# STATE OF MICHIGAN

# COURT OF APPEALS

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REST IN THE SON, INC.,

Plaintiff-Counterdefendant-Appellant,

V

PETER B. FLETCHER, STEPHEN F. FLETCHER, and NICHOLAS H. FLETCHER,

Defendants-Counterplaintiffs-Appellees.

UNPUBLISHED
March 8, 2002

No. 223790
Washtenaw Circuit Court
LC No. 96-007884

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Before: White, P.J., and Smolenski, and Owens, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's order granting defendants' motion for summary disposition in this property dispute between a real estate developer and property sellers. We reverse.

Plaintiff is a real estate developer. Defendants are brothers who jointly owned approximately 126 acres of vacant real property in Pittsfield Township, Washtenaw County. The property was subdivided into four parcels, denominated phases I, II, III and IV. This case involves phase II of the project.

The parties entered into several agreements relating to the property. The first agreement, on April 16, 1992, was for the purchase of phase I. The parties executed a rider to the April 16, 1992 agreement, which stated in pertinent part:

> 12. This offer supersedes all previous offers, and the deposit in the amount of $45,000.00 will be transferred to this offer to purchase, with SEMMCO, as BROKER, to abide the closing under the terms of this Agreement and the terms and conditions hereof pertaining to the disposition of the good faith deposit.
>
> 13. The total price will be $1,300,000.00 which averages out to be $4,000.00 per lot with a minimum of 325 buildable lots divided into four different phases.

A. Phase I buildable lots at $3,000 per lot, Phase II $4,333.33 per buildable lot . . .

14. PAYMENT OF PURCHASE PRICE. The purchase price shall be paid as follows:

A. At closing Purchaser shall pay to seller a full payment of phase 1 @ $3,000 per buildable lot. See attached prelimenary [sic] site plan

B. At closing, within 24 months, Seller and Purchaser shall execute an option agreements [sic] on an additional phases [sic]. For consideration of these options, see (B)IV:

(I) full payment phase one

(II) Interest Rate . . .

(III) Term: The options shall be fully exercised within seven (7) years, 84 months, after first closing.

(IV) Taxes: Real estate taxes shall be paid by the Seller on phases II, III, and IV . . .

(V) Releases: After platt [sic] being recorded and anytime in a 24 month time frame other phases, II, III, IV, will be released to purchaser upon payment of the entire phase. If purchaser is not in default under the options, Purchaser shall be entitled to release, upon the payment of the sum of entire phase per buildable lots released ("Release Price") the portion of the subject property which is to remain subject to these options must have access, by easement or other means reasonable [sic] satisfactory to Seller, to a publically [sic] dedicated right-of-way and to Utilities.

(vi) **Proposed Road improvement to Carpenter Road: Carpenter Road is the total responsibility of seller. Seller/broker will petition** County (or whoever is the governing body) to assess property owners on either side of the proposed Road."

The parties executed an "Option Agreement" on October 31, 1994, which incorporated by reference the April 16, 1992 agreement:

1. Pursuant to the terms of a Purchase Agreement dated April 16, 1992, Purchaser has completed the closing for Phase I for property located in Pittsfield Township, Washtenaw County, Michigan.

2. **Seller hereby grants to Purchaser the option to purchase the property as indicated as Phase II, Phase III and Phase IV** on the attached Rider upon the following terms and conditions:

a. Purchaser shall exercise each option in consecutive order.

b. The purchase price for each Phase shall be as follows:

| | |
|---|---|
| Phase II (113 units x $4,333.33) | $489,666.29 |
| Phase III (64 units x $4,333.33) | $277,333.12 |
| Phase IV (74 units x $4,333.33) | $320,666.42 |

c. **Purchase[r] may exercise its option for Phase II at any time within 24 months from the date of this agreement.** If Purchaser exercises its option for Phase II within 24 months, it shall then have an option for 24 months from the date it exercised its option for Phase II to exercise an option for Phase III. . . . Notwithstanding anything to the contrary herein, all options shall be fully exercised within seven (7) years from the date of this agreement.

3. Interest rate – in addition to the above purchase price, Purchaser shall pay Seller interest from the date hereof at the rate of seven percent (7%) per annum which shall be due at the time of closing on the exercise of the option. As each phase closes, the above interest will commence on the purchase price of the next phase.

4. At closing, Purchaser shall pay to Seller the above stated purchase price in cash or certified funds at which time it will receive a warranty deed for said phase being purchased. At closing any prorated real estate taxes or other prorated items will be adjusted and added or credited to the purchase price. In addition, Purchaser shall reimburse Seller for the engineering site fee for the applicable phase which was paid by Seller.

5. All closings for each phase shall be within 15 days after written notice of election by Purchaser.

* * *

7. In the event Purchaser fails to exercise any of its options when due, all remaining options shall be cancelled and shall no longer be in force or effect and any remaining deposits still being held by realtor shall be forfeited.

8. **This Option Agreement is given pursuant to the terms of the Purchase Agreement dated April 16, 1992 which to the extent applicable, is incorporated herein by reference.** [Emphasis added.]

On May 9, 1995, plaintiff, defendants, Pittsfield Charter Township, and the Washtenaw County Road Commission executed a "Road Improvement Agreement" that provided in pertinent part:

STATEMENT OF FACTS

Developer has been proposing a certain development in Pittsfield Charter Township to be known as Arbor Ridge Condominium, a Planned Unit Development single family residential community. As a part of that development, the Developer has proposed to make extensive road improvements, all of such improvements being deemed necessary by the Developer to the success of its project. The Township has given various approvals to the project, based on the assurances of the Developer and the Owner that they would in fact, construct the various improvements in the event that the Developer or any successor proceeds with the project. . . . There have been no representations regarding the availability of a special assessment district to finance construction of the road improvement except as to Morgan Road, but such an arrangement as to an extension of Cloverlane Drive is not prohibited by this agreement.

Arbor Ridge, as proposed, is a Planned Unit Development which may consist of various phases, the development of which is subject to several conditions included in the action of its Township Board on September 13, 1994 . . . .

**The Township is especially concerned that no development occur in the area identified in the submitted surveys as Phase 2 without the simultaneous construction of an extension of Cloverlane Drive from its current western-most point to Carpenter Road and dedication of same as a public street.**

AGREEMENT

1. The Township and the Road Commission agree that they will cooperate with the Developer and the Owner in causing the road improvements established and defined below to be constructed, and the Road Commission further agrees to cooperate with the Developer and/or Owner.

2. **If the Developer** or any successor **undertakes any development within the area identified as Phase 2** . . . **then the Developer or successor shall simultaneously construct Cloverlane Drive** from its current western-most point to the west line of the East ½ of the Southwest ¼, Section 13.

3. **If any party or entity undertakes any development within the area identified as Phase 2** . . . then **Owner shall take all actions necessary to accomplish the construction of Cloverlane Drive** from the West line of the East ½ of the Southwest ¼, Section 13 connecting it to Carpenter Road, **including but not limited to obtaining any necessary easements or rights-of-way** whether by a negotiated purchase agreement, petitioning for a public taking of the same by condemnation, if legally feasible, or petitioning for a special assessment district, but **the failure of one or more of these methods shall not relieve Owner from the obligation hereunder.**

* * *

> 8. Notwithstanding any other provision in this Agreement, the parties understand and agree that **the Developer is not obligated to begin construction of Cloverlane Drive until it has received final site plan approval of Phase II of the Condominium.** Moreover, **no Building Permit for any homes in Phase II of the Planned Unit Development will be issued prior to the completion and acceptance of the road improvements** or until suitable performance guarantees have been posted with the Township or Road Commission; provided that this provision shall not preclude Developer from obtaining grading, infrastructure and foundation permits while construction of the road is proceeding.
>
> 9. All parties acknowledge that this Agreement shall be null and void if it is the judgment of the Washtenaw County Circuit Court in a case to be filed entitled Rest in the Son, Inc. v Washtenaw County Board of Road Commissioners for the County of Washtenaw, Pittsfield Charter Township, and Peter B. Fletcher, File No. 950 0 CZ, that the agreement of Developer and Owner to construct the Improvements is not authorized by law. Upon entry of a judgment that this Agreement is valid, a copy of this Agreement and/or said Judgment may be recorded by Township in the office of the Register of Deeds for Washtenaw County, the cost of said recording to be reimbursed by Developer. . . . [Emphasis added.]

In a declaratory judgment entered by the Washtenaw Circuit Court on May 11, 1995 in the case discussed above, *Rest in the Son, Inc., v Board of County Road Commission for the County of Washtenaw*, No. 95-4547-CZ, the court ordered that the Road Improvement Agreement quoted *supra*, "is a proper and lawful contract" and that the parties thereto "are bound by the provisions therein."

By letter dated May 17, 1995, plaintiff's counsel wrote defendants' counsel, in pertinent part:

> I am writing this letter to follow up the action last week regarding the Road Improvement Agreement to avoid any delays and to attempt to resolve some outstanding issues.
>
> I have enclosed a copy of the Declaratory Judgment entered by Judge Morris on May 11, 1995, and a copy of an executed Road Improvement Agreement.
>
> **As indicated in the Road Improvement Agreement, we will not be able to undertake any development in Phase II unless there is simultaneous construction of the extension of Cloverlane Drive.** My client hopes to begin construction in the Spring of 1996. Accordingly, there is very little time to begin the process of engineering and obtaining permits. **This is especially true for the portion of Cloverlane Drive to be constructed or facilitated by your client since there may be wetlands involved. Time is of the essence. Please encourage your client to use his best efforts in this matter.**

* * *

> We would like to discuss these issues as soon as possible. Please let me know when we can meet to resolve these issues. [Emphasis added.]

By letter dated May 17, 1996, plaintiff's counsel again wrote defendants' counsel, stating in pertinent part:

> I am writing to follow-up our conversation regarding the **status of the development of Cloverlane Drive** and **its impact on the development of Arbor Ridge**.
>
> I have spoken with Bob Skrobola, Treasurer of Pittsfield Township. [sic] and expressed my client's concern regarding potential liability for having only one point of ingress and egress into Phase I of the development. **I have explained that the Township's refusal to issue any permits on Phase II until the construction of Cloverlane Drive is proceeding** could create significant liability for my client and Township. Mr. Skrobola promised to talk with a few of the Board Members and get back to me after he spoke with Mr. Etter.
>
> I had a conversation with John Etter as recently as May 14, 1996 regarding my conversation with Bob Skrobola and my reading of the Road Improvement Agreement. . . . **I believe it is in the Township's interest and within our legal rights to allow us to proceed with Phase II Development at this time.**
>
> * * *
>
> This letter is simply to demonstrate the **efforts to which my client has allowed me to go in order to resolve the roadblock created by the lack of the necessary easements or right of ways for Cloverlane Drive to cover the road.** My client is no longer willing to incur expenses and costs to resolve issues that are the responsibility of your client. **In light of the delay in obtaining the necessary easements or right of ways,** my client could suffer significant loss of profits as well as potential exposure due to the lack of ingress/egress into Phase I. **It is imperative that your client undertake every effort to obtain the necessary easement and right-of-way to complete Cloverlane Drive. In addition, it would be appropriate for us to extend the time periods within the agreement within which my client must exercise its options.** Without such an extension, **my client will have to take appropriate action in order to protect her interest.**
>
> I anticipate receiving a response from Mr. Etter within the next few days regarding the Township's willingness to accommodate our concerns. However, this should provide no comfort to your client. Any relief the Township is willing to provide **will be predicated upon your client progressing with the right-of-ways or easements. My client's position has been extremely clear**, including my letter of May 17, 1995, wherein we indicated that time is of the essence. A

> year has now passed and we are no further ahead. Please contact me so that we may discuss the issues raised in this letter and how to proceed with Pittsfield Township. [Emphasis added.]

By letter dated June 14, 1996, plaintiff's counsel wrote to defendants' counsel, stating in pertinent part:

> I am writing to provide the status of my client's efforts to continue in the development of Arbor Ridge and **to request some action on behalf of your client.**
>
> I have been informed by John Etter that he has met with various staff and elected officials of Pittsfield Township regarding **our desire to proceed with development in Phase II** in all the relevant issues. Mr. Etter has indicated that **the Township is remaining firm in its position that there shall be no activity in Phase II of the development until there have been "actions necessary to accomplish the construction of Cloverlane Drive" . . . "including but not limited to obtaining any necessary easements or rights-of-ways whether by negotiated purchase agreement, . . . ". Until the Township sees some positive steps towards obtaining the easement by your client, they are unwilling to allow us to proceed with any further building in your development.**
>
> * * *
>
> As I indicated in my letter of May 17, 1995 and, more recently, of my letter of May 17, 1996, my client will suffer substantial damages if it is not allowed to proceed with the construction of residences in Phase II **in the immediate future. . . .**
>
> **Time was of the essence in May of 1995. Time has now run out.** My client has only 8 lots left in Phase I of Arbor Ridge. **If there is no substantial action taken towards obtaining the easement within the next 60 days, my client will have no choice but to take appropriate measures in order to recover its damages.** [Emphasis added.]

Plaintiff filed its complaint on October 31, 1996, the last day that the option for Phase II could be exercised. Plaintiff's complaint alleged breach of contract concerning the Road Improvement Agreement; requested specific performance of the Road Improvement Agreement and rider; and injunctive relief in the form of a time extension of the option agreement in light of defendants' failure to initiate the road construction process.

The circuit court granted defendants summary disposition on the basis that no genuine issue of material fact existed with respect to the option agreement and the Road Improvement Agreement.[1] The circuit court noted that the option agreement "makes no mention of any

[1] Defendants' prior motion for summary disposition, brought under MCR 2.116(C)(8), had been (continued…)

pending agreements or road construction conditions." Although the court recognized that plaintiff had presented evidence that it began engineering work of Phase II and obtained a site plan for Phase II, it concluded that the parties' obligations under the Road Improvement Agreement did not arise unless the option was exercised, that plaintiff did not exercise the option, and that the option lapsed as a matter of law.

This Court reviews the circuit court's grant of summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; NW2d (1999). "[T]he moving party has the initial burden of supporting its position by . . . documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* at 454-455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

We review de novo issues of contract interpretation. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). The primary goal in contract interpretation is to determine and enforce the parties' intent. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). To determine the parties' intent, this Court will read the document as a whole and attempt to apply the plain language of the contract. *Id.* Where the contractual language is not ambiguous, its construction is a question of law for the court and it is error to submit the matter to the jury. *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 816; 286 NW2d 34 (1979). A contract is considered 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). 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).

Plaintiff contends that defendants' duty to provide adequate access to the phase II property, i.e., construction of Cloverlane Drive, was inextricably tied to the option agreement. Plaintiff asserts that defendants had a duty (1) to obtain rights-of-way for Cloverlane Drive from the phase II parcel to Carpenter Road, and (2) to construct the Cloverlane Drive extension. Plaintiff argues that defendants' duty arose out of the 1992 rider to purchase agreement, the option agreement, and the Road Improvement Agreement. The essence of plaintiff's argument is that it was prevented from exercising the option because defendants did not satisfy a required condition, that being the acquisition of rights of way and construction of the Cloverlane Drive extension; therefore, plaintiff was entitled to relief in order to allow it the opportunity to exercise the option. We agree.

The parties' option agreement incorporated by reference the April 16, 1992 purchase agreement to the extent applicable. The rider to the 1992 purchase agreement provided that the improvement to Carpenter Road would be "the total responsibility of seller," but did not state when that responsibility arose. The Road Improvement Agreement made clear defendants' responsibilities for obtaining the necessary rights of way and for construction of the Cloverlane

(…continued)

denied by a different circuit judge several years earlier.

Drive extension. Defendants' obligations under the Road Improvement Agreement were not conditioned on plaintiff's exercise of the option.

Plaintiff's counsel subsequently wrote defendants' counsel several times requesting that defendants acquire the necessary rights of way so that plaintiff could exercise its option and commence development of Phase II. Plaintiff clearly communicated its desire to exercise the option in letters to defendants' counsel. Plaintiff performed surveys, site designs and related engineering work on Parcel II, and won final approval for its Phase II site plan from Pittsfield Township before the October 31, 1996 expiration of the option. On October 31, 1996, plaintiff filed its two count complaint requesting damages from defendants' refusal to acquire the necessary rights of way and construct the Cloverlane Drive extension, and equitable relief.

We conclude under these circumstances that a question of fact remained whether defendants' failure to perform their contractual duty to obtain rights of way and construct the Cloverlane Drive extension constructively breached the parties' agreements, either barring defendants from arguing lack of timely exercise of the option or rendering meaningless plaintiff's exercise of the option.

Reversed.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Donald S. Owens