STATE OF MICHIGAN

COURT OF APPEALS

RICHARD F. CLOUS, d/b/a RICHARD CLOUS CONTRACTOR,

Plaintiff/Counterdefendant-Appellee,

v

DAVID L. VICKERY and CANDICE VICKERY,

Defendants/Counterplaintiffs-Appellants,

and

NBD BANK,

Defendant.

UNPUBLISHED
January 28, 2000

No. 210145
Wexford Circuit Court
LC No. 96-012237 CH

Before: Kelly, P.J., and Markey and Collins, JJ.

PER CURIAM.

Defendants/counterplaintiffs David and Candice Vickery (the Vickerys) appeal as of right from the trial court's order denying their motion for retrial or remittitur. They also appeal the trial court's entry of judgment, following a bench trial, for plaintiff/counterdefendant Richard M. Clous (Clous) in the amount of $14,823.72, and dismissal of their counterclaims. We affirm.

The Vickerys contracted with Clous to build them a home. After completion of the home, a dispute arose between the parties concerning the balance owed Clous. Eventually, Clous filed a claim of lien pursuant to § 111 of the Construction Lien Act, MCL 570.1101 *et seq.;* MSA 26.316(101) *et seq.*, claiming $13.018.36 as defendant's unpaid balance. Clous subsequently filed a complaint against the Vickerys and NBD[1] to enforce the claim of lien and for payment of the outstanding balance.

Various claims and counterclaims followed, culminating in a three-day bench trial in October 1997. At the close of Clous's proofs, NBD moved for a directed verdict in its favor on priority of its mortgage interest over Clous's lien, and the court granted the motion. The court found that because

Clous had signed full unconditional lien waivers at various points during the construction of the Vickerys' home, he could not make a lien claim against their property. The court stated that it was convinced that Clous did not intend to fully waive his lien rights on the property, but rather, believed he was signing partial waivers covering disbursement of construction funds at various points in the construction project.[2] However, the court found that the Construction Lien Act requires that the language of such forms be strictly construed, and that because the forms were generated by Clous, any question regarding the language would be construed against him. Thus, concluded the court, Clous's construction lien was invalid and NBD was entitled to a directed verdict in its favor. The court noted, however, that its decision to grant NBD's motion for directed verdict did not affect the other issues before the court. The trial court's rulings with regard to a number of those issues are the subject of this appeal.

The Vickerys' first argument on appeal is that the trial court erred in finding that the parties' contract did not violate the Michigan Consumer Protection Act (the Consumer Protection Act), MCL 445.901 *et seq.;* MSA 19.418 *et seq.* Characterizing the issue as one of statutory interpretation, the Vickerys argue that the trial court held them to a higher standard than is permitted by the Consumer Protection Act. They point to various language in the court's opinion in support of their argument. However, a review of the trial court's opinion reveals that its comments were merely prefatory to its factual findings on each of the Vickerys' Consumer Protection Act claims. The court noted, and the record shows, that the Vickerys engaged in extensive negotiations with Clous regarding the construction of their home, that they were familiar with Clous's work because he had built a home for Candice Vickery's sister, that their decision to proceed with Clous as their builder was deliberate and considered, and that this was not a situation where one party was at a disadvantage in the bargaining process. The court did not find, as suggested by the Vickerys, that the Consumer Protection Act is not available to sophisticated consumers such as the Vickerys, nor that they were experts in construction.

The substance of the remainder of the Vickerys' argument is that the court erroneously concluded that there was not sufficient evidence to support their claims that Clous violated various provisions of the Consumer Protection Act. This Court may not set aside a trial court's findings of fact unless they are clearly erroneous. *Andrews v Pentwater Twp*, 222 Mich App 491, 493; 563 NW2d 713 (1997). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

The Vickerys alleged violations of numerous subsections of MCL 445.903(1); MSA 19.418(3)(1). On appeal, the Vickerys do not identify any particular factual finding as being clearly erroneous; rather, they reiterate their allegations that Clous made numerous misrepresentations to them and assert that the court erred in finding otherwise. However, the trial court addressed each of the Vickerys' Consumer Protection Act claims in its opinion, specifically identifying the testimony on which it relied in making its findings of fact with regard to each claim, or noting the absence of testimony in support of a particular claim. After reviewing the record, we are not left with the definite and firm conviction that a mistake was made.

The Vickerys' next argument on appeal is that the trial court erred in refusing to consider parol evidence when interpreting the parties' contract because the contract was ambiguous and the proffered

parol evidence clarified the ambiguity. We disagree. Decisions with regard to whether parol evidence should be considered in interpreting a contract involve questions of law and fact. We review questions of law de novo. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997). We review questions of fact for clear error. *Andrews, supra*.

"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." *UAW-GM v KSL Recreation Corp,* 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co,* 184 Mich App 574, 580; 458 NW2d 659 (1990). However, extrinsic evidence is admissible to clarify the meaning of an ambiguous contract. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). The initial question of whether contractual language is ambiguous is a question of law. *Brucker, supra* at 447-448. A contract is ambiguous if the language is subject to two or more reasonable interpretations or is inconsistent on its face. *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984). If a contract, though inartfully worded or clumsily arranged, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear. *Allstate Ins Co v Goldwater*, 163 Mich App 646, 648; 415 NW2d 2 (1987). Courts are not to create ambiguity where none exists. *UAW-GM, supra*.

Where one writing refers to another, the two writings are to be construed together. *Culver v Castro,* 126 Mich App 824, 826; 338 NW2d 232 (1983). Similarly, where there are several agreements relating to the same subject matter, the intention of the parties must be gleaned from all the agreements. *Id.* A primary principle of construction is that a contract is to be harmonized as far as possible. *Czapp v Cox,* 179 Mich App 216, 219; 445 NW2d 218 (1989).

Here, the parties executed a number of documents which, according to trial testimony, both sides perceived as constituting their agreement. The first document is titled "Proposal." That document references a "16 Page Spec Sheet" and an "Allowance Sheet," which is also referred to as the "Estimate."[3] The final document is a "Cost-Plus Contract." The "Cost-Plus Contract" provides, in pertinent part, as follows:

> In our Cost-Plus Contract, we agree with you that we will do all work requested of us at our cost, plus an add on of 10%. With regard to non-labor items, which includes all materials, supplies, invoices, charges, permits, inspection fees and any similar charges, "Cost-Plus" means any of these items which are charged to and paid by us. All of these items are billed to you at the actual charge paid by us plus an add on rate of 10%.
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> * * *
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> In short, the total cost of the construction, materials involved in the construction and the handling of sub-contracted work and materials, plus 10% is what we are contracted for.

The "Proposal" signed by both parties lists the proposed price for construction of the home as $325,375 and specifies that the job will "be billed at a cost plus 10%." Thus, both the "Proposal" and the "Cost-Plus Contract" unambiguously and without qualification identify the contract as a "cost-plus" contract.

The Vickerys point to the "Estimate" in support of their argument that their contract with Clous is ambiguous and that the court should have considered parol evidence to resolve the ambiguity. The "Estimate" lists the RCC (Richard Clous Construction) Coordination Fee as $20,000. Because $20,000 is less than ten percent of $325,375, argue the Vickerys, that term clearly contradicts the "cost-plus" term in the "Proposal" and "Cost-Plus Contract." The Vickerys argue that the court should have considered parol evidence of the parties' negotiations and contemporaneous oral agreements that, they contend, shows that the parties' agreement was that Clous would receive a $20,000 coordination fee on the agreed upon price of $325,375, and that he would receive the ten percent coordination fee only on any costs beyond that amount that were paid through his books.

As the trial court noted in its decision, however, there is no language whatsoever in the parties' contract to indicate that the $20,000 figure listed on the estimate was a flat coordination fee that applied to the contract price of $325,375 and that the ten percent coordination fee was to apply only to charges beyond that. Rather, the "Cost-Plus Contract" explicitly and unambiguously states that the ten percent fee would be charged against all work done on the project that was charged through Clous. Moreover, the terms noted by the Vickerys are not necessarily contradictory; rather, they may be harmonized. The "Cost-Plus Contract" allows for the possibility that the Vickerys would contract directly with some subcontractors, thereby avoiding the coordination fee. Evidence was presented at trial that the Vickerys did, in fact, contract with some subcontractors directly. Thus, the fact that the "Estimate" does not list a coordination fee that is ten percent of the contract price of $325,375 does not render the parties' agreement ambiguous. Indeed, as the trial court noted, "[a]ny ambiguity in the transaction is created not by the documents but by the unilateral assertion of Mr. and Mrs. Vickery of what they understood the transaction to be." However, a party who signs a contract cannot seek to avoid it on the basis that he did not read it or he supposed that it was different in its terms. *Farm Bureau Ins Co v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999); *Stopczynski v Ford*, 200 Mich App 190, 193; 503 NW2d 912 (1993).

The Vickerys also argue that the court should have considered parol evidence on the threshold question of whether the four documents at issue comprised the parties' entire agreement. A prerequisite to applying the parol evidence rule is a determination that the parties intended the writing to be a complete expression of their agreement, *In re Skotzke Estate*, 216 Mich App 247, 251-252; 548 NW2d 695 (1996), and parol evidence is admissible as it bears on that threshold question. *UAW-GM, supra* at 492-493. However, the Vickerys' assertion that the four documents at issue here do not represent a complete integration of the parties' agreement is contrary to statements made by them at trial and in their brief on appeal.

The trial court found that "there is absolutely no dispute that [the four documents] are the writings which Mr. Clous and Mr. and Mrs. Vickery regard as the contract of the parties." In their brief on appeal, the Vickerys confirm that those four documents embodied their agreement with Clous, even

citing to testimony given during trial. They argue, however, that because the four documents did not include their alleged oral agreement that Clous would charge only $20,000 on the first $325,375 in costs billed through him, the contract was not a complete integration, i.e., that part of their agreement was not reduced to writing. However, as discussed above, the contract unambiguously addressed the manner of billing to be employed during the project. This is not a case where an essential element of the agreement was not reduced to writing. See *UAW, supra* at 493. The manner of billing was addressed by the contract, and parol evidence "is not admissible to vary the terms of a contract which is clear and unambiguous." *Id.* at 492. Because the parties' agreement, as embodied by the four documents identified by the parties, is not inconsistent on its face and fairly admits of but one interpretation, we conclude that the trial court did not err in finding the agreement unambiguous and refusing to consider parol evidence in interpreting that contract.

The Vickerys' third argument is that the trial court erred in finding that they failed to make reasonable attempts to mitigate their damages. We disagree. Reasonableness of mitigation is a question of fact. *Bak v Citizens Ins Co,* 199 Mich App 730, 739; 503 NW2d 94 (1993). This Court reviews the trial court's findings of fact for clear error. *Andrews, supra.*

In contract actions, the injured party must make every reasonable effort to minimize its damages. *Gorman v Soble,* 120 Mich App 831, 846; 328 NW2d 119 (1982). The burden is on the defendant to show that a plaintiff has not employed such efforts. *Id.* Here, Clous testified that he often returns to the homes of his customers to correct defects that they bring to his attention after construction is completed, and, in fact, that such action is customary in the industry up to a year after completion of construction. Both the Vickerys' expert and Clous's expert testified similarly. As the Vickerys themselves acknowledge, they took possession of their home on or about December 22, 1995. They first notified Clous of the alleged defects in construction at about the same time they filed their amended counterclaim on December 17, 1996, nearly a year later. At that point, Candice Vickery testified, they were involved in litigation with Clous and would not permit Clous to return to their home to correct any defects. Although the Vickerys argue that they did nothing to make any of the alleged defects any worse, they also did not allow Clous to attempt to remedy any of them before claiming breach and money damages.

Moreover, the Vickerys' own expert testified that although he thought many of the alleged defects should have been discovered and corrected by Clous before he left the job, all of the alleged defects were the sort that could have been corrected by Clous had they been brought to his attention after completion of the project. Although the Vickerys contend that they were not obligated to let Clous correct any of the defects before hiring someone else to fix them and claiming damages, the law requires that a party claiming damages resulting from an alleged breach must make every *reasonable effort* to minimize those damages. *Gorman, supra.* Given that the Vickerys did not even allow Clous *to attempt* to cure any of the alleged defects, we conclude that the trial court did not clearly err in finding that the Vickerys did not make reasonable efforts to mitigate their damages.

The Vickerys' fourth argument on appeal is that the trial court abused its discretion in denying the Vickerys' request for attorney fees for their defense of Clous's invalid and vexatious lien claim. We disagree. An award of attorney fees under MCL 570.1118(2); MSA 26.316(118)(2), is within the

discretion of the trial court. *Vugterveen System, Inc v Olde Millpond Corp*, 454 Mich 119, 133; 560 NW2d 43 (1997). A trial court's finding that a claim is frivolous or vexatious is reviewed for clear error. *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996).

The Construction Lien Act contains an attorney-fee provision which states, in pertinent part, as follows:

> The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious. [MCL 570.1118(2); MSA 26.316(118)(2).]

Thus, "[a] court has discretion to award attorney fees to a prevailing lien claimant, but may only award attorney fees to a prevailing defendant if the suit was vexatious." *Vugterveen, supra*.

We conclude that the trial court did not clearly err in finding that Clous's admittedly invalid lien claim was not vexatious. Clous testified that he never intended to sign full unconditional waivers, thereby precluding his ability to recover money owed him through the Construction Lien Act. Indeed, it would make no sense for someone to continue to sign such waivers at various points in the construction project if he understood that he had completely waived his lien rights by signing the first one. Moreover, given that Clous prevailed on his contract claim, his money claim against the Vickerys clearly was not without arguable legal merit. Accordingly, we conclude that the trial court did not abuse its discretion in denying the Vickerys attorney fees.

The Vickerys' fifth argument on appeal is that the trial court erred in failing to award damages on their slander of title claim. We disagree. Whether the Vickerys proved the elements of slander of title involves questions of fact. Again, we review the trial court's rulings on questions of fact for clear error. *Andrews, supra.*

The Vickerys brought a common law slander of title action against Clous, as distinguished from a statutory claim made pursuant to MCL 565.108; MSA 26.1278. See *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). To establish slander of title at common law, a plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages. *Id.* Malice may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury. *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990).

Again, the trial court found that Clous filed his lien claim in the belief that he had signed partial conditional waivers, as opposed to full unconditional waivers of lien. The court concluded that while his mistake prevented him from being able to assert a valid lien claim, it was not evidence of malice, i.e., that he knowingly filed an invalid claim with the intention of causing the Vickerys injury. The court reiterated its finding under Clous's contract claim that he had a valid money claim against the Vickerys, and concluded that Clous's filing of the lien claim was an attempt to use a remedy provided by statute to

enforce that claim against the Vickerys, not to cause them injury. The record amply supports the court's finding; thus, we conclude that it was not clearly erroneous.

The Vickerys' next argument on appeal is that the trial court abused its discretion in refusing to admit an exhibit they tendered because the court erroneously concluded that the exhibit was a settlement document. However, the Vickerys waived this issue by withdrawing their request to admit the exhibit at trial. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Accordingly, we will not consider this issue.

The Vickerys' seventh argument on appeal is that the trial court erred in finding that Clous did not breach the parties' contract. We disagree. Again, we review the trial court's findings of fact for clear error. *Andrews, supra*.

The Vickerys assert that because the testimony that there were defects in the house was "uncontroverted," the court clearly erred in finding that they were not entitled to recover for those defects. While the Vickerys are correct that testimony regarding a number of the defects they alleged was uncontroverted, it does not necessarily follow that Clous breached the parties' contract and that the Vickerys were damaged. As the trial court noted, the contract called for the construction of the home to be completed "in a substantial workmanlike manner." Although the trial court acknowledged that the flaws identified by the Vickerys do exist to one degree or another, it also found that given the scope of the project and the overall performance, the enumerated defects do not constitute a deviation from the contractual requirement that the work be done in a substantial workmanlike manner. Our review shows that the court's findings are amply supported by the record. Accordingly, we conclude that the trial court did not clearly err in finding that the Vickerys were not entitled to recovery on their breach of contract claim.

Finally, the Vickerys identified an eighth issue on appeal in their questions presented: Whether the trial court improperly failed to grant remittitur for a claimed offset of $4,000. However, by failing to brief the merits of this issue, the Vickerys have abandoned it. *Great Lakes Div of National Steel Corp v City of Ecorse*, 227 Mich App 379, 407-408; 576 NW2d 667 (1998).

Affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Jeffrey G. Collins

[1] NBD holds the mortgage on the property in question.

[2] MCL 570.1115; MSA 26.316(115) provides, in pertinent part, as follows:

> (2) A lien claimant who receives *full payment* for his or her contract shall provide to the owner, lessee, or designee *a full unconditional waiver of lien.*

(3) A lien claimant who receives *partial payment* for his or her contract shall provide to the owner, lessee, or designee *a partial unconditional waiver of the lien* for the amount which the lien claimant has received, if the owner, lessee, or designee requests the partial unconditional waiver. [Emphasis added.]

[3] Testimony at trial established that preparation of an "estimate" is a prerequisite to obtaining construction financing. The figures included there are considered "allowances," and, as construction proceeds, may change according to the desires of the customer(s).