STATE OF MICHIGAN

COURT OF APPEALS

LOPICCOLO HOMES, INC.,

Plaintiff/Counterdefendant-Appellant,

v

GRAND/SAKWA OF BROOKLANE and GRAND/SAKWA PROPERTIES, INC., a/k/a GRAND OLD PROPERTY COMPANY, INC.,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees,

and

SALVATORE LOPICCOLO,

Third-Party Defendant.

UNPUBLISHED
December 23, 2003

No. 241386
Wayne Circuit Court
LC No. 99-933336-CZ

LOPICCOLO HOMES, INC.,

Plaintiff/Counterdefendant,

v

GRAND/SAKWA OF BROOKLANE and GRAND/SAKWA PROPERTIES, INC., a/k/a GRAND OLD PROPERTY COMPANY, INC.,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees,

and

SALVATORE LOPICCOLO,

Third-Party Defendant-Appellant.

No. 244800
Wayne Circuit Court
LC No. 99-933336-CZ

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

These consolidated appeals arise out of a contract dispute. In Docket No. 244800, third-party defendant Salvatore LoPiccolo (Salvatore) appeals by delayed leave granted the March 4, 2002, order granting partial summary disposition in favor of appellees, Grand/Sakwa of Brooklane (Brooklane) and Grand/Sakwa Properties, Inc. (Sakwa, Inc.). In Docket No. 241386, counterdefendant LoPiccolo Homes, Inc. (LoPiccolo, Inc.), appeals as of right from the trial court's April 26, 2002, final judgment, following a bench trial. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Brooklane owned property in Northville Township that was platted for residential development as the Brooklane Ridge Subdivision. The property was subject to deed restrictions recorded as "Declaration of Restrictions" with the Wayne County Register of Deeds. The declaration included various provisions for building use restrictions, architectural control, preserving woodlands and wetlands, establishing a subdivision association composed of lot owners, and enforcement. In 1998, Brooklane entered into an option agreement with LoPiccolo Inc. for fifty-nine lots in the Brooklane Ridge Subdivision. The agreement set forth various obligations owed by the parties both before and after the exercise of the option. As part of the option agreement, Salvatore LoPiccolo and Sakwa Inc. guaranteed certain obligations owed by LoPiccolo Inc. and Brooklane, respectively. LoPiccolo Inc. exercised the option to purchase the lots, but a number of disputes later arose between the parties with regard to their obligations under the Declaration of Restrictions and option agreement.

In June 1999, LoPiccolo Inc. filed this action in the Oakland Circuit Court against Brooklane and its guarantor, Sakwa Inc. (hereafter, collectively, "appellees"), and sought declaratory relief and damages for breach of contract. After venue was transferred to Wayne Circuit Court, appellees filed a countercomplaint against LoPiccolo Inc. and a third-party complaint against LoPiccolo Inc.'s guarantor, Salvatore LoPiccolo (hereafter, collectively, "appellants"). Appellees asked for injunctive relief, specific performance, and damages under the Declaration of Restrictions and option agreement.

The trial court resolved most of the parties' disputes by summary disposition and awarded $69,000 to appellees based on appellants' failure to comply with soil erosion requirements under the option agreement. The trial court also conducted a bench trial on appellees' claims for damages to curbs and gutters in the subdivision and for attorney fees and costs allegedly owed by appellants under the Declaration of Restrictions and option agreement. The trial court ruled that appellees failed to prove their claim for damages to curbs and gutters, but it awarded appellees $78,000 for attorney fees and costs.

II. Analysis

A. Summary Disposition

Appellants challenge the trial court's award of $69,000 to appellees on summary disposition. We review the trial court's grant of summary disposition de novo to determine if appellees were entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).[1]

We affirm the trial court's ruling that appellants are liable for corrective measures required because of appellants' failure to comply with the soil erosion requirements in the option agreement. The facts and arguments set forth by appellants in their response to the motion for summary disposition concern the soil erosion requirements in the option agreement.[2] The "Optionee's Responsibilities" provision in Article XVII(D) of the agreement states:[3]

> Optionee shall have the following responsibilities with respect to each and every lot which Optionee has acquired pursuant to this Option Agreement, which responsibilities shall survive closing and delivery of any instrument of conveyance:
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> * * *
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> D. The parties acknowledge that initially Optionor shall be required to comply at its expense with any soil erosion permits from the County. After Optionor has so complied with any such permits, and Optionee has entered into this Option, it shall then be Optionee's responsibility to protect and maintain all

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[1] A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra* at 120. The motion must specifically identify the issues as to which the movant believes that there is no genuine issue of material fact. MCR 2.116(G)(4); *Maiden, supra* at 120. The movant has the initial burden of supporting its position with affidavits, depositions, admissions, or other documentary proofs. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to set forth specific facts showing a genuine issue of material fact for trial. MCR 2.116(G)(4). *Quinto, supra* at 362.

[2] Contrary to appellants' claim on appeal, the trial court did not find a violation of the "Soils Clause" in the option agreement which addresses the suitability of soil for basement construction. Rather, the trial court's ruling was based on appellants' own breach of soil erosion obligations under the option agreement. Because appellants have not shown the relevancy of the "Soils Clause" to their liability for the soil erosion requirements, we decline to consider the "Soils Clause" further. We need not address an issue given only cursory treatment in an appellant's brief. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Nor do we consider appellants' cursory position that their duties under Article XVII never commenced because appellees were negligent and dilatory in exercising obligations under Article XI of the option agreement. See MCR 2.116(G)(4); see also *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110; 593 NW2d 595 (1999) (this Court will not review a case on a different theory from which it was tried).

[3] We note that appellants raised additional arguments in their motion for reconsideration, but do not address that motion on appeal. Hence, we will deem any issue concerning that motion abandoned on appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

> soil erosion installations made by Optionor on each lot subject to this Option. Optionee shall have a limited license to go upon the land to comply with the aforegoing. Optionee shall reimburse Optionor at Closing for the amount of soil erosion bonds paid for by Optionor and which are on deposit with Wayne County for the number of lots acquired by Optionee.

The other soil erosion provision, Article XI(B), Installation of Improvements, provides, in pertinent part:

> Optionee shall be responsible for finish grading of all lots following Closing as to the same. It shall further be the responsibility of Optionee to obtain all necessary permits and implement all necessary construction practices as required by the Township or other governmental body having jurisdiction thereof with respect to soil erosion and in compliance with Act 347, the Sedimentation and Erosion Control Act as to each lot subject to this Option. . . . Optionee shall indemnify, defend and save Optionor harmless from all claims, costs and damages which result from Optionee's violation of the aforegoing, including reimbursement to Optionor of all reasonable attorney fees incurred. . . .[4]

We reject appellants' claim that Article XII(D) establishes a condition precedent to their soil erosion obligations under Article XI(B). Because the option agreement is unambiguous, its meaning can be determined in a summary disposition proceeding under MCR 2.116(C)(10). *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991). Parties to a contract may render the contract divisible as to specific items of performance. *Lansing v Lansing Twp*, 356 Mich 641, 647-648; 97 NW2d 804 (1959). Whether a particular provision of a contract is a condition precedent to performance depends on whether there is a fact or event that the parties intend must take place before there is a right to performance. *Mikonczyk v Detroit Newspaper, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999).

Here, Article XVII(D), Optionee's Responsibilities, cannot be reasonably interpreted as establishing a condition precedent to Article XI(B), Installation of Improvements, because it does not state a fact or event that must occur before appellants have a duty to "obtain all necessary permits and implement all necessary construction practices as required by the Township or other

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[4] The cited act, 1972 PA 347, was repealed by 1995 PA 60, before the date of the option agreement, but is now contained in Part 91 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.9101 *et seq*. Under Part 91 of the NREPA, a "person shall not maintain or undertake a land use or earth change governed by this part or the rules or governed by an applicable local ordinance, except in accordance with this part and the rules or with the applicable local ordinance and *pursuant to a permit* approved by the appropriate county or local enforcing agency" (emphasis added). MCL 324.9112(1). Further, a "person who owns land on which an earth change has been made that may result in or contribute to soil erosion or sedimentation of the waters of the state shall implement and maintain soil erosion and sedimentation control measures that will effectively reduce soil erosion . . . ." MCL 324.9116.

governmental body having jurisdiction thereof with respect to soil erosion and in compliance with Act 347, the Sedimentation and Erosion Control Act . . . ." Rather, Article XI(B) is clearly intended to address appellants' responsibilities following closing, while Article XVII(D) establishes responsibilities triggered when the option agreement was entered.

Article XVII(D) is reasonably construed only as prohibiting appellees from charging appellants for the expense, with the exception of bond reimbursement, of their initial compliance with the soil erosion permit. Article XVII(D) unambiguously shifts the responsibility to protect and maintain appellees' soil erosion installations to appellants "[a]fter Optionor has so complied with any such permits, and Optionee has entered into this Option." The critical event for determining if appellants owed a duty of performance under Article XVII(D), therefore, is appellees' completion of a soil erosion installation pursuant to the permit. Regarding which party might be liable for expenses, the critical consideration under Article XVII(D) is whether expenses were incurred by appellees to fulfill initial compliance requirements under the soil erosion permit (appellees' responsibility), or the failure to protect and maintain a soil erosion installation (appellants' responsibility).

The material question, therefore, is not whether Article XVII(D) establishes a condition precedent to Article XI(B), but whether appellees were asking appellants to reimburse them for preexisting conditions relating to their initial compliance, contrary to Article XVII(D). Because the record reflects that appellees sought damages related to appellants' own soil erosion obligations under the option agreement, we hold that appellants failed to establish any genuine issue of material fact regarding their liability. Appellants did not support their proposition that they could avoid their soil erosion obligations based on an unfulfilled condition precedent to their performance.

Further, we hold that appellees submitted sufficient documentary evidence to support their claimed damages. Evidence established appellants' violation of the soil erosion requirements and appellees' unrebutted documentary evidence established the amount of costs incurred. MCR 2.116(G)(4) provides, in pertinent part, that, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Here, appellees filed an affidavit setting forth that the amount of expenses it incurred was $69,000 for appellants' failure to take corrective measures to prevent soil erosion. Appellants filed no affidavit or admissible evidence to counter this fact. Consequently, the trial court properly found no genuine issue of material fact existed as to this amount.

B. Attorney Fees

Appellants also challenge the trial court's award of attorney fees and costs. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." MCR 2.613(C); *Alan Custom Home, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 505 (2003).

In general, a "party claiming the right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and to avoid a directed verdict." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196; 555 NW2d 733 (1996). Contract provisions providing for attorney fees are construed

as containing this reasonableness standard to avoid violating public policy. *In re Estate of Howath*, 108 Mich App 8, 12; 310 NW2d 255 (1981). But as with other contractual provisions,

> in interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. [*Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).]

Here, the trial court correctly accepted appellants' stipulation of fact regarding the reasonableness of the hourly rates and hours claimed by appellees. *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000). The trial court also correctly took judicial notice of facts that were capable of accurate and ready determination from its own records. MRE 201; *In re Thurston*, 226 Mich App 205, 216 n 10; 574 NW2d 374 (1997), rev'd on other grounds 459 Mich 923 (1998). But the trial court erred by failing to consider that appellees did not prevail on all claims that they pursued or defended against in this action. Specifically, the trial court erred by not taking into account that appellants succeeded in recovering an award of $23,167.72, on their claim for advertising reimbursement, and that appellees failed to recover on their claim for damages to curbs and gutters.

Appellants did not stipulate that the full amount of attorney fees and costs requested by appellees were recoverable under the option agreement or Declaration of Restrictions. Therefore, without evidence that appellees prevailed on all claims and defenses, the trial court's determination that no additional proofs were needed on the issue of attorney fees was erroneous. Even if reasonable, appellees nonetheless had the burden of proving that their requested attorney fees and costs were recoverable under specific contractual provisions of the option agreement or Declaration of Restrictions.

Because the trial court erroneously determined that further proofs were not necessary, we vacate the judgment of $78,000, and remand for further proceedings to establish the amount of attorney fees and costs and whether they are recoverable under specific provisions of the option agreement or Declaration of Restrictions.

Affirmed in part, vacated in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter