DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MATTHEW J. SHANKS, Plaintiff-Appellant, v. MERITAGE HOMES OF ARIZONA, INC., an Arizona corporation, d/b/a MONTEREY HOMES, Defendant-Appellee.	)	1 CA-CV 09-0137 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-001318

The Honorable Larry Grant, Judge
The Honorable Peter B. Swann, Judge

AFFIRMED

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W E I S B E R G, Judge

¶1 Matthew J. Shanks appeals from the dismissal of his complaint seeking a declaration that a real estate contract he had entered with Meritage Homes of Arizona, Inc. ("Meritage") was unenforceable and a judgment for an amount not less than the earnest money paid to Meritage. For the reasons that follow, we affirm the judgment in favor of Meritage.

BACKGROUND

¶2 On December 10, 2006, Shanks and Meritage signed a contract for the sale of a lot with a house to be constructed in Scottsdale, Arizona. Shanks paid Meritage $157,016 in earnest money toward the final sales price of $1,567,828. On October 9, 2007, Meritage notified Shanks that the house would be ready for occupancy and that the closing would take place on November 27, 2007. On November 28, Shanks sent notice of his election to terminate the agreement on the ground that Meritage had violated statutes that required the disclosure of certain rescission rights and asked for the return of his earnest money. Meritage declined to return Shanks' deposit, and after further unsuccessful attempts to close the sale, declared the contract void and notified Shanks that it would retain, as the contract allowed, his earnest money.

¶3 Shanks filed a complaint for declaratory and other relief, alleging that because the sales agreement did not obligate Meritage to complete construction within two years from

the date of the agreement, the contract involved the purchase of an "unimproved lot" as defined by Arizona Revised Statutes ("A.R.S.") section 32-2101(25),(58) (2008). Because both A.R.S. § 32-2185.01(D) (2008) and Rules of the Arizona Department of Real Estate ("ADRE")[1] required that an agreement involving an unimproved lot disclose the purchaser's right to rescind the contract "by midnight of the seventh calendar day following the day the purchaser . . . executed the agreement," Shanks argued that Meritage's failure to disclose in the sales agreement his right to rescind rendered the contract unenforceable under A.R.S. § 32-2185.06 (2008).

¶4 Meritage moved to dismiss the complaint for failure to state a claim or alternatively for summary judgment. It argued that Shanks' home was fully completed when he attempted to cancel the contract, that Meritage had properly terminated the agreement, and that pursuant to paragraph 16(a) of the contract, Meritage had asserted its right to liquidated damages for Shanks' nonperformance. Meritage also argued that the agreement was for an *improved* lot and pointed to the Public Report, which recited the rescission right for buyers of unimproved lots but also explained that "[a] contract . . . for purchase of a lot, which includes a building or obligates the seller to complete construction of a building within two years from the contract

[1]*see* A.A.C. R4-28-804.

date, does not constitute the purchase of an unimproved lot. *Therefore, if your purchase includes a lot and a building or a building to be built, you are not entitled to the rescission rights described in the Report*." (Emphasis added.)

¶5 Shanks cross-moved for summary judgment. After hearing oral argument on the motions, the court granted Meritage's motion with respect to liability and denied Shanks' cross-motion. Meritage next moved for summary judgment on its right to liquidated damages, and Shanks did not contest that the agreement "contained an otherwise enforceable liquidated damages provision." The court entered a signed judgment in favor of Meritage and dismissed Shanks' complaint with prejudice. Shanks timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶6 On appeal from the grant of summary judgment, "we review de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). Also, we review *de novo* questions of contract and statutory interpretation. *Tenet HealthSystem TCH, Inc. v. Silver*, 203 Ariz. 217, 219, ¶ 5, 52 P.3d 786, 789 (App. 2002).

¶7 Shanks argues on appeal that because Meritage's contract did not promise to build the proposed residence within two years, the agreement was for an "unimproved lot" within the meaning of A.R.S. § 32-2101(58), and that because the sales agreement failed to give notice of the rescission rights mandated for sale of an unimproved lot, Meritage could not enforce the purchase agreement's liquidated damages provision against him.

¶8 Both parties agree that this appeal turns upon whether the lot was improved or unimproved. An "[u]nimproved lot or parcel" is "a lot or parcel of a subdivision that is not an improved lot or parcel." A.R.S. § 32-2101(58). Section 32-2101(25) defines an "[i]mproved lot or parcel" as "*a lot* or parcel *of a subdivision upon* which lot or parcel there is a residential, commercial or industrial building or concerning w*hich a contract has been entered into* between a subdivider and a purchaser *that obligates the subdivider directly, or indirectly through a building contractor, to complete construction of a residential,* commercial or industrial *building on the lot* or parcel *within two years* from the date on which the contract of sale for the lot is entered into." (Emphasis added.)

¶9 The statutory scheme governing real estate sales imposes a number of notice requirements on sellers of *unimproved* lots. Section 32-2185.01 (D) states:

> *Any contract . . . to purchase or lease an* ***unimproved*** *lot* or parcel *may be rescinded by the purchaser without cause of any kind by* sending or delivering written notice of rescission by *midnight of the seventh calendar day following the day on which the purchaser* or prospective purchaser *has executed such contract* or agreement. *The subdivider shall clearly and conspicuously disclose, in accordance with regulations adopted by the commissioner, the right to rescind* provided for in this subsection and shall provide, in accordance with regulations adopted by the commissioner, an adequate opportunity to exercise the right to rescission within the time limit set forth in this subsection. The commissioner may adopt regulations to exempt commercial and industrial subdivisions from such requirements.

(Emphasis added.) Although the statute does not specify in what way a seller must disclose the right to rescind, a rule adopted by ADRE, A.A.C. R4-28-804(A), provides:

> *Any agreement or contract for the purchase . . . of an* ***unimproved*** *subdivided lot . . . shall contain substantially the following language* in bold print . . . above the signature portion of the document*:*
>
> *The purchaser . . . has the legal right to rescind (cancel) this agreement* without cause or reason of any kind, and to the return of any money or other consideration *by sending or delivering a written notice of rescission to the seller . . . by midnight of the seventh calendar day following the day the purchaser . . . executed the*

> *agreement*. If the purchaser . . . does not inspect the lot or parcel before the execution of the agreement, the purchaser . . . shall have six months to inspect the lot or parcel, and at the time of inspection shall have the right to unilaterally rescind the agreement.

(Emphasis added.)

¶10 Shanks cites A.R.S. § 32-2185.06 to contend that Meritage's failure to disclose his rescission rights in the sales contract rendered the contract unenforceable. That statute provides:

> *All agreements . . . for the purchase or lease of subdivided land*[2] *. . . shall clearly and conspicuously disclose,* in accordance with [ADRE] regulations *. . . the purchaser's right to receive a copy of the public report, and in the case of* ***unimproved*** *lots . . . not exempted by regulation . . ., the purchaser's right to rescind* the agreement as provided in § 31-2185.01*.* ***Any contract . . . which fails to make disclosures pursuant to this section shall not be enforceable against the purchaser***.

(Emphasis added.)

¶11 Also, by Rule, ADRE requires a subdivision developer to provide buyers with a copy of the subdivision's Public Report. A.A.C. R4-803(A) states:

> *A developer . . . shall ensure that any* agreement or *contract for the sale . . . of*

[2]"[S]ubdivided lands" is defined in § 32-2101(55) as: "improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into six or more lots . . . ."

> *a property interest in a development that requires a public report contains substantially the following language* in bold print or print larger than the other print used in the document above the signature portion of the document: THE DEVELOPER SHALL GIVE A PROSPECTIVE PURCHASER A COPY OF THE PUBLIC REPORT AND AN OPPORTUNITY TO READ AND REVIEW IT BEFORE THE PROSPECTIVE PURCHASER SIGNS THIS DOCUMENT.

In this transaction, the sales contract contained the mandatory language notifying buyers of the right to receive the Public Report, and Shanks acknowledged that he had received and reviewed the Public Report before signing the sales agreement.

¶12 The second page of the Public Report stated in part that if subdivided lands were sold without the delivery of the Public Report to the buyer, the buyer could rescind the sale. It also stated that "agreements for the purchase of an unimproved lot* (without a building) may be rescinded by you without cause by sending or delivering written notice of rescission by midnight of the seventh calendar day following the signing." The footnote explained that

> **[a] contract or agreement for purchase of a lot, which* includes a building or *obligates the seller to complete construction* of a building *within two years* from the contract date, *does not constitute the purchase of an unimproved lot*. *Therefore, if your purchase includes* a lot and a building or *a building to be built, you are not entitled to the rescission rights* described in paragraphs 2 and 3.

(Emphasis added.)

¶13 The words, "a building to be built," are not in the statute defining an improved lot. Shanks, however, attached to his reply in support of his cross-motion for summary judgment an affidavit by Roy R. Tanney, Assistant Commissioner of Development Services for ADRE. Tanney avowed that since 1983, all of the quoted language in the preceding paragraph "or similar language has been included in all subdivision public reports." Shanks argued from Tanney's affidavit that Meritage's Public Report did not obligate it to complete construction within two years and thus the contract was not for an improved lot.

¶14 The superior court, however, concluded that Meritage's Public Report was incorporated by reference in the purchase agreement, that the notice given in the Report of a buyer's rescission rights had been approved by ADRE, and that the language in the Report that buyers of "a building to be built" were not entitled to the rescission rights constituted Meritage's "assurance" that Shanks' home would be completed within two years from the contract date. Thus, Shanks had purchased an improved lot and was not entitled to rescind the contract in November 2007.

¶15 Shanks now challenges the conclusion that the Public Report was incorporated by reference into the sales agreement

because neither document contained specific language doing so. He cites other contract provisions, for example, to argue that Meritage knew how to specifically incorporate by reference and that its failure to expressly incorporate the Public Report indicates a lack of intent to do so. We conclude otherwise.

¶16 We have held that "substantially contemporaneous instruments will be read together to determine the nature of the transaction between the parties." *Pearll v. Williams*, 146 Ariz. 203, 206, 704 P.2d 1348, 1351 (App. 1985). Furthermore, to incorporate another document by reference, no particular language is required. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 258, 681 P.2d 390, 420 (App. 1983). But, there must be a "clear and unequivocal" reference to the other document, the reference "must be called to the attention of the other party, he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co., Inc.*, 214 Ariz. 344, 346, ¶ 8, 152 P.3d 1227, 1229 (App. 2007) (*quoting United Cal. Bank*, 140 Ariz. at 268, 681 P.2d at 420).

¶17 Here, the sales agreement clearly referred and called attention to the Public Report by informing Shanks that he had to be given a copy of the Report and had to acknowledge that he had received, read, and reviewed it. Shanks initialed this

contract provision and on the same date signed a receipt for the Report that stated in part: "by signing this receipt the buyer has accepted the public report and acknowledges the information it contains." The terms of the Public Report were thereby readily available to both parties, and Shanks consented to those terms. Because we "look to the plain meaning of the words as viewed in the context of the contract as a whole," *United California Bank*, 140 Ariz. at 259, 681 P.2d at 411, we conclude that the Public Report was incorporated by reference. *See Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007) (interpretation of a contract is a question of law for our *de novo* review).

¶18 Shanks asserts, however, that the Public Report could not be incorporated because it was issued by ADRE rather than the parties.[3] The Report itself refutes this assertion by stating that it "was prepared by the subdivider and none of the information in this report has been verified by the Department."

¶19 Shanks further contends that because the purchase agreement did not obligate Meritage to complete construction

[3]Shanks alternatively contends that because the Public Report stated that it was for informational purposes only, Meritage could not have intended to incorporate the report into the agreement. Shanks failed to raise this contention in the superior court, and we decline to consider it. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 203-04, ¶ 6, 119 P.3d 467, 470-711 (App. 2005).

within two years, the agreement was not for the sale of an improved lot. He notes that not only did the agreement fail to promise completion within a particular time but instead stated that Meritage "has not and cannot guarantee a completion date." The latter provision, however, was a clause addressing possible commercial frustration of the construction contract by events beyond Meritage's control. *See, e.g., Mobile Home Estates, Inc. v. Levitt Mobile Home Sys.*, 118 Ariz. 219, 222, 575 P.2d 1245, 1248 (1978) (recognizing that commercial frustration may justify nonperformance of a contract); *Garner v. Ellingson*, 18 Ariz. App. 181, 182, 501 P.2d 22, 23 (1972) (noting that commercial frustration may include both impossibility of performance as well as impracticability due to "extreme or unreasonable difficulty or expense"). Shanks cites no evidence to suggest that this frustration provision was intended to override express language in the Public Report that the contract was for sale of an improved lot.

¶20 Accordingly, given our conclusion that the Public Report was incorporated by reference, the language on page two of the Report notified Shanks that "[a] contract or agreement for purchase of a lot, which includes a building *or obligates the seller to complete construction within two years from the contract date, does not constitute the purchase of an unimproved lot*. Therefore, if your purchase includes a lot and a building

to be built, you are not entitled to the rescission rights described" in the report. (Emphasis added.)

¶21 In addition to these statements concerning rescission, the Report gave notice of other important information about the subdivision, soil, nearby land uses, utility providers, access, improvements, zoning, taxes, and the homeowners' association. Shanks contends that many of these items cannot be characterized as contract terms. We need not resolve this question. Our focus is on statements regarding the nature of the lot Shanks purchased and the explicit language on page fifteen: "*This offering is for [an] improved lot*" . . . [and is one on which] *there is a* residential . . . building or concerning a *contract* . . . *that obligates the subdivider . . . to complete construction of a residential . . . building on the lot . . . within two years*" from the date of the contract. (Emphasis added.) Shanks has not explained why Meritage would include this information in the Report if Meritage did not intend to be bound by it, and Tanney's affidavit offers no insight regarding this language. Significantly, we note that if Meritage had sold a lot "by means of a public report which contain[ed] an untrue statement of a material fact or omit[ted] a material fact required to be stated," it could be liable in damages to a buyer under A.R.S. § 32-2183.03 (2008).

¶22 Moreover, we find no ambiguity in the statements in the Public Report and thus no fact question that might bar summary judgment. *See Hartford v. Indus. Comm'n*, 178 Ariz. 106, 111, 870 P.2d 1202, 1207 (App. 1994) ("Whether a contract is ambiguous is a question of law."). A contract is not ambiguous merely because the parties disagree as to its meaning; contract language is ambiguous only if it reasonably can be construed to have more than one meaning. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005). Although the explanation of the consequences attached to purchase of an improved lot might have been placed in the sales agreement, its placement in the Report did not create an ambiguity. By the disclosure in the Public Report, Meritage notified Shanks that he did not qualify for the recission rights governing unimproved lots and bound itself to complete construction of Shanks' home within two years, subject to possible commercial frustration.

CONCLUSION

¶23 We uphold the superior court's ruling that the Public Report was incorporated by reference in the parties' sales agreement and that the Report clarified the limitation on recission rights for sale of an improved lot. Accordingly, we affirm dismissal of Shanks' complaint and the judgment in favor of Meritage. Meritage has requested an award of its attorney's fees and costs on appeal pursuant to the parties' contract and

A.R.S. 12-341 (2003), 12-341.01 (2003) and 12-342 (2003). We grant the request of Meritage subject to its compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/
PATRICIA K. NORRIS, Presiding Judge

/S/
MARGARET H. DOWNIE, Judge