STATE OF MICHIGAN

COURT OF APPEALS

EDWARD C. LEVY COMPANY d/b/a LIBERTY SAND & GRAVEL COMPANY,

Plaintiff-Appellant,

and

DETROIT AREA COUNCIL OF BOY SCOUTS OF AMERICA,

Plaintiff-Counterdefendant-Appellant,

v

METAMORA TOWNSHIP,

Defendant-Counterplaintiff-Appellee,

and

METAMORA LAND PRESERVATION ALLIANCE and LANDEX, INC.,

Intervening Defendants-Counterplaintiffs-Appellees.

UNPUBLISHED
January 22, 2009

No. 279431
Lapeer Circuit Court
LC No. 06-037672-CZ

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants. Plaintiffs challenge a number of the court's rulings, including its denial of a motion seeking leave to amend the pleadings. We reverse and remand for further proceedings in regard to the summary disposition ruling, but affirm the court's denial of the request to amend the pleadings.

Plaintiff Detroit Area Council of Boy Scouts of America (Boy Scouts) own approximately 1,573 acres of land known as the "D-Bar-A Scout Ranch" in Metamora Township. The property is zoned for recreational use. In the 1980s, the Boy Scouts entered into

a lease agreement with Ajax Paving Industries (Ajax) that envisioned Ajax mining sand and gravel deposits on the property. However, an application for a mining permit submitted by the Boy Scouts and Ajax was rejected by defendant Metamora Township (township). Following an unsuccessful suit in federal district court challenging the township's permit denial, the Boy Scouts and Ajax filed an appeal in the United States Court of Appeals for the Sixth Circuit. While the appeal was pending, the parties entered into a settlement agreement in 1991.

As part of the settlement, the Boy Scouts agreed that it would not apply for a mining permit that would "propose or result in the use of Dryden Road within the Township or within the Village of Metamora . . . as a haul route for commercial quantities of sand, gravel or topsoil prior to January 1, 2011, unless a substantial change in conditions shall have occurred." The settlement agreement expressly provides that a "substantial change in conditions" means:

> (1) widening of Dryden Road to four travel lanes within one half mile of Gardner Road;
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> (2) new development or use of property, subsequent to the date of this Agreement, within the Township or Village for manufacturing, commercial, or extractive uses which generate an aggregate annual average of 50 or more heavy trucks per weekday or an aggregate seasonal average of 25 or more gravel trains per weekday on Dryden Road, as determined by traffic counts conducted at the east boundary of the Village;
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> (3) use of Dryden Road in the vicinity of the D-Bar-A Scout Ranch by an annual average of 100 or more heavy trucks per weekday, or a seasonal average of 50 or more gravel trains per weekday, as determined by traffic counts conducted at the east boundary of the Village; or
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> (4) other changes in the use and occupancy of property in Metamora Township along Dryden Road east of the Village and/or in the volume and composition of traffic on Dryden Road, as measured at the east boundary of the Village, which have an effect similar to those described in the preceding sub-paragraphs.

In 2004, the Boy Scouts and plaintiff Edward C. Levy Company (Levy) signed a lease covering a portion of the property. Under the lease, Levy was given permission to conduct mining operations for sand, stone, and gravel on the property, and the Boy Scouts were entitled to monthly royalty payments on mined minerals.

In late 2005, plaintiffs submitted an application to the township for the rezoning of the leased land from recreational to agricultural, as mining is permitted as a special land use only with respect to land zoned as agricultural. The township planning commission recommended denial of the rezoning application, and subsequently the township board denied the application. Plaintiffs then filed their complaint, alleging that the township's action violated their due process rights under the Michigan Constitution. They asked the court to enjoin the township from interfering with plaintiffs' lease and the mining of minerals on the land. The township filed a counterclaim for breach of contract and later filed a motion for summary disposition, arguing

that the settlement agreement bound the Boy Scouts and its successors and assigns. The trial court granted the township's motion, entering judgment in favor of the township on its counterclaim and summarily dismissing plaintiffs' complaint. The trial court ruled that there had been no substantial change in conditions since the 1991 settlement agreement, opining that conditions 1 through 3, as outlined above, needed to all be satisfied as a single unit or condition to effectuate a substantial change in conditions, or that condition 4, standing alone, had to be satisfied. The trial court's reasoning rested on the fact that the word "or" followed the semicolon after condition 3 and before condition 4, but "or" was not similarly used between conditions 1 and 2 and between conditions 2 and 3, where only semicolons were present.

Plaintiffs argue that the trial court's decision constituted an erroneous construction of the settlement agreement. Plaintiffs maintain, and we agree, that the four conditions stood separate and independent from each other and formed four alternate scenarios under which a substantial change in conditions would exist.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). "[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id.* "If the language of [a] contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). A contract is ambiguous if its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).

We conclude that the contract language at issue clearly and unambiguously described four independent and alternative scenarios under which a substantial change in conditions is established. In general, the "disjunctive term 'or' refers to a choice or alternative between two or more things." *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004); see also *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997); *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995). Each of the four conditions, separated by semicolons, can stand on its own, and the use of the term "or" between the third and fourth conditions shows an intent that the string of conditions constitute four separate alternative scenarios, with satisfaction of any one of the four establishing a substantial change in conditions. The four conditions are separately spaced, in paragraph form, and independently numbered. And conditions 1 through 3 do not reflect a continuing thought pattern or sequence.[1] The trial court's insistence that the term "or" had to be used between each of the four conditions in order to show that four alternatives existed lacks grammatical justification. By simple analogy, if a person informed a painter in writing to paint one's house "red, black, blue, or white," clearly four alternative colors are contemplated, and not a choice

[1] It is argued that use of the semicolons alone shows an intent to connect the conditions together, unifying the first three conditions as a single condition or test. A supposed supporting example in an attached grammatical guide is: "Jim is a good typist; he makes few mistakes." The example is inapposite. We are addressing conditions that are numerically, substantively, and spatially separate and independent.

between painting the house red, black, and blue, or, in the alternative, white. While it might make it more emphatically clear to state, "paint the house red or black or blue or white," using the single disjunctive "or" between the third and fourth choices also clearly communicates four alternative choices and is the conventional manner in doing so. Here, had the word "and" appeared after the semicolon as to condition 2 and before condition 3, it would have reflected an intent that conditions 1 through 3 must all be shown in order to establish a substantial change in conditions. But the word "and" is not used anywhere between any of the conditions.

We agree with plaintiffs' argument that "it is counter-intuitive to suppose that the parties would have written subparagraphs (C)(1), (C)(2), and (C)(3) in three different paragraphs joined by semicolons, rather than using a single paragraph, if they wanted to express a single test of substantially changed conditions." (Emphasis omitted.) Accordingly, the trial court erred in its interpretation of the settlement agreement and thus erred in summarily dismissing the case with respect to plaintiffs' complaint and in entering judgment in favor of the township on the counterclaim. Although plaintiffs contend that there is no dispute that condition 3 was established, we believe that the best procedural course is to allow the trial court to first address the issue on remand, either at trial or on another motion for summary disposition.

Given our ruling, we see no need to address many of the other arguments presented by plaintiffs on appeal. However, some issues still require addressing as they may arise again on remand. Should plaintiffs on remand again argue that Levy was not bound by the settlement agreement because of its status as a lessee, the argument is to be rejected. Plaintiffs' contention to the contrary is wholly lacking in merit. The settlement agreement bound the Boy Scouts and its assigns, and the lease not only pertained to possession of certain land but additionally constituted an assignment of the Boy Scouts' general rights as property owners to mine any mineral deposits located on or beneath the land. See *Burkhardt v Bailey*, 260 Mich App 636, 654-655; 680 NW2d 453 (2004). Plaintiffs' contrary reading of *Burkhardt* with respect to assignments is flawed and misplaced. It is nonsensical to read the settlement agreement as allowing the Boy Scouts to contract with any and all mining companies, except for Ajax, and to then immediately seek township permission to mine the property regardless of the application waiting period (January 1, 2011). Moreover, a lessee's property interest rights are limited to the rights possessed by the lessor as it is "fundamental property law that a lessor can transfer no greater rights than he possesses." *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 24; 614 NW2d 634 (2000). Thus, because the Boy Scouts' rights to use the land were limited by the settlement agreement, any rights acquired by Levy under the lease were similarly limited by the settlement agreement. Even if Levy's mining operation was going to affect different acreage than that sought to be mined by Ajax, Levy is still bound by the settlement agreement. This is because the agreement makes clear that the use of Dryden Road as a haul route for sand, gravel, or topsoil is the problematic activity and the obstacle to overcome and because Levy indisputably wishes to use Dryden Road for just such purposes.

Next, plaintiffs suggest that even if there has not been a substantial change in conditions under the settlement agreement, which would preclude submission of a mining permit application, it still does not defeat their complaint alleging violation of due process. This argument does not stand scrutiny. If, because of the settlement agreement, the Boy Scouts and Levy are not presently entitled to seek permission to mine the property, and therefore cannot mine the property, there can be no due process violation in the township's refusal to rezone the

property so as to allow for mining. By executing the settlement agreement, the Boy Scouts and its assigns essentially waived any claim of a constitutional deprivation related to denial of a mining application by the township, as long as the denial was in accordance with the agreement. See *Whispering Pines AFC, Home, Inc v Dep't of Treasury*, 212 Mich App 545, 550; 538 NW2d 452 (1995)(constitutional rights may be waived by contract even if such constitutional rights are not specifically referenced in the language of the contract). Any other ruling would render the settlement agreement meaningless and nugatory.

Finally, we address plaintiffs' arguments pertaining to amendment of the answer to the counterclaim. The Boy Scouts desired to add the affirmative defenses of waiver, estoppel by acquiescence, and estoppel by laches in order to defeat application of the settlement agreement. The underlying premise of each of these defenses concerns the manner in which the township handled the rezoning application. Plaintiffs' position is that the township should have immediately and firmly rejected the rezoning application on the basis of the 1991 settlement agreement, consistent with the township's interpretation of the agreement in the litigation, instead of allowing plaintiffs to needlessly spend time and money in the lengthy rezoning process. We hold that the trial court did not abuse it discretion in denying the motion to amend the pleadings. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

Leave to amend a party's pleadings is properly denied if amendment would be futile. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). The record reflects that throughout the township's proceedings relative to the rezoning application concerns about compliance with the 1991 settlement agreement were at the forefront and presented an obstacle to rezoning. There were demands by the township that plaintiffs show that there had been a substantial change in conditions. The township board's meeting minutes indicated that plaintiffs had "failed to demonstrate a substantial change in conditions to justify an application which proposed to use, or results in the use, of Dryden Road as a haul route." There is simply no record support for plaintiffs' contention that waiver occurred, that estoppel by acquiescence took place, and that estoppel by laches was shown. Accordingly, any amendment would be futile, and the trial court did not abuse its discretion in denying the motion seeking leave to amend the pleadings.

We reverse and remand for further proceedings consistent with this opinion in regard to the summary disposition ruling, but affirm the court's denial of plaintiffs' motion seeking leave to amend the pleadings. No costs are awarded under MCR 7.219 as no party fully prevailed on appeal. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio