plaintiffs’ payment of property taxes on the disputed property, creates a latent ambiguity with regard to the property the parties intended to include in the purchase agreement. In *City of Grosse Pointe Park v Michigan Municipal Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005) (opinion by Cavanagh, J.), the Supreme Court distinguished between a *patent* ambiguity, which appears on the face of a document, and a *latent* ambiguity, which is not readily apparent from the language of a contract, “but instead arises from a collateral matter when the document’s terms are applied or executed.” *Id.* (citation omitted). “A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning.” *In re Woodworth Trust*, 196 Mich App 326, 328, 492 NW2d 818 (1992). Even when contractual language appears clear and intelligible and suggests but a single meaning on its face, extrinsic or parol evidence may be used to show a latent ambiguity and therefore create “a necessity for interpretation.” *In re Kramek Estate*, 268 Mich App 565, 574-575; 710 NW2d 753 (2005).

Here, the fact that defendants sought to legally split the parcel of property conveyed to plaintiffs from the remainder of the property owned by defendants, and the allegation that plaintiffs had been paying the property taxes on the disputed parcel, do not create an ambiguity with respect to the purchase agreement. The plain language of the purchase agreement identifies the property to be conveyed. Had the parties intended the sale to include the disputed property, there would have been no purpose in first identifying the totality of defendants’ property, and then carving out and identifying the portion of that property that was the subject of the purchase agreement. Plaintiffs’ extrinsic evidence does not reveal a latent ambiguity.¹

Plaintiffs next argue that the statute of frauds did not bar consideration of extrinsic evidence in this case. The statute of frauds provides:

No ... interest in lands, other than leases for a term not exceeding 1 year, ... shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party

¹ It appears, however, that plaintiffs would have a cause of action against defendants to recover the wrongfully paid property taxes. The fact that the county billed the wrong party for the property taxes does not create a latent ambiguity in the purchase agreement itself.

creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. [MCL 566.106.]

Here, plaintiffs failed to present any documentary evidence of a written agreement between the parties with regard to the sale of the Sprenger lots. Thus, the statute of frauds bars enforcement of a purported contract regarding the lots.

Plaintiffs maintain that the trial court should have considered extrinsic evidence to determine whether the description of the property in the purchase agreement was ambiguous, and that the trial court should have permitted plaintiff Saveway the opportunity to conduct discovery to present extrinsic evidence to identify the property. However, as previously discussed, there is no ambiguity in the description of the property to be conveyed in the purchase agreement and, therefore, the parol evidence rule bars the admission of extrinsic evidence. Thus, this case is factually distinct from *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354; 320 NW2d 836 (1982), the case on which plaintiffs rely. In *Opdyke*, the court held that whether a writing is unclear and ambiguous on its face with regard to whether it was intended as the parties' final agreement, extrinsic evidence may supplement, but not contradict, the terms of the written agreement. *Id.* at 367.

Plaintiffs next contend that the trial court erred by finding that plaintiffs failed to submit evidentiary support for their claims without giving plaintiffs the opportunity to conduct discovery to develop that evidentiary support. Plaintiffs concede that summary disposition may be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. See, e.g., *Oliver v City of Dearborn Heights*, 269 Mich App 560, 567; 715 NW2d 314 (2006). However, plaintiffs' argument fails to consider the fact that the trial court had the purchase agreement, the plat maps, and the lot split documents presented to it by plaintiffs, and that the trial court stated that it

is not convinced that further discovery will change any of the facts set forth herein. The documents speak for themselves, and it is clear that the Sprenger lots, or the disputed lots in question, were not a part of the purchase agreement.

As discussed in the issues above, given the integration clause in the purchase agreement, as well as the clear and unambiguous nature of the language of the purchase agreement, the parol evidence rule barred the admission of extrinsic evidence.²

Lastly, plaintiffs argue that the trial court erred by relying on *Michigan Nat'l, supra*, which held that a party opposing a motion for summary disposition because discovery is not

² The additional evidence that plaintiffs purportedly wished to present appears to be proof that it paid the property taxes on the disputed lots, as well as testimony that the parties anticipated the sale of the disputed lots in the purchase agreement. However, receipts for the payment of property taxes should have already been in plaintiffs' possession. Further, even if plaintiff was able to obtain deposition testimony in support of its position regarding prior oral agreements, the evidence would have been barred by the integration clause and the parol evidence rule.

complete must provide some independent evidence that a factual dispute exists.” *Id.* at 241. They maintain that *Michigan Nat’l* is distinguishable because in that case some discovery had been conducted, though discovery was not complete. However, in the present case, plaintiffs did not identify any facts that they expected discovery to reveal that would have exposed a latent ambiguity in the express terms of the purchase agreement. As previously stated, plaintiffs should have already had receipts for the alleged tax payments in their possession. Additionally, any witness testimony regarding the parties’ agreements prior to the execution of the written purchase agreement would not be admissible because of the express integration clause and the unambiguous language of the purchase agreement.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald