

STATE OF MICHIGAN
COURT OF APPEALS

KNAPP'S VILLAGE, L.L.C.,

Plaintiff/Counter Defendant-
Appellant,

V

KNAPP CROSSING, L.L.C.,

Defendant/Counter Plaintiff/Third-
Party Plaintiff-Appellee.

and

STEVEN D BENNER,

Counter Defendant/Third-Party
Defendant-Appellant,

and

PAUL DYKSTRA, JACK DYKSTRA
EXCAVATING INC., and LAMAR
CONSTRUCTION COMPANY,

Defendants.

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

In this action for breach of contract, plaintiff/counter-defendant Knapp's Village, L.L.C. (Village) and counter-defendant/third-party defendant Steven D. Benner (Benner) appeal as of right the trial court's judgment granting defendant/counter-plaintiff/third-party plaintiff Knapp Crossing, L.L.C.'s (Crossing) motions for summary disposition under MCR 2.116(C)(10) and awarding Crossing contractual damages and attorney fees. We affirm the trial court's grant of summary disposition but remand this case for the trial court to apportion attorney fees consistent with this opinion.

I. FACTS

This dispute arises from three agreements between Crossing, Village, and Benner: the License Agreement, the Option Agreement, and the Sales Agreement. On August 26, 2009, Crossing and Village entered into the License Agreement whereby Village was granted the right to develop property owned by Crossing in exchange for a monthly fee. As security for the License Agreement, Village granted a mortgage to Crossing on property owned by S.D. Benner, L.L.C., an entity controlled by Benner. At the same time, the parties entered into the Option Agreement, whereby Village was granted the right to purchase either (1) all of the property or (2) any of the eight individual parcels contained thereon. Lamar Construction Company and Dykstra Excavating were thereafter hired to construct infrastructure and improvements on the property. Through the alleged defective workmanship of those entities, development of the property was delayed, resulting in a failure by Village to meet the conditions of the License and Option Agreements. On September 15, 2010, Village attempted to exercise its option to purchase one of the eight parcels located on the subject property. A disagreement developed between the parties as to whether the purchase price should be \$425,000 or a “discount” price of \$250,000. To resolve the dispute, the parties executed the Sales Agreement whereby Crossing agreed to sell the parcel for the “discount” price, subject to certain conditions that, if breached by Village, would result make Village liable for the \$175,000 difference as liquidated damages. One such condition states if either Village or Benner declared bankruptcy, Village would be in default and thus liable for the liquidated damages. Delays in development continued and Village failed to adhere to the terms of the various Agreements.

On May 13, 2011, Village filed a six-count complaint against Crossing and others alleging, among other things, Crossing and its “affiliates” breached the License and Option Agreements by causing delays and defects in the development of the property which interfered with Village’s ability to adhere to the terms of the three Agreements. Crossing responded by filing its own counter complaint and third-party complaint alleging Village defaulted on the License, Option and Sales Agreements by, among other things, failing to develop the property in accordance with the terms of the Agreements, failing to pay property taxes on the property used as security for the Agreements, failing to timely deliver the property to the owner of the restaurant, and allowing S.D. Benner to file for Chapter 11 Bankruptcy. Crossing requested the \$175,000 difference in purchase price of the restaurant parcel as liquidated damages pursuant to the Sales Agreement as well as costs and fees, including attorney fees, incurred in bringing the action. Crossing thereafter filed two separate motions for summary disposition under MCR 2.116(C)(10). The trial court granted both motions, entered an order of final judgment dismissing Village’s claims, and awarded Crossing \$175,000 in liquidated damages and \$77,818 in attorney fees.

II. SUMMARY DISPOSITION

Village does not dispute the trial court’s judgment dismissing its claims, but instead argues it erred in granting summary disposition in favor of Crossing on its counterclaims. We review de novo a trial court’s decision on a motion for summary disposition. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* In reviewing such a motion, we consider the evidence in the light most favorable to the nonmoving party. *Id.* at 582-583. “Summary disposition is appropriate only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 583.

Village essentially concedes to committing substantial breaches of the License, Option and Sales Agreements, but argues the trial court erred in granting summary disposition in favor of Crossing because those breaches resulted from the conduct of Lamar Construction and others, who Village contends are “affiliates” of Crossing such that their conduct can be attributed to Crossing. Village also argues, for the first time on appeal, a disputed issue of fact exists as to whether the defense of impossibility excused its failure to perform. We disagree.

First, Village waived its argument with respect to the defense of impossibility by failing to raise it in the trial court in opposition to summary disposition. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Second, its claim Crossing was somehow responsible for Village’s failure to perform lacks merit. Village contends Lamar Construction and others have “partial common ownership” with Crossing. However, Village presented no such evidence to the trial court. Crossing itself admitted one of the principal owners of Lamar Construction also owns a 5 percent minority interest in Crossing. This fact, however, shows at most a mere “connection” between those entities and is insufficient to establish that they are “affiliates” of one another. See *Wyrembelski v St Clair Shores*, 218 Mich App 125, 128-129; 553 NW2d 651 (1996). Thus, the alleged defective workmanship of other entities cannot be imputed to Crossing. Finally, we note the trial court listed other grounds for finding Village breached the various Agreements, such as failing to pay property taxes on the property securing those Agreements and filing for bankruptcy, which in and of themselves supported that the Agreements were breached. Village does not dispute these grounds. On the record before this Court, there was no genuine issue of material fact and Crossing was entitled to summary disposition as a matter of law.

III. LIQUIDATED DAMAGES

Village next argues the \$175,000 difference in purchase price awarded to Crossing pursuant to the terms of the Sales Agreement was an unenforceable penalty. Village did not raise this issue in the trial court. As noted above, the failure to raise an issue in the trial court generally results in its waiver. *Walters*, 481 Mich at 387. However, we may overlook the preservation requirements where “the issue involves a question of law and the facts necessary for its resolution have been presented.” *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Whether a liquidated damages clause is enforceable or invalid as a penalty is a question of law, *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998), and the facts necessary for its resolution are before us. Thus, we will review this issue; however, review is for plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

“A contractual provision for liquidated damages is nothing more than an agreement by the parties fixing the amount of damages in the case of a breach of that contract.” *Barclae v Zarb*, 300 Mich App 455, 485; 834 NW2d 100 (2013) (citations omitted). In *Barclae*, 300 Mich App at 485, this Court stated:

It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are

uncertain and difficult to ascertain at [the] time [the] contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation. [*Id.* (citation omitted).]

“The validity of a liquidated damages clause depends on the conditions existing when the contract was signed rather than at the time of the breach.” *Id.* (citation omitted).

The Sales Agreement executed by the parties expressly states upon a default by Village, it would be liable for the \$175,000 difference in purchase price as liquidated damages. The mere fact the parties expressly agreed the \$175,000 amount constituted liquidated damages and not a penalty does not necessarily make it so. *Moore v St Clair Co*, 120 Mich App 335, 341; 328 NW2d 47 (1982). In this case, however, the parties stipulated in the Sales Agreement:

[T]he actual damages to be suffered by [Crossing] in the event of [Village’s] default are uncertain; that it would be impracticable and extremely difficult to ascertain the actual damages suffered by [Crossing] . . . ; and that under the circumstances existing as of the date of this Agreement, the \$175,000 difference] represent[s] a reasonable estimate of such damages are reasonable in relation to the possible injury [Crossing] will incur as a result of such default.

We cannot conclude the \$175,000 difference in purchase price was unreasonable or excessive, let alone that it was “plainly” so. The trial court did not plainly err in awarding Crossing the \$175,000 difference in purchase price as liquidated damages.

IV. ATTORNEY FEES

Village lastly argues the trial court erred in awarding an excessive amount of attorney fees to Crossing and by holding Village and Benner, in his individual capacity, jointly and severally liable for the full amount of those fees. Under Michigan law, “attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract.” *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234 (2009). In determining whether a contract provides for attorney fees, we accord the contractual language its plain and ordinary meaning and, where “unambiguous, we construe and enforce the contract as written.” *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

A. REASONABLENESS OF ATTORNEY FEES

We conclude the total amount of attorney fees awarded by the trial court was reasonable. We review a trial court’s decision to award attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (citation omitted). “An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Id.* (citation omitted). The License Agreement provides “[Crossing] may recover all damages incurred by reason of [Village]’s breach, including . . . reasonable attorneys’ fees” Although there is no precise formula for determining the reasonableness of attorney fees, our Supreme Court has articulated a list of factors for a trial court to consider:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982).]

Moreover, our Supreme Court has noted that trial courts have also relied upon the eight factors listed in Rule 1.5(a) of the MRCP, which are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. [*Smith*, 481 Mich at 530, quoting MRPC 1.5(a).]

“Although a trial court is not required to consider every factor in detail, the trial court should endeavor to briefly discuss the above factors ‘in order to aid appellate review.’” *Souden v Souden*, 303 Mich App 406, 416; 844 NW2d 151 (2013) (citation omitted).

Here, Crossing requested a total of \$169,061.01 in attorney fees. The trial court granted Crossing’s request, but in an amount significantly less than requested. Specifically, using the 2010 Economics of Law Practice Attorney Income and Billing Rate Summary Report submitted with Crossing’s motion, the trial court assessed an hourly rate for each attorney involved in the litigation. The trial court then considered the hours expended by each attorney and, after deducting various billed hours as duplicative or otherwise unrelated to the litigation, multiplied the number of hours expended by the reasonable hourly rate for each attorney to arrive at a total fee of \$77,818. After determining the base number, the trial court expressly considered whether any of the factors set forth in *Wood*, 413 Mich at 588, or MRPC 1.5(a) justified an increase or decrease from that number, including the professional standing and experience of the attorneys; the skill, time and labor involved; the complexity of the case; the expeditiousness of the resolution; and the proximity between the fees charged and the trial court’s own evaluation of what the reasonable fees should be. The trial court found no upward or downward departure was justified. We conclude the trial court adequately followed the applicable law in determining a reasonable award of attorney fees in this case and therefore no abuse of discretion exists.

B. JOINT AND SEVERAL LIABILITY

While we find the amount of attorney fees awarded by the trial court to be correct, we do not find Village and Benner are jointly and severally liable for these fees. There were three separate contracts entered into between the parties. The License Agreement expressly provides:

In the event [Village] fails to perform any of its obligations under this Agreement and such failure continues beyond all applicable grace, notice and cure periods . . . [Crossing] shall have the right to immediately terminate this Agreement and pursue any and all rights and remedies in law or equity . . .

* * *

Should [Crossing] terminate this Agreement, in addition to all other remedies available under this Agreement, at law or in equity, [Crossing] may recover all damages incurred by reason of [Village]'s breach, including the cost of recovering the Property [and] reasonable attorneys' fees . . .

The plain and unambiguous terms of the License Agreement thus clearly provide a basis for an award of attorney fees against Village. However, there is no basis for concluding Benner, in his individual capacity, can be held jointly and severally liable for any such fees. Benner did not personally guarantee the License Agreement. Moreover, while he signed the Agreement, he did so as a member of Village, not in his personal capacity. This is not sufficient to hold him personally liable. *Livonia Bldg Materials Co v Harrison Const Co*, 276 Mich App 514, 523-524; 742 NW2d 140 (2007).

The Option Agreement contains no provision for the recovery of attorney fees. However, the Option Agreement specifically references the License Agreement and provides “[t]his agreement *and the agreement to which it refers* constitute the entire agreement between the parties” (emphasis added). Thus, the terms of the License Agreement, including those terms pertaining to the recovery of attorney fees, were incorporated by reference into the Option Agreement, thereby providing a basis for recovering attorney fees from Village for litigation related to that Agreement. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998) (“Where one writing references another instrument for additional contract terms, the two writings should be read together”). Again, however, Benner, in his individual capacity, cannot be held jointly and severally liable for any attorney fees incurred in relation to the Option Agreement because he did not personally guarantee that Agreement and signed the Agreement only as a member of Village. *Livonia Bldg Materials Co*, 276 Mich App at 523-524.

Finally, the Sales Agreement contains no provision for the recovery of attorney fees. Moreover, unlike the Option Agreement, it does not reference the License Agreement or any other agreement providing for such fees. Thus, Village cannot be held liable for attorney fees incurred by Crossing for litigation related to that Agreement. Benner, however, personally guaranteed the Sales Agreement, including “the full and prompt payment” of, among other things, “reasonable attorney fees and legal expenses” related to Crossing’s compelling performance of the Sales Agreement. Thus, while Village itself cannot be held liable for attorney fees resulting from litigation over the Sales Agreement, Benner can.

In sum, we conclude, by the plain language of the Agreements at issue, Village was liable for any attorney fees incurred in relation to the License and Option Agreements, while Benner is personally liable for any attorney fees incurred in relation to the Sales Agreement. The trial court erred in holding Village and Benner liable, jointly and severally, for the total amount.

We affirm the trial court's grant of summary disposition in favor of Crossing and its award of damages and attorney fees, but we remand the case for the trial court to properly apportion the awarded attorney fees between Village and Benner in his individual capacity. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Joel P. Hoekstra

/s/ William C. Whitbeck