STATE OF MICHIGAN

COURT OF APPEALS

THE BARRY A. BREAKEY, M.D., P.C., PENSION AND PROFIT SHARING PLAN,

Plaintiff-Appellant,

v

BARRY BATES, THOMAS A. DELL, OTTO GAGO, WILLIAM R. HARRIS, Individually and as Trustee, WILLIAM R. PARKER, CAROLYN W. PARKER, his wife, MARY ANN KELLY, CARL F. LAICH, Individually and as Trustee, PIYUSH C. PATEL and VISUMATI P. PATEL, his wife, SADASIVA REDDY and VIJAYA L. REDDY, his wife, and, C. BRADFORD LUNDY, III,

Defendant-Appellees.

UNPUBLISHED
December 13, 1996

No. 187353
Washtenaw County
LC No. 92-043789

Before: McDonald, P.J., and Murphy and J.D. Payant,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting summary disposition in favor of defendants in this action to enforce defendants' guaranty agreements. We affirm.

First, plaintiff argues that the guarantees were unconditional. We disagree. In construing a contract of guaranty, the intention of the parties governs. *Miller Industries, Inc v Cadillac State Bank*, 40 Mich App 52, 55; 198 NW2d 433 (1972). In determining what those intentions are, the court must consider the language of the contract, as well as the situations and circumstances of the parties at the time the contract was made. *Id.* A "condition precedent" is a fact or event that the parties intend to exist or take place before there is a right to performance of a contract. *Reed v Citizens Insurance Company of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993). A

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

condition precedent creates no rights or duties in and of itself; rather, it is a limiting or modifying factor that, if not fulfilled, precludes the right to enforce the contract or provision thereof. *Id.*

Defendants' guaranty agreements clearly indicated that they were "[p]ursuant to the terms of an Offering Memorandum dated July 15, 1986 ("Offering Memorandum"), which is made a part hereof by reference." The POM plainly expressed that the completion of the offering was conditioned on the fact that ten units were subscribed to and that ten notes were purchased. This condition could not have been waived by the managing general partner. Moreover, none of the parties dispute the fact that the managing general partner broke escrow before all of the notes had been purchased. We conclude that the trial court properly considered the contract language, as well as the parties' situation and circumstances, in construing that the obtainment of subscriptions for ten units and ten notes was a condition precedent to the validity of the guaranty agreements. *Miller Industries, supra,* 55. Until the offering was completed, defendants could not have become "limited partners," nor could the notes or guaranty agreements become effective.

Next, plaintiff maintains that the trial court erred in granting summary disposition in favor of defendants because plaintiff was entitled to rely on the doctrine of equitable estoppel. We disagree. Equitable estoppel arises where:

> "[A] party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of those facts." [*Hoye v Westerfield Ins Co,* 194 Mich App 696, 705; 487 NW2d 838 (1992) (quoting *Southeastern Oakland Co Incinerator Authority v Dep't of Natural Resources,* 176 Mich App 434, 442-443; 440 NW2d 649 (1989)).]

An essential element of estoppel is that a party *knowingly* permitted the opposite party to act to its own disadvantage. *Commercial Union Ins Co v Medical Protective Co,* 136 Mich App 412, 422; 356 NW2d 648 (1984), aff'd in part and remanded 426 Mich 109; (1986). "There can be no estoppel unless a party is misled to his prejudice *by the one against whom it is set up." Shean v US Fidelity & Gaur Co,* 263 Mich 535, 541; 248 NW2d 892 (1933) (emphasis added). Estoppel does not arise where one is not deceived or misled, but rather acts upon his own judgment with knowledge of the facts. *Id.* Moreover, there can be no estoppel where it appears that the facts were known to both parties or that both had the same means of ascertaining the truth. *Rix v O'Neil,* 366 Mich 35, 42; 113 NW2d 884 (1962); *Shean, supra,* 541.

Plaintiff has failed to present any facts that establish that defendants knew that the conditions for the completion of the offering had not been met. See *Commercial Union, supra,* 422. Notwithstanding this fact, plaintiff and defendants had the same means of ascertaining the truth and plaintiff was not "destitute of any convenient and available means of acquiring such knowledge." See *Rix, supra,* 42. Plaintiff admitted that it could have investigated and discovered whether all of the subscriptions had been obtained. Accordingly, we conclude that plaintiff may not invoke the doctrine of equitable estoppel. *Rix, supra,* 42; *Shean, supra,* 541.

Plaintiff further asserts that defendants' conduct enabled plaintiff's injury to occur and, therefore, defendants should bear the loss, despite the managing general partner's fraud. We disagree. We did not find the cases cited by plaintiff to be persuasive. Plaintiff has failed to present any facts which establish that defendants were deceived by the managing general partner's misrepresentations when defendants signed their guaranty agreements. Instead, defendants understood the nature and extent of their obligations and justifiably believed that their guaranty agreements would not be valid if the offering was not completed. Moreover, defendants executed their guaranties after plaintiff made its initial loan payment; thus, defendants' guaranty agreements could not have induced plaintiff into entering into its note subscription agreement. We conclude that the trial court properly held that plaintiff's remedy lies with the managing general partner, who was the one who perpetrated the fraud.

Upon a review of the lower court file, granting the benefit of any reasonable doubt to plaintiff, we conclude that no record can be developed that would leave open an issue upon which reasonable minds might differ. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Pickney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Accordingly, the trial court did not err in granting summary disposition in favor of defendants.

Finally, plaintiff argues that in the event that this Court finds that defendants' guaranty agreements were unconditional and valid, plaintiff's motion for summary disposition, pursuant to MCR 2.116(C)(4), (C)(9) and (C)(10), should be granted. Based on the above disposition of the case, we will not address this argument further.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant