STATE OF MICHIGAN

COURT OF APPEALS

B. B. BANUCKS, INC.,

Plaintiff-Appellant,

v

CITY OF MIDLAND,

Defendant-Appellee.

UNPUBLISHED
September 5, 2000

No. 215176
Midland Circuit Court
LC No. 96-005043-CZ

PRODO, INC.,

Plaintiff-Appellant,

v

CITY OF MIDLAND,

Defendant-Appellee.

No. 215177
Midland Circuit Court
LC No. 95-004857-CZ

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant partial summary disposition of plaintiffs' consolidated actions for reimbursement and credit for improvements to subdivision property. We affirm in part, reverse in part and remand to the trial court.

Plaintiffs are subdivision developers who sued pursuant to several city ordinances that they alleged gave a private cause of action for credits or reimbursement from the city for oversized

subdivision improvements. Plaintiffs also sued for credits for double fronting lots, claiming that the city ordinance required that they receive tax credits if forced to improve both an internal subdivision street and a public street as a condition of approval of the subdivision. The trial court ruled pursuant to MCR 2.116(C)(8) and (10) that § 20-4 of Midland's city ordinance provided no basis for plaintiffs' recovery, and that any claim for reimbursement that plaintiffs might have under chapter 23 of the ordinance was waived by plaintiffs' failure to reserve the right to seek reimbursement in plaintiffs' contracts with the city to complete the subdivisions. The court further denied plaintiffs' motion to amend their complaints to allege a takings cause of action.

Initially, plaintiffs argue that the trial court erred in ruling that Midland ordinance § 20-4 created no right for plaintiffs to seek reimbursements or credits for allegedly oversized public improvements. This Court reviews a circuit court's grant of summary disposition de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). The rules governing the construction of statutes apply with equal force to the interpretation of municipal ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). Accordingly, we review this issue de novo. *Michigan Municipal Liability & Property Pool v Muskegon Cty Bd of Cty Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999).

The trial court did not err in ruling that Midland ordinance § 20-4 provided no basis for recovery by a subdivision developer. This section appears in chapter 20, governing special assessments, and only addresses public improvements made in special assessment districts. Section 20-4 could not serve as a basis for plaintiffs' reimbursement because none of the improvements in the various subdivisions occurred in special assessment districts. Instead, these improvements were made in the construction of housing developments. Improvements made for subdivisions are governed by Chapter 23 of the code.

Next, plaintiffs argue that the trial court abused its discretion in denying their request to amend their pleadings to claim an unconstitutional taking of property. A trial court's decision on a motion to amend pleadings is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

The trial court did not abuse its discretion in denying Prodo's motion to amend its complaint with regard to Plymouth Estates Nos. 1 and 3, Plymouth Park Drive Estates No. 1, and Winchester Estates No. 4 because any takings claims related to these developments were barred by the statute of limitation. MCL 600.5813; MSA 27A.5813; see *Hart v Detroit*, 416 Mich 488; 331 NW2d 438 (1982). Further, while it is a close question, we conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for amendment of the complaint regarding the remaining subdivisions. A motion to amend pleadings should ordinarily be granted absent such factors as undue prejudice to the opposing party, undue delay, bad faith, or dilatory motive on the movant's part, or where the proposed amendment would be futile. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). This Court has recently stated that an oral motion for amendment is not sufficient under MCR 2.118, governing amendment of pleadings. *Lown v JJ Eaton Place*, 235 Mich App 721, 723; 598 NW2d 633 (1999). Here, plaintiffs filed neither a separate written motion for amendment nor a

proposed amended complaint. Under the reasoning of *Lown*, plaintiffs' failure to file a proposed amended complaint violated MCR 2.118, making the court's denial a reasonable exercise of discretion.

Finally, plaintiffs argue the trial court erred in determining that their agreements with the city entered into to ensure the installation of all required improvements within twenty-four months after the plat's approval were actually contracts. In addition, plaintiffs argue that even if the agreements are contracts, the trial court erred in concluding that the contracts barred plaintiffs' claims for reimbursements or credits. We disagree with plaintiffs that the agreements were not contracts. However, we remand this matter to the trial court for further consideration of the issue whether the contracts barred plaintiffs' claims for reimbursements or credits.

A finding that the parties intended a written instrument to be a complete expression of their agreement concerning the matters covered is a prerequisite to the application of the parol evidence rule. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 669; 591 NW2d 438 (1998). When a contract contains an integration clause it is conclusive; parol evidence is not admissible to show that the agreement is not integrated unless fraud is alleged or where an agreement is incomplete on its face and requires parol evidence to fill in the missing terms. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502; 579 NW2d 411 (1998), citing 3 Corbin, Contracts, § 578, p 411.

However, when there is no integration clause, parol evidence is admissible to the extent it bears on whether the parties intended a written instrument to be a complete expression of their agreement concerning the matters. *Farm Credit Services, supra* at 669. Here, none of the contracts submitted to the trial court included an integration clause, therefore parol evidence was not conclusively barred for the purposes of determining whether the parties intended the contract to be a complete expression of their agreement and what its terms meant. *Id.*; *UAW-GM, supra* at 502. The trial court was presented with no evidence that the contracts were a complete integration of the parties' agreements. Therefore, contrary to the trial court's ruling, parol evidence was admissible to explain the terms of the parties' agreements.

Additionally, plaintiffs cannot be said to have waived their rights in the contracts. The city ordinance provides that the city "shall pay for that part of required facility, the size of which exceeds that normally required to serve the subdivision under consideration, as determined by the city engineer." § 23-74. The use of the word "shall" indicates a mandatory, rather than a discretionary, provision. *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997). This mandatory language seems to create a non-waiveable duty to pay for excessive improvements. While no cases have discussed the waiver of rights under ordinances, our Supreme Court has held that the waiver of statutorily protected rights in a contract should not be inferred unless explicit and the waiver is clear and unmistakable. *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 460; 473 NW2d 249 (1991). The contracts contain no clear and unmistakable language of plaintiffs' waiver. Neither the ordinances nor the contracts specifically provide that a developer's claim for reimbursements or credits is waived unless reserved at the time the pacts are drafted.

The trial court erred in ruling that the contracts barred plaintiffs' claims for credits and reimbursements because they were not reserved. Questions of fact regarding integration of the agreement prohibited summary disposition.

Affirmed in part, reversed in part and remanded to the trial court. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff