STATE OF MICHIGAN

COURT OF APPEALS

CP LIMITED PARTNERSHIP, a/k/a CP PROPERTIES LIMITED PARTNERSHIP, Plaintiff/Crossdefendant-Appellant/Cross-Appellee, v CHESTNUT CREEK FARM, INC., d/b/a CHESTEN COMPANY, Defendant/Crossplaintiff-Appellee/Cross-Appellant.	UNPUBLISHED May 13, 2004 No. 246049 Oakland Circuit Court LC No. 01-035238-NZ

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting partial summary disposition in its favor,[1] which required it to use monies awarded from escrow for construction of a road. Defendant cross-appeals the trial court's order to the extent it permits plaintiff to retain any surplus monies remaining from the escrow funds following the expenditures for road construction. We affirm in part, reverse in part and remand.

Plaintiff and defendant first entered into an agreement for conveyance of land in 1995, when defendant agreed to sell plaintiff a portion of a tract of land defendant owned in Davison Township that was developed for use as a mobile home park and other residential purposes. As part of this agreement, plaintiff and defendant entered into a land contract and development agreement for the remainder of the mobile home park site. Access to the mobile home park was by a private road ("Chestnut Creek Boulevard") that also served the property retained by defendant. Subsequent to the 1995 agreement between plaintiff and defendant, but prior to the sale that comprises the subject of this appeal, defendant sold part of the land retained to a third party. A condition of the sale of land to the third party involved an obligation by defendant to

[1] We note that the parties consented to the filing of this order and that it is a final order because it dismissed all remaining claims with prejudice pending the outcome on appeal.

improve Chestnut Creek Boulevard to the standards established and delineated by the Genesee County Road Commission for dedication as a public road.[2]

On July 24, 1998, plaintiff and defendant entered into a purchase agreement to convey the mobile home park. Plaintiff paid $1,800,000 to defendant at the closing, and according to the purchase agreement another $300,000 in deferred payments was to be made "pursuant to Section 2.2 and 2.3" of the agreement. Under section 2.3, $200,000 was to be paid to defendant by plaintiff as vacant "pads" or lots within the mobile home park were leased. And, pursuant to section 2.2, the remaining $100,000 was to be placed into an escrow account for use in payment of expenses incurred for improvements needed to bring the Chestnut Creek Boulevard roadway to the standard required by the Genesee County Road Commission for dedication as a public road. It is the distribution of these funds that comprises the basis for this appeal. The agreement between the parties is comprised of three documents: (a) a purchase agreement, (b) a promissory note, and (c) an escrow agreement; all executed contemporaneously on July 24, 1998.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion for summary disposition under this section of the court rule, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the non-moving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Contract interpretation involves issues of law that are also subject to de novo review by this Court. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

The parties do not dispute the material facts, but rather, dispute how the language of the contract applies. This Court in *Wausau Underwriters Ins Co v Ajax Paving Indus*, 256 Mich App 646; 671 NW2d 539 (2003), provided the following with regard to contract interpretation:

> A long-established rule of contract interpretation is that the intent of the parties is ascertained and enforced according to the plain language of the contract. *Zurich Ins Co v CCR and Co (On Rehearing)*, 226 Mich App 599, 603-604; 576 NW2d 392 (1997). Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), quoting *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947)). A contract that is clear and unambiguous is construed as a matter of

[2] The benefit of having Chestnut Creek Boulevard dedicated as a public road is the transfer of obligation and responsibility for all expenses incurred to maintain the road to Genesee County.

law. *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

"A contract is ambiguous if its provisions may reasonably be understood in different ways." *Universal Underwriters Ins Co v Kneeland,* 464 Mich 491, 496; 628 NW2d 491 (2001). That the parties dispute the meaning of a contract does not, in itself, establish an ambiguity. *Gortney v Norfolk & W R Co,* 216 Mich App 535, 540; 549 NW2d 612 (1996). If a contract is ambiguous, this Court may construe the contract in order to determine the parties' intent. *Old Kent Bank v Sobczak,* 243 Mich App 57, 63; 620 NW2d 663 (2000). "However, if a contract, even if inartfully worded or clumsily arranged contract, fairly admits of but one interpretation," the contract is not ambiguous. *Michigan Township Participating Plan v Pavolich,* 232 Mich App 378, 382; 591 NW2d 325 (1998). When a document's language is clear and unambiguous interpretation is limited to the actual words used. *Universal Underwriters Ins Co, supra* at 496. "The judiciary may not rewrite contracts based on discerned 'reasonable expectations' of the parties because to do so 'is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.'" *Burkhardt v Bailey*, __ Mich App __; __ NW2d __ (Docket No. 243354, issued February 19, 2004), slip op p 29, quoting *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

We find that the plain language of the written contract is clear and unambiguous in providing that once the road improvement project was not completed within the specified time period, the escrow agreement was to be terminated with the funds delivered to plaintiff, buyer, who was not required to complete the road improvement project. See *Wausau Underwriters Ins Co, supra* at 650.

The purchase agreement provides, in material part:

> 13(h) This Agreement and the exhibits hereto contain all of the representations and statements by each party to the other and express the entire understanding between the parties with respect to the transactions contemplated hereby. All prior agreements (including the Purchase Agreement for Phase I) communications concerning the subject matter hereof are merged in and replace by this Agreement.

The language in the purchase agreement relied upon by plaintiff in support of its contention that the escrowed monies should be remitted to plaintiff, without condition or restriction on use, section 2.2, provides, in relevant part:

> Seller is responsible for payment of the Project expenses from and up to the Escrowed Amount. If amounts in excess of the Escrowed Amount are necessary to complete the Project; Seller or Chestnut Creek Development may pay such additional amounts, as provided in the Road Agreement. If there is a surplus of funds held by Escrow Agent after payment in full of the work to complete the Project, Escrow Agent shall deliver such surplus to Buyer and such surplus shall be added to the Leased Pad Payment pursuant to Section 2.3.

> Seller will commence the Project with reasonable diligence and will continue the Project through completion with reasonable diligence. Seller will not be in default under this Section 2.2 for failing to commence or complete the Project if such failure is caused by an Act of God, strike, shortage, or force majeure. *If the Project is not completed on or before eighteen (18) months from the Closing Date, the Escrow Agreement shall be terminated and all remaining funds delivered to Buyer who may, but shall not be required to, complete the project, and Buyer may deduct all amounts incurred from the Leased Pad Payment*. [Emphasis added.]

The final sentence of section 2.2 of the purchase agreement clearly provides for a relinquishment of escrow funds to plaintiff upon defendant's failure to complete the road improvement project within eighteen months of the closing date. Defendant does not contend that its failure to initiate or complete the road improvement project was due to "an Act of God, strike, shortage, or force majeure." It is undisputed that defendant did not complete or even initiate the road improvement project within the specified time period. The last sentence of section 2.2 provides that defendant's failure to complete the road project on time "shall" terminate the escrow agreement. The term "'shall' denotes a mandatory rather than a discretionary course of action." *Liggett Restaurant Group, Inc v City of Pontiac and City of Pontiac Stadium Building Authority*, 260 Mich App 127, 138; 676 NW2d 633 (2003). In addition, the provision only provides that on termination the remaining funds should be delivered to plaintiff, and plaintiff "*may*, but shall not be required to" complete the road improvement project. Use of the word "may" indicates a discretionary act. See *Port Huron v Amoco Oil Co*, 229 Mich App 616, 631; 583 NW2d 215 (1998). As such, we find, upon a review de novo, that defendant's failure to comply with the time limitation provided in the last sentence of section 2.2 resulted in a termination of the escrow agreement with the funds to be delivered to plaintiff and that plaintiff was not required to complete the road improvement project with these funds.

Defendant contends a determination that plaintiff is entitled to retain the escrow funds without completing the road improvement project is in conflict with section 2.3 of the purchase agreement, which states, in relevant part:

> Seller shall be entitled to a Leased Pad Payment which is equal to the sum of (a) Two Hundred Thousand ($200,000) Dollars plus (b) any surplus delivered to Buyer pursuant to the second to the last sentence of Section 2.2[3] or minus (c) any funds in excess of $100,000 paid by Buyer to complete the Improvements pursuant to the last sentence of Section 2.2 . . . .

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[3] We note that this appears to be a mistake in draftsmanship as the second to last sentence of section 2.2 provides that "Seller will not be in default under this Section 2.2 for failing to commence or complete the Project if such failure is caused by an Act of God, strike, shortage, or force majeure." This provision most likely refers to the last sentence of the second paragraph of section 2.2 stating "If there is a surplus of funds held by Escrow Agent after payment in full of the work to complete the Project, Escrow Agent shall deliver such surplus to Buyer and such surplus shall be added to the Leased Pad Payment pursuant to Section 2.3."

Defendant argues that section 2.3 of the purchase agreement contemplates plaintiff completing the project and paying defendant funds or by subtracting funds if payments beyond the $100,000 are made. We do not agree that section 2.3 of the purchase agreement conflicts with section 2.2 because this provision does not make ambiguous section 2.2 as the sections can be read consistently. Section 2.3 of the purchase agreement can be read consistently with section 2.2 because under section 2.3 if plaintiff did decide to complete the road improvement project, which it did not, it could subtract from the $200,000 lease pad payment provision. But, this does not change nor conflict with section 2.2 of the purchase agreement, which makes this decision to complete the road improvement project within plaintiff's discretion. Plaintiff decided not to complete the road project, which it was entitled to do under section 2.2 of the purchase agreement, and thus, could not subtract funds from the $200,000 lease pad payments because funds were not used to complete the road improvement project.

Defendant also contends that the recitals to the escrow agreement and the provisions of the escrow agreement support that the parties' intent for the purchase agreement was that the $100,000 was for payment to complete the road improvement project. The escrow agreement provides, in relevant part:

> *6. Authorization to Complete.* In the event the Improvements are not completed by the Completion Date, Seller hereby irrevocably authorizes and empowers Buyer to complete the Improvements, in which case the Escrow Fund, and all interest earned thereon, shall be immediately delivered to Buyer who shall complete the work and disburse any proceeds from the Escrow Fund remaining after Buyer completes the work to Seller pursuant to the Purchase Agreement.

It is recognized, as a general rule of contract construction, "that where one writing refers to another, the two writings are to be construed together." *Foremost Insurance Co v Allstate Insurance Co,* 439 Mich 378, 389 n 27; 486 NW2d 600 (1992), citing *Whittlesey v Herbrand Co,* 217 Mich 625, 627-628; 187 NW 279 (1922). But, as we noted, according to section 2.2 of the purchase agreement defendant's failure to complete the road improvement project within the specified time period served to terminate the escrow agreement. The plain unambiguous language of the purchase agreement provides that the escrow agreement was to terminate. Accordingly, the mere fact that the escrow agreement and the purchase agreement were executed contemporaneously, and the escrow agreement refers to plaintiff completing the road improvement project, does not create an ambiguity in the plain language of the purchase agreement which provides that the escrow agreement was to be terminated upon a failure by defendant to complete the project within a certain period of time. Further, as noted above, section 13(h) of the purchase agreement expressed "the entire understanding of the parties with respect to the transactions contemplated hereby." Because the express and plain language of the contract provided that the escrow agreement would terminate upon defendant's failure to complete the road improvement project within the specified period of time and defendant did not even initiate the project within this time period, we need not address the application of the

escrow agreement to the purchase agreement as the escrow agreement was terminated pursuant to section 2.2 of the purchase agreement.[4]

We further note that the promissory note does not affect our plain language interpretation of the purchase agreement because payment pursuant to the promissory note is contingent upon dedication and acceptance of the new road. Defendant, admittedly, never even initiated construction on the road improvement project. In addition, the promissory note provides that the $100,000 should be delivered pursuant to the escrow agreement. However, pursuant to section 2.2 of the purchase agreement the escrow agreement terminated with the funds to be properly distributed to plaintiff.

We find, upon a review de novo, that the trial court properly determined that the escrow funds were to go to plaintiff, but improperly determined that plaintiff was required to use the funds to complete the road project.

On cross-appeal, defendant contends the trial court erred in awarding plaintiff any funds remaining in escrow following payment of expenses incurred for the road improvement project. As determined, *supra*, plaintiff was not required to complete the road improvement project. We also find, upon a review de novo, that plaintiff may retain the funds that were held in escrow without payment to defendant or further construction of the road. The clear and unambiguous language of the purchase agreement provides when the defendant failed to perform within the proper time period "the Escrow Agreement *shall be terminated* and *all remaining funds delivered to buyer* [plaintiff] who may, but shall not be required to, complete the Project." (Emphasis added.) The language of the agreement is clear and unambiguous. As such, the court was required to apply the plain language of the contract. *Old Kent Bank*, *supra* at 63.

Lastly, we note that defendant's contention that allowing plaintiff to keep the escrow funds would result in an improper forfeiture or an illegal penalty clause is without merit. First, the provision appears to be an incentive provision rather than a forfeiture provision[5] or liquidated damages clause as it provided defendant an incentive for completing the road project within the specified period of time. Second, even if the provision of the purchase agreement terminating the escrow agreement with funds going to plaintiff is a liquidated damages clause, which is not our finding,[6] it is not an illegal penalty. Whether such a provision is invalid as a penalty is a

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[4] We note that the escrow agreement provides the duties and liabilities imposed on the escrow agent; while the purchase agreement provided the duties and liabilities imposed on the parties to the agreement. See *Smith v First Nat'l Bank & Trust Co*, 177 Mich App 264, 268; 440 NW2d 915 (1989); *Starboard Tack Corp v Meister*, 103 Mich App 557, 562; 303 NW2d 38 (1981).

[5] Even if the provision was a forfeiture provision, which is not our finding, it was not improper because it was in clear and unequivocal language, and not created by implication. See *Smith v Independent Order of Foresters*, 245 Mich 128; 222 NW 166 (1928); *Leighton v Leighton*, 10 Mich App 424, 433-434; 159 NW2d 750 (1968).

[6] It appears that the clause is an incentive clause, but because plaintiff refers to it as a liquidated damages clause in its complaint (although plaintiff later claims it was not a liquidated damages clause) we will address it as such.

question of law. *UAW-GM Human Resource Center, supra* at 508. In light of the fact that there are costs associated with maintaining the road that would have been alleviated by construction of the road and the fact that it is unknown how much it would cost, to construct the road to meet standards for approval by the Genesee County Road Commission for dedication and how much it will cost to maintain the road until this status is obtained, the provision is '"reasonable with relation to the possible injury suffered' and not 'unconscionable or excessive.'" *Id*. quoting *Moore v St Clair Co*, 120 Mich App 335, 339; 328 NW2d 47 (1982).

We affirm the award of escrow monies to plaintiff, but reverse the trial court with regard to the restriction that funds be used for road construction and remand for entry of summary disposition in favor of plaintiff consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot