

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

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JNCC, L.L.C.,

Plaintiff-Appellant,

v

METROPOLITAN TITLE COMPANY, FIRST  
AMERICAN TITLE INSURANCE COMPANY,  
TERRY BROWN, GRAND/SAKWA  
PROPERTIES, L.L.C., and GARY SAKWA,

Defendants-Appellees.

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UNPUBLISHED

July 20, 2010

No. 290915

Oakland Circuit Court

LC No. 2008-095066-CZ

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Plaintiff JNCC, L.L.C., appeals as of right from an order granting defendants' motions for summary disposition. We affirm.

The facts as pertinent to this appeal are largely undisputed. Plaintiff, a developer of property, entered into an option agreement with Hometowne Central Village, L.L.C., the predecessor of defendant Grand/Sakwa Properties, L.L.C. (GS), whereby GS was granted an option to purchase developed condominium lots in Wayne County.<sup>1</sup> The option agreement required GS to pay two earnest-money deposits, totaling \$250,000, into an escrow account with defendants Metropolitan Title Company and First American Title Insurance Company (the title companies). The title companies received the checks but did not immediately cash them, instead entering into an agreement with GS providing that if plaintiff became entitled to the money, GS would indemnify the title companies for any money paid.<sup>2</sup>

GS subsequently sued plaintiff, alleging that plaintiff had breached the option agreement by, among other things, failing to treat the property's soil properly. GS sought to enforce the agreement. Plaintiff filed a counterclaim, claiming that it had not breached the agreement and

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<sup>1</sup> For ease of reference, this opinion will refer to "GS" as the pertinent entity.

<sup>2</sup> There was evidence presented below that this arrangement was not uncommon in the industry.

that it thus remained fully in effect. Plaintiff later changed tactics, however, and argued that the option agreement should be rescinded. Plaintiff claims that it changed course because it learned that GS and the title companies had acted fraudulently with respect to the earnest money and had falsely represented that the money was being held in escrow. In its appellate brief, plaintiff states that it “relied on these fraudulent statements by purchasing and developing the property . . ., sustaining millions of dollars in damages.” GS claims that plaintiff changed course and sought rescission of the agreement because plaintiff faced significant additional expenditures relating to “unsuitable fill and treatment of soil” if the option agreement were to remain in place.

The lawsuit and counterclaim were submitted to arbitration. The arbitrator found that GS had breached the agreement as it related to the earnest money and rescinded it, stating, “The rescission of the Option Agreement abrogates the agreement in toto.” The arbitrator also stated:

. . . having found that the Option Agreement is rescinded, neither party can enforce the contract. However, the parties acted for a significant period of time pursuant to the terms of the Option Agreement, and the damages they seek within their contract claims also fall within the scope of their claims for equitable relief. Accordingly, although the Option Agreement is not enforceable, the parties’ claims for equitable relief are deemed by the arbitrator to encompass all their claims for loss, and thus the arbitrator addresses their claims for recovery of all losses.

The arbitrator found that “even in equity, [plaintiff] is not entitled to damages, or attorney fees, as it likewise breached the Option Agreement . . . in the manner in which soils and fills are treated . . . .” The arbitrator held that plaintiff could make no claim against the earnest money and “shall recover nothing on its claim for damages or slander of title against [GS].” Plaintiff filed a motion to confirm the arbitration award, and the award was confirmed.

Plaintiff then filed the instant lawsuit, claiming that defendants defrauded it into purchasing and developing the property and thus caused more than 17 million dollars in damages. Plaintiff raised claims of fraudulent misrepresentation, tortious interference, breach of fiduciary duty, and civil conspiracy. Defendants filed motions for summary disposition, arguing that plaintiff’s lawsuit was barred by res judicata, collateral estoppel, and judicial estoppel.<sup>3</sup> The trial court granted the motions, stating:

I first consider whether or not causes of action can exist here.

I appreciate Counsel’s California case references that you can have [a] tort independent of a contract. It sounds like the argument that we had earlier today on another case. But, nevertheless, if you and I, Counsel, do have a contract for me to purchase your car, and in the midst of the development of that contract, or after it, whatever, I kick you in the shin, then I can certainly appreciate in

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<sup>3</sup> The title companies also argued lack of causation, but the trial court did not reach this argument, finding it moot.

California, and probably here in Michigan, even if the contract between you and I disappears, nevertheless, you've got a sore shin and you've got a tort action against me. I can see that.

I cannot, in evaluating the tort claims here, conceive of a situation that does not have, at its root, for the necessary prosecution of those torts, the underlying contract. And it's for that reason, and it is the reasons stated by both Counsel in their motion, not the subsequent [causation] argument, and I'm not going to address it because it's moot. But it's the reasons by both Defendants that without the underlying contract, the – no tort actions may lie.

It's for those reasons, articulated by them in their briefs and arguments, as well as what I've stated here, that the Court respectfully grants [the] Motions for Summary Disposition.

Plaintiff contends that the trial court should have allowed its lawsuit to proceed. We review de novo a trial court's ruling concerning a motion for summary disposition. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). The court based its summary-disposition ruling on MCR 2.116(C)(7) and (10). In evaluating a summary-disposition motion under MCR 2.116(C)(10), a court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the opposing party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* In evaluating a summary-disposition motion under MCR 2.116(C)(7), a court, again, considers the documentary evidence submitted by the parties. *Patterson v Kleiman*, 447 Mich 429, 434-435; 526 NW2d 879 (1994). MCR 2.116(C)(7) allows for summary disposition based on "prior judgment" or "other disposition of the claim before commencement of the action."

In resolving this appeal, we find instructive the case of *Walraven v Martin*, 123 Mich App 342; 333 NW2d 569 (1983). In *Walraven, id.* at 344, the plaintiff purchased a café from the defendants and later discovered that the city was planning sewer work and that the area around the restaurant would be torn up for some time. The plaintiff sued the defendants, the real estate broker, and the listing agent, alleging fraudulent concealment and other claims. *Id.* at 345-346. This Court stated:

We reiterate that, while plaintiff is entitled to complete relief, he is not entitled to double recovery. Hence, if verdicts are eventually returned against the sellers, defendants Martin and Samuels, for both rescission and damages, judgment may be entered on only one since these are alternative measures of plaintiff's loss. If judgment for damages is entered against the sellers, the other defendants may be held jointly and severally liable if a verdict is rendered against them. However, if judgment for rescission is entered against the sellers, the other defendants may only be held liable to the extent that the rescission judgment has failed to restore the status quo (because of the sellers' insolvency or otherwise). [*Id.* at 351.]

Here, plaintiff sought rescission in the earlier lawsuit, and it was granted. The “status quo” was indeed restored, and plaintiff cannot therefore seek additional damages by way of the instant lawsuit.

Plaintiff specifically elected to seek rescission of the agreement, when GS was seeking enforcement of the agreement. Under the doctrine of judicial estoppel, a party that has unequivocally and successfully set forth a position in a prior proceeding is estopped from setting forth an inconsistent position in a later proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). A party’s earlier position was successful if the court accepted it as true. *Id.* at 510. In the earlier proceeding, plaintiff contended that the option agreement should be rescinded because of the alleged fraud, and the arbitrator agreed and rescinded the agreement. Plaintiff now seeks damages related to the *enforcement* of the agreement. This is impermissible.

We find that, at the very least, plaintiff’s lawsuit is barred by the rationale of *Walraven* and judicial estoppel. As such, we need not address the additional arguments raised on appeal.

Affirmed.

/s/ Peter D. O’Connell  
/s/ Patrick M. Meter  
/s/ Donald S. Owens