STATE OF MICHIGAN

COURT OF APPEALS

EAGLE RIDGE, L.L.C., Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 17, 2009
v	No. 286862 Oakland Circuit Court
ALBERT HOMES, L.L.C., Defendant/Counter-Plaintiff-Appellant.	LC No. 2007-082080-CH

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Defendant Albert Homes, LLC appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to plaintiff Eagle Ridge, LLC. We affirm in part, reverse in part, and remand for further proceedings.

I. Basic Facts and Procedural History

TriMount/Morgan Lake Development, LLC (TriMount) owned certain real estate in Independence Township. It planned to develop the property into a golf course and a condominium site. After the property fell into foreclosure, TriMount quitclaimed the property and assigned its right of redemption to Albert Homes. Albert Homes sold the property to Eagle Ridge for $4.5 million. It then used the $4.5 million to redeem the property from foreclosure.

On May 24, 2002, Albert Homes and Eagle Ridge entered into two agreements regarding the property. The first agreement, the offer to purchase real estate (the purchase agreement), concerned the golf course. The second agreement, the option agreement, concerned the condominium site.

In the purchase agreement, Albert Homes agreed to complete the development of the golf course by February 28, 2004. Eagle Ridge would then sell the golf course to Albert Homes for $1.00. The purchase agreement contained the following default provisions:

> **Purchaser's [Albert Homes] Default.** In the event of default by the Purchaser hereunder, the Seller may, at his option, elect to enforce the terms hereof or declare a forfeiture hereunder. Notwithstanding the foregoing, Seller shall give

> Purchaser 30 days notice of default to allow Purchaser to cure said default before taking action under this Purchase Agreement[.]
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> **Seller's [Eagle Ridge] Default.** In the event of default by the Seller hereunder, the Purchaser may, at his option, elect to enforce the terms hereof.

In the option agreement, Eagle Ridge granted an exclusive option to Albert Homes to purchase 207 condominium home sites. Eagle Ridge was to develop the home sites in three phrases (Phases III, VI, and V). Phase III was to be completed "within eighteen months of the date of th[e] agreement." The option agreement defined the "completion" of a phase "as the installation of sufficient improvements such that building permits are available to" Albert Homes. After being notified that a phase was complete, Albert Homes was to "immediately" purchase two home sites and begin construction of a model home on each of the sites. The option agreement contained the following default provisions:

> **OPTIONEE'S [ALBERT HOMES] DEFAULT**. In the event of default by Optionee, Optionor may declare a forfeiture hereunder and retain any and all monies paid by the Optionee, maintain an action against Optionee for specific performance and/or maintain an action against Optionee for any costs, expenses and damages suffered by Optionor as a result of Optionee's default. *A default on Optionee's obligation under the Purchase Agreement for the purchase of the related golf course property from Optionor shall be a default on this Option.* Notwithstanding the foregoing, Optionor shall give Optionee 30 days notice of default to allow Optionee to cure said default before taking action under this Option Agreement.
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> **OPTIONOR'S [EAGLE RIDGE] DEFAULT**. In the event of default by the Optionor, Optionee shall be entitled to enforce the terms hereof as the Optionee's sole remedy. [Emphasis added.]

The option agreement could only be amended by a writing signed by the parties.

On August 22, 2003, Eagle Ridge and Albert Homes amended the purchase agreement. The parties agreed that Albert Homes would have until February 24, 2005, to complete the golf course. They also agreed that Albert Homes would satisfy the existing mortgage of Treadwell Golf Associates (Treadwell) and that Albert Homes would pay all taxes and assessments owed after May 24, 2002. The parties never signed a writing amending the option agreement.

In April 2006, Eagle Ridge received a letter from Independence Township, informing Eagle Ridge that "[b]uilding permits can be applied for and issued," but that "[n]o certificate of occupancies will be issued until the remainder of the agreement is completed." Eagle Ridge forwarded a copy of the letter to Albert Homes.

In April 2007, Eagle Ridge sued Albert Homes for breach of the purchase agreement and breach of the option agreement. Eagle Ridge claimed that Albert Homes breached the purchase agreement by not completing the golf course by February 24, 2005, by not discharging the Treadwell mortgage, and by not paying all taxes owed after May 24, 2002. It requested specific performance of the purchase agreement. Eagle Ridge claimed that Albert Homes breached the

option agreement (1) by failing to immediately purchase two home sites and construct model homes thereon upon being notified in April 2006 that the Phase III home sites were completed and (2) not completing the golf course by February 24, 2005. This last claim was based on the cross-default provision in the option agreement.

Albert Homes filed a three-count counter-complaint against Eagle Ridge. Albert Homes claimed that Eagle Ridge breached the option agreement by failing to complete the Phase III home sites by November 2003. And, according to Albert Homes, Eagle Ridge's "breaches [of the option agreement] created an impossibility of performance" of its obligations under the purchase agreement. Albert Homes also asserted claims for fraud and misrepresentation and promissory estoppel. These claims were based on Eagle Ridge's representations that it had the ability and resources to complete the Phase III home sites by the end of November 2003.

Eagle Ridge moved for summary disposition pursuant to MCR 2.116(C)(10) on its complaint and on Albert Homes's counter-complaint. At the motion hearing, the trial court found that Albert Homes breached the purchase agreement by not completing the golf course by February 24, 2005. In addition, it found that the April 2006 letter from Independence Township did not satisfy the "completion" requirement of the option agreement. However, it stated that, because the purchase agreement did not contain a cross-default provision, Albert Homes could not assert Eagle Ridge's breach of the option agreement as a defense to its breach of the purchase agreement. The trial court also found that genuine issues of material fact existed regarding whether Albert Homes had satisfied the Treadwell mortgage and whether it had paid the required taxes. The trial court granted in part and denied in part the motion for summary disposition.

Thereafter, Eagle Ridge moved for entry of judgment. It stated that after "carefully considering" the trial court's oral ruling, it had decided to withdraw its request for specific performance of the purchase agreement and, instead, seek forfeiture of the agreement, which it claimed would resolve the litigation in full. Eagle Ridge explained that it was entitled to judgment on its claim that Albert Homes breached the purchase agreement based on the trial court's holding that its failure to complete the Phase III home sites could not be asserted by Albert Homes as a defense for Albert Homes's failure to complete the golf course.[1] It also explained that the trial court's finding that Albert Homes did not timely complete the golf course entitled it to judgment on its claims that Albert Homes defaulted on the option agreement, because, pursuant to the cross-default provision in the option agreement, Albert Homes's breach of the purchase agreement constituted a default under the option agreement. In addition, Eagle Ridge reasoned that, even if specific performance of the option agreement was ordered, Albert Ridge could obtain no relief, because Albert Ridge's rights to purchase the condominium home sites under the option agreement were vitiated when it failed to complete the golf course.

[1] Eagle Ridge explained that the trial court's finding that there were genuine issues of material fact regarding whether Albert Homes paid the Treadwell mortgage or the taxes was moot because it only "need[ed] one default" by Albert Homes to succeed on its claim for breach of the purchase agreement.

After receiving the parties' arguments, the trial court stated that it was satisfied that Eagle Ridge's arguments were correct. It entered an order granting summary disposition to Eagle Ridge on its claims for breach of the purchase agreement and breach of the option agreement. The order also declared that the purchase agreement was forfeited and the Albert Homes's rights under the option agreement were abrogated. The order stated that it was a full and final adjudication of all the claims that were or could have been raised in the matter.

II. Standards of Review

We review a trial court's decision on a motion for summary disposition de novo. *Tevis v Amex Assurance Co*, 283 Mich App 76, 80; 770 NW2d 16 (2009). Summary disposition is proper under MCR 2.116(C)(10) if, when viewing the documentary evidence and all reasonable inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 80-81. We also review de novo issues of contract interpretation. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

III. Purchase Agreement

On appeal, Albert Homes argues that the trial court erred in granting summary disposition to Eagle Ridge on Eagle Ridge's claim for breach of the purchase agreement. Specifically, Albert Homes contends that the trial court erred in prohibiting it from asserting Eagle Ridge's failure to complete the condominium home sites as a defense to its failure to complete the golf course. Albert Homes also claims that the trial court's grant of summary disposition was premature because discovery had not yet been completed.

The fundamental goal of contract interpretation is to ascertain and give effect to the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Where the parties enter into several agreements relating to the same subject matter, the parties' intentions must be gleaned from all the agreements. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346; 561 NW2d 138 (1997). Albert Homes and Eagle Ridge entered into the purchase agreement and the option agreement on the same date and both agreements related to the property that Albert Homes had redeemed from foreclosure. Because the agreements related to the same subject matter, the parties' intentions for whether Albert Homes could condition its obligation to complete the golf course by February 24, 2005, on Eagle Ridge's obligation to complete the home sites must be gleaned from the purchase agreement and the option agreement.

To determine the intent of contracting parties, we begin by examining the language of the contract. *Randolph v Reisig*, 272 Mich App 331, 333; 727 NW2d 388 (2006). "An unambiguous contractual provision is reflective of the parties' intent as a matter of law, and if the language of the contract is unambiguous, we construe and enforce the contract as written." *Id.* (quotations and alternations omitted). We must give effect to every word, phrase, and clause in a contract, and avoid any interpretation that would render any part of the contract surplusage or nugatory. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638; 734 NW2d 217 (2007).

The purchase agreement did not contain a cross-default provision. No provision in the purchase agreement conditioned Albert Homes's obligation to complete the golf course by February 24, 2005, on Eagle Ridge's completion of the home sites under the option agreement. There was, however, a cross-default provision in the option agreement. The provision provides: "A default on [Albert Homes's] obligation under the Purchase Agreement for the purchase of the related golf course property from [Eagle Ridge] shall be a default on this Option." Thus, Albert Homes's rights under the option agreement were conditioned on the performance of its obligations under the purchase agreement.

The effect of allowing Albert Homes to assert Eagle Ridge's failure to complete the home sites under the option agreement as a defense to its failure to complete the golf course under the purchase agreement would be to render nugatory the fact that the option agreement, but not the purchase agreement, contained a cross-default provision. By including a cross-default provision in the option agreement, the parties intended for Albert Homes's rights under the option agreement to be conditioned on its completion of the golf course. In contrast, by not including a cross-default provision in the purchase agreement, the parties did not intend for Albert Homes's obligation to complete the golf course to be conditioned on the completion of home sites. Accordingly, Albert Homes cannot assert Eagle Ridge's failure to complete the home sites as a defense to its failure to complete the golf course. The trial court did not err in granting summary disposition to Eagle Ridge on its claim for breach of the purchase agreement.[2]

Further, the trial court's grant of summary disposition was not premature. Generally, summary disposition is inappropriate if discovery has not yet closed. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). "However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Id.* The nonmoving party must identify a disputed issue. *Id.*; *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

The disputed issue identified by Albert Homes is whether the parties intended for its obligation to complete the golf course to be conditioned on Eagle Ridge's completion of the condominium home sites. However, the unambiguous language of the purchase agreement and the option agreement established that the parties did not intend for Albert Homes's obligation to complete the golf course by February 24, 2005, to be conditioned on Eagle Ridge's completion of the home sites. Because unambiguous contractual language must be enforced as written,

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[2] We reject Albert Homes's argument that Eagle Ridge's "unclean hands" prevent Eagle Ridge from obtaining relief on the purchase agreement. The clean hands doctrine requires that "[o]ne who seeks the aid of equity must come in with clean hands." *Isbell v Brighton Area Schools*, 199 Mich App 188, 189; 500 NW2d 748 (1993). "An action for damages for a breach of contract is historically an action at law, not in equity." *Stroud v Glover*, 120 Mich App 258, 261; 327 NW2d 462 (1982). Because Eagle Ridge's claim was for breach of contract, Eagle Ridge was not seeking the aid of equity. Thus, the clean hands doctrine is not applicable.

Randolph, supra, additional discovery would not uncover factual support for Albert Homes's position that it could assert Eagle Ridge's failure to complete the home sites as a defense to its failure to complete the golf course.

IV. The Option Agreement

Albert Homes argues that the trial court erred in granting summary disposition to Eagle Ridge on its claim for breach of the option agreement. It contends that because Eagle Ridge was the first party to breach the option agreement, Eagle Ridge cannot maintain an action for breach of the agreement against it.

A party who first breaches a contract may not maintain an action against the other contracting party for the latter party's subsequent breach or failure to perform. *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 573; 127 NW2d 340 (1964); *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007). This rule, however, only applies if the initial breach is a substantial breach. *Able Demolition, Inc, supra* at 585. "To determine whether a substantial breach occurred, a trial court considers whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Id.* (quotation omitted).

Eagle Ridge claims that its failure to complete the condominium home sites does not invoke the "first to breach rule" because its breach was not substantial when considered in light of the fact that, under the terms of the purchase agreement, Albert Homes could not assert Eagle Ridge's failure to complete the home sites as a defense to Albert Homes's failure to complete the golf course. We disagree with this reasoning. The benefit that Albert Homes expected to receive under the option agreement was completed condominium home sites that it could sell to the public for a profit, which would provide it with income while it finished the golf course. Because Eagle Ridge has not completed the home sites, Albert Homes did not receive this benefit. Eagle Ridge's failure to complete the condominium home sites was a substantial breach of the option agreement.

The option agreement provides that a default by Albert Homes on its obligations under the purchase agreement is a default on the option agreement. Considered relative to the cross-default provision of the option agreement, the question becomes whether Eagle Ridge breached the option agreement before Albert Homes breached the purchase agreement and, thereby, defaulted on the option agreement. Pursuant to the purchase agreement, Albert Homes was to complete the golf course by February 24, 2005. Pursuant to the option agreement, Eagle Ridge was to complete the Phase III home sites by November 2003. Thus, pursuant to the written terms of the two agreements, it appears that Albert Homes's breach of the purchase agreement occurred *after* Eagle Ridge breached the option agreement. However, Eagle Ridge has asserted that the parties worked cooperatively on the development of the home sites, that control over the timeliness of the completion of the sites was in the hands of third parties, and that Albert Homes knew of the regulatory hurdles that it faced in developing the home sites.[3] We express no opinion regarding which party first breached the option agreement. We only hold that the

[3] Eagle Ridge's assertions are not supported by record evidence.

documentary evidence presented to the trial court does not establish that Eagle Ridge breached the option agreement after Albert Homes breached the purchase agreement.

Additionally, Eagle Ridge claims that requiring it to complete the home sites would be worthless because Albert Homes breached the purchase agreement and, consequently, has no rights under the option agreement. In support, Eagle Ridge notes that Albert Homes's only remedy under the option agreement is specific performance. This argument is based on the premise that, even if Eagle Ridge committed the first breach of the option agreement, it may still enforce the cross-default provision against Albert Homes. In other words, even assuming that it was the first party to breach the option agreement, Eagle Ridge is attempting to use Albert Homes's subsequent breach to maintain its action against Albert Homes to have the option agreement forfeited. This is prohibited by case law. *McCarty*, *supra*; *Able Demolition, Inc*, *supra*. If Eagle Ridge was the first party to breach the option agreement, Eagle Ridge is precluded from enforcing the agreement's cross-default provision against Albert Homes. Accordingly, the trial court erred in granting summary disposition to Eagle Ridge on its claim for breach of the option agreement and abrogating Albert Homes's rights under the option agreement.[4]

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

[4] In its oral opinions, the trial court never addressed Albert Homes's counterclaims for fraud and misrepresentation and promissory estoppel. Albert Homes may pursue these claims on remand.