

STATE OF MICHIGAN
COURT OF APPEALS

DILUSSO BUILDING COMPANY, INC.,
MARIA DIMERCURIO, GAETANO
DIMERCURIO, and DAMIANO DIMERCURIO,

UNPUBLISHED
February 21, 2003

Plaintiffs-Appellees,

v

CONCORD INDUSTRIAL GROUP and
GERALD T. KLEBBA,

No. 233912
Macomb Circuit Court
LC No. 01-000195-CK

Defendants-Appellants.

Before: White, P.J., and Kelly and R.S. Gribbs,* JJ.

PER CURIAM.

In this breach of contract case, defendants appeal by right the order granting judgment for plaintiffs. We affirm.

Defendants contend that the trial court committed clear error when it found the terms of the option agreement ambiguous and considered parol evidence to discern the intent of the parties. The construction and interpretation of an unambiguous contract is a question of law that this Court reviews de novo. Whether terms of a contract are ambiguous is also a question of law that this Court will review de novo. *Henderson v State Farm Fire*, 460 Mich 348, 353; 596 NW2d 190 (1999). If a contract is clear and unambiguous, its meaning is a question of law; if the language is unclear or is susceptible to multiple meanings, interpretation is a question of fact. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). This Court reviews a trial court's factual findings following a civil bench trial for clear error. MCR 2.613(C).

Defendants argue that the integration clause in the agreement prohibits the use of parol evidence to interpret the agreement. In *UAW-GM*, this Court acknowledged that "an integration clause nullifies all antecedent agreements." *UAW-GM, supra*, 228 Mich App 499, 502. The use of parol evidence to explain a clear and unambiguous written contract is prohibited where there is an integration clause unless the contract is obviously incomplete on its face or where there is

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

fraud. Parol evidence is not admissible to determine whether a contract is integrated when a written contract contains such a clause. *Id.* at 494-495.

However, the trial court found that the provision of the agreement regarding the manner by which an option could be exercised was ambiguous. The provision in question states:

Buyer may exercise this option by giving written notice of such exercise as to one (1) or more lots, providing such written notice to Seller by depositing said written notice in the United States mail, postage prepaid, registered mail, and addressed to the Seller at the address set forth above at any time during the primary period of this option or any extension hereof. Said service shall be complete at the time of delivery or mailing, as determined by post mark [sic].

The court found that the word “may” was permissive and indicated one manner in which the option could be exercised, but not the only manner. The court also found that service being complete at the time of mailing *or* delivery was inconsistent. A contract is ambiguous if “its words may reasonably be understood in different ways.” *UAW-GM, supra*, 228 Mich App 491 (citing *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982)). Where, as here, the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties. *UAW-GM, supra*, 228 Mich App 192. Therefore, the trial court did not err in considering parol evidence to clarify the meaning of the ambiguity. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

Furthermore, the trial court appeared to rely more on evidence of the parties’ course of performance under the option agreement in arriving at the conclusion that the options could be exercised in a manner other than written notice delivered by United States mail.¹ In *Jacob v Cummings*, 213 Mich 373, 378; 182 NW 115 (1921), the Michigan Supreme Court stated:

The written agreement, after it was signed by the defendant, could be modified, and strict performance thereunder waived or abrogated by the parties, without violating the [parol evidence] rule against the admission of evidence to alter, vary or contradict a written agreement. The rule relates to an attack upon the writing itself, and has no reference to the right of the parties to change the method or manner of performance, or waive rights or remedies thereunder by parol. . . . If the parties considered it to their advantage to depart from strict performance of the agreement, that would constitute a sufficient consideration.

“A departure from stipulated performance can be predicated upon acts as well as upon an express agreement to that effect.” *Id.* at 378-379; *Turner v Williams*, 311 Mich 563, 566; 19 NW2d 100 (1945). A course of performance is generally considered highly persuasive evidence of proper contract interpretation when introduced against the party so performing. *Schroeder v Terra*

¹ While the court and the parties refer to a “course of dealing,” the manner in which the parties transacted business under the option agreement is actually a “course of performance.” A course of dealing involves conduct that occurred with regularity prior to the present contract. Course of performance, on the other hand, relates to the conduct of the parties under the contract in question. Black’s Law Dictionary, 7th Edition.

Energy, 223 Mich App 176, 191; 565 NW2d 887 (1997). Therefore, whether or not the written agreement was ambiguous, the court did not clearly err in considering the actual performance of the parties and in holding that written notice was not the only manner of exercising the options allowed under the agreement.

Defendants also argue that the statute of frauds prevents the court from finding that an oral agreement for the sale of the lots existed between plaintiffs and defendants after the original option agreement expired without being extended by written notice. This argument is without merit. Under the Michigan statute of frauds, MCL 566.108, a valid contract for the sale of land must be in writing. *Zurcher v Herveat*, 238 Mich App 267, 277; 605 NW2d 329 (1999). However,

partial performance of an oral contract to convey an interest in land may remove that contract from the statute of frauds. Possession and improvements in regard to the property may remove it from the statute. Payment of money pursuant to the contract is another factor to consider. [*Zaborski v Kutyla*, 29 Mich App 604, 607; 185 NW2d 586 (1971) (citations omitted).] See also, MCL 566.110.

Here, plaintiffs and defendants continued their business dealings after the written option contract expired even though it was not extended by written notice. Plaintiffs exercised options during this period by entering onto the lots and building houses upon them, as they had done during the first two years dealing with defendants, and defendants accepted payment and provided deeds when plaintiffs were ready to close the sales. Therefore, the court did not clearly err in finding that plaintiffs and defendants had an oral land sale contract for the third year of their business dealings. Furthermore, this oral contract was enforceable as to the final three lots, notwithstanding the statute of frauds, because plaintiffs partially performed the contract and conveyed their interest in the land by taking dominion and control over the lots and building houses on them, just as they had done with the other lots covered by the parties' agreement. *Zaborski, supra*, 29 Mich App 607.

Defendants next argue that the trial court erred in granting plaintiffs specific performance of the option agreement because plaintiffs did not strictly comply with its terms. We disagree. Although this Court reviews de novo a decision granting specific performance, factual findings in support of that determination are reviewed for clear error. A factual finding is clearly erroneous only where this Court is left with a definite and firm conviction that a mistake has been made. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

As defendants correctly point out, the Michigan Supreme Court has held that:

[a]n option is not a contract of purchase, it is simply a contract by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time. An option is but an offer, strict compliance with the terms of which is required; acceptance must be in compliance with the terms proposed by the option both as to the exact thing offered and within the time specified; otherwise the right is lost. [*Le Baron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 313; 29 NW2d 704 (1947), citing *Olson v Sash*, 217 Mich 604, 606; 187 NW 346 (1922).]

However, options for the purchase of land, where based on a valid consideration, are valid contracts, and may be specifically enforced. *Solomon Mier Co v Hadden*, 148 Mich 488, 491-492; 111 NW 1040 (1907); *Bd of Control v Burgess*, 45 Mich App 183, 185; 206 NW2d 256 (1973).

Neither plaintiffs nor defendants strictly complied with the terms of the option agreement. Plaintiffs did not give written notice of its exercise of an option, and defendants did not supply title insurance commitments for the sold lots. However, “[a]n option may ripen into a binding bilateral contract of purchase and sale by a seasonable exercise of the option and compliance with its terms by the optionee.” *Le Baron Homes, supra*, 319 Mich 315. The court found that plaintiffs permissibly exercised their options by building houses on the lots prior to sale to third parties, as allowed by the ambiguous term in the option agreement regarding the manner of exercising the options. The exercise of the options in this manner was an acceptance of defendants’ offer to sell and created a bilateral contract between the parties. Such a contract can be specifically performed. Furthermore, if the court was granting the specific performance of an oral land contract, as opposed to the written option contract, such a remedy is possible when there has been part performance of the contract, as here. *Jenks v Jenks*, 70 Mich App 688, 689; 247 NW2d 588 (1976). Therefore, the trial court did not clearly err by granting specific performance and vesting title to the three disputed lots in plaintiffs.

Defendants next contend that plaintiffs lost all rights to the remaining three lots when the option agreement expired by its terms. Defendants claim that the “time of essence” provision prohibits the extension of any deadlines for exercising the options without written waiver by the parties. Since there was no written waiver of the date of expiration of the agreement, defendants claim that the options expired by the agreement’s terms before plaintiffs exercised them.

However, we agree with the trial court that, by the terms of the agreement itself, the agreement was not extended for the third year. Plaintiffs did not extend the option agreement by written notice as required. Although defendants could argue that they waived the requirement for written notice by their acquiescence to plaintiffs’ continued construction on and sale of the lots, they did not make this argument. Instead, defendants argued that the memorandum of the option agreement acted as an extension. However, defendants’ attorney testified that the memorandum was simply intended as a document that plaintiffs could record as evidence of the option agreement in order to protect plaintiffs’ interest against the lots. Furthermore, the plain language of the memorandum itself indicates its main purpose is to “giv[e] public record of the fact of the execution of the above-referenced Option agreement.” Since the memorandum did not act as an extension of the agreement for the third year, and no written notice was given to extend the agreement, the parties were transacting business without an express agreement for the third year. Although the written agreement stated that time was of the essence, the written agreement had expired. Defendants cannot now claim that plaintiffs did not comply, during the third year, with the terms that were relevant only during their previous agreement.

Defendants next claim that the trial court erred in finding that defendants were estopped by their conduct from claiming that the option period had expired. We disagree. This Court’s review of a trial court’s application of equitable estoppel is de novo, with no reversal unless the trial court’s findings were clearly erroneous or this Court would have reached a different result in the lower court’s position. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 582; 458 NW2d 659 (1990).

Equitable estoppel may arise when: (1) a party, by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999). Here, plaintiffs exercised their options on the lots by building houses on them and selling the lots and houses to third parties. Defendants allowed plaintiffs to do this, and aided plaintiffs' efforts by closing on the lots after plaintiffs sold them to the third parties. At no point in their business transactions did defendants object to the manner in which plaintiffs were exercising their options on the lots. Hence, plaintiffs justifiably relied on defendants' acquiescence and built houses on the remaining three lots in the belief that defendants would close on them when plaintiffs found a buyer for them as defendants did before, regardless of the strict terms of the agreement. If defendants are allowed to suddenly require strict compliance with the written terms of the agreement, plaintiffs will lose the cost of building the houses, and any profit they would have realized. Therefore, we believe that the trial court did not err in ruling that defendants are estopped from declaring the option period expired.

Defendants' final argument is that the trial clearly erred when it found unjust enrichment under an express contract. We disagree. When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered. A trial court's findings are considered clearly erroneous where this Court is left with a definite and firm conviction that a mistake has been made. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. In such instances, the law operates to imply a contract in order to prevent unjust enrichment. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). However, a contract will be implied only if there is no express contract covering the same subject matter. *Id.* As discussed *supra*, the trial court properly found that there was not an express contract between the parties for the third year they were transacting business. Defendants would be unjustly enriched if they were to keep the benefit of the houses valued at over \$200,000 on each lot and plaintiffs would lose the money they invested in building the houses and any profit they would have received from their sale. Since there was no express contract covering the same subject matter, a contract to prevent unjust enrichment of defendants can be implied.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs