

STATE OF MICHIGAN
COURT OF APPEALS

JOHN MICHAEL SALPIETRA and MARY
SALPIETRA,

UNPUBLISHED
November 16, 2004

Plaintiffs-Appellants,

v

KINDER PROPERTIES and B & V
CONSTRUCTION,

No. 248153
Oakland Circuit Court
LC No. 02-040563-CZ

Defendants-Appellees.

Before: Cavanagh, P.J., and Kelly and H Hood*, JJ.

PER CURIAM.

Plaintiffs, John Michael Salpietra and Mary Salpietra, appeal as of right from the trial court order granting defendant Kinder Properties (Kinder) summary disposition pursuant to MCR 2.116(C)(10) and defendant B & V Construction (B & V) summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm the order with regard to B & V and reverse the order with regard to Kinder.

Plaintiffs purchased a residential lot of an unimproved building site in a condominium project in Oakland Township. Kinder was the project developer, and B & V was the subcontractor who did the land balancing of the lot. Plaintiffs' builder discovered rotting vegetation and seeping water in the soil, indicating that the lot had been improperly graded and filled. Plaintiffs incurred expenses of \$24,175 to correct the fill problem before construction of their home could be accomplished. Plaintiffs then discovered that erosion controls had not been properly installed or maintained on the lot, thereby allowing water to damage the basement walls and housing structure. Plaintiffs spent an additional \$40,000 to construct stone fences to correct this washout problem. Plaintiffs filed a complaint against Kinder, in part alleging that Kinder breached its purchase agreement by failing to provide an unimproved building site suitable and ready for construction of a residence. Plaintiffs also filed a breach of contract claim against B & V on the theory that plaintiffs were third-party beneficiaries of the earthwork contract between defendants.

Plaintiffs argue that the trial court erroneously granted Kinder summary disposition, concluding that the purchase agreement was an unambiguous contract that imposed no duty on

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

Kinder to provide unit soils suitable for construction. We review questions of contract ambiguity and the trial court's decision to grant summary disposition de novo. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Rose, supra* at 461. Summary disposition is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

"A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). Where two provisions in the same contract "irreconcilably conflict with each other," the contract language is ambiguous. *Klapp, supra* at 467. Courts may not ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity. *Id.* Rather, contracts are to be "construed so as to give effect to every word or phrase as far as practicable." *Id.* (internal citations omitted).

The language of the purchase agreement is ambiguous because two provisions irreconcilably conflict with each other. The purchase agreement provides, in relevant part, as follows:

WHEREAS, each Condominium Unit will consist of *an unimproved building site suitable and ready for construction of a residence thereon* in accordance with the ordinances of Oakland Township . . .

* * *

Purchaser shall have the right within the withdrawal period set forth in paragraph 6 of the General Provisions, to conduct, at his own expense, such soil tests on the Unit being purchased as he deems appropriate to satisfy himself as to the suitability of the Unit soils for construction, and Developer makes no representation or warranty with respect thereto. Upon conduct of any such test, Purchaser shall restore the Unit to its original condition. [Emphasis added.]

Kinder maintains that the contract is not ambiguous because the more specific limitation of warranties and representations regarding the suitability of the unit soils for construction modifies the more general provision providing for a building site suitable and ready for a construction. Kinder cites no legal authority to support the proposition that, where a specific provision of a contract modifies a more general provision, the contract is not patently ambiguous. As stated above, the test for determining a contract's ambiguity is not whether one of two conflicting provisions is more specific than the other, but whether the two provisions "irreconcilably conflict." Moreover, concluding that the more specific provision of the purchase agreement supersedes the general provision ignores the general language of the contract in order to avoid a finding of ambiguity, which we are not entitled to do. *Klapp, supra* at 467.

If a contract is subject to two interpretations, factual development is necessary to determine the intent of the parties, and summary disposition is inappropriate. *Klapp, supra* at

469; *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). The “Whereas” paragraph of the purchase agreement states that Kinder would provide a lot “suitable and ready for construction,” but the agreement subsequently purports to disclaim any liability on Kinder’s part with regard to “the suitability of the unit soils for construction.” Because the unit soils are a part of the unimproved building site that Kinder agreed to provide plaintiffs, the purchase agreement’s assurance that plaintiffs will receive an unimproved building site “suitable and ready for construction” and subsequent disclaimer of liability regarding the “suitability of the unit soils for construction” create a patent ambiguity for the jury to resolve. Accordingly, we conclude that the trial court erred in granting summary disposition on plaintiffs’ breach of contract claim against Kinder.

Plaintiffs further argue that the trial court erred in granting summary disposition on their breach of contract claim against Kinder because Kinder breached the contract when it failed to ensure that suitable erosion controls were installed and maintained. “If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties.” *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). The provision for a building site suitable and ready for construction of a residence and the language limiting the developer’s representations and the subsequent disclaimer regarding the suitability of “soil conditions” are not defined in the contract. Therefore, whether the contract term “soil condition” includes soil erosion or whether soil erosion is not a “soil condition” but a factor that would impair the suitability of the building site for construction of a residence is a question of fact for the jury. Further, because the contract’s construction presents a question of fact for the jury, the trial court’s decision to grant Kinder summary disposition regarding plaintiffs’ breach of contract claim was erroneous. *Klapp, supra* at 469.

Plaintiffs also argue that the trial court erred in granting B & V summary disposition regarding their breach of contract claim. We review de novo a trial court’s ruling on a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Rose, supra* at 461. When considering a motion pursuant to MCR 2.116(C)(8), all well-pleaded factual allegations in support of the claim are accepted as true and construed in the light most favorable to the nonmoving party. *Adair, supra* at 119. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

MCL 600.1405, which governs the rights of third-party beneficiaries in contracts, provides in relevant part as follows:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

This section “does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation ‘directly’ to or for the person.” *Koenig v South Haven*, 460 Mich 667,

676-677; 597 NW2d 99 (1999). A third-party beneficiary may be a class of people provided that the class is “sufficiently described or designated.” *Id.* at 680. Although plaintiffs describe the class of third-party beneficiaries as “residential lot purchasers,” that specific designation does not appear in defendants’ grading and fill contract.

Plaintiffs further argue that, because the written offer that constitutes the grading and fill contract is clearly a quote that lacks Kinder’s signature and other contract terms, parol evidence is necessary to fill in the missing gaps not set forth in the agreement. But, again, it is how the contracting parties designate and describe the class in the contract itself that creates third-party beneficiaries. A third-party beneficiary may be a member of a class, but:

the class *must* be sufficiently described. This follows ineluctably from subsection 1405(1)’s requirement that an obligation be undertaken *directly* for a person to confer third-party beneficiary status. As can be seen then, this of course means that the class must be something less than the entire universe, e.g., “the public”; otherwise, subsection 1405(2)(b) would rob subsection 1405(1) of any narrowing effect. The rationale would appear to be that a contracting party can only be held to have knowingly undertaken an obligation *directly* for the benefit of a class of persons if the class is *reasonably identified*. Further, in undertaking this analysis, an objective standard is to be used to determine *from the contract itself* whether the promisor undertook “to give or to do or to refrain from doing something directly to or for” the putative third-party beneficiary. [*Koenig, supra* at 680 (emphasis added and internal citations omitted).]

Because an objective look at the contract does not reveal any specific third-party beneficiary designation, we find plaintiffs’ argument unconvincing. Moreover, strangers to a contract may not avail themselves of the parol evidence rule to add or alter terms of a contract. *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989). Because the contract at issue did not confer third-party beneficiary status on plaintiffs, plaintiffs could not allege a breach of contract claim under a third-party beneficiary theory. For this reason, we conclude that the trial court properly granted B & V summary disposition pursuant to MCR 2.116(C)(8).

We affirm the court’s decision to grant B & V summary disposition regarding plaintiffs’ breach of contract claim, but reverse its decision to grant Kinder summary disposition regarding plaintiffs’ breach of contract claim.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood