

STATE OF MICHIGAN
COURT OF APPEALS

LOFTS ON THE NINE, LLC,

Plaintiff-Appellant,

v

KEVIN AKEY,

Defendant-Appellee.

UNPUBLISHED
February 10, 2011

No. 294825
Oakland Circuit Court
LC No. 2009-102996-CK

LOFTS ON THE NINE, LLC,

Plaintiff-Appellant,

v

JAMES FLOWERS,

Defendant-Appellee.

No. 295977
Oakland Circuit Court
LC No. 2009-101063-CK

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff Lofts on the Nine, L.L.C. appeals as of right the trial court's orders granting summary disposition for each of the defendants, Kevin Akey and James Flowers. In each case, both arising out of condominium sales contracts between Lofts on the Nine and defendants, the trial court found that the contracts were unenforceable on the ground that Lofts on the Nine was not a licensed residential builder. We affirm.

I. FACTS

Lofts on the Nine is the owner of a multi-story, mid-rise building constructed on Nine Mile Road in the City of Ferndale. The first floor of the project is devoted to commercial use for lease by retail businesses. The remainder of the building contains 36 residential condominium units available for purchase. Ronnisch Construction, a Michigan licensed residential builder, began construction on the project in mid-2007. Lofts on the Nine hired Ronnisch Construction to work on the project pursuant to a building contract executed in May 2007. In the contract,

Lofts on the Nine is identified as the “owner,” Ronnisch Construction is identified as the “contractor,” and AZD Associates is identified as the project “architect.”

After receiving the project plans from AZD Associates, Ronnisch Construction obtained a building permit from the city of Ferndale. Under the terms of the building contract, Ronnisch provided all of the labor and materials necessary to build the project and performed the construction on the project.

In April 2007, Akey, one of the principle owners of AZD Associates, entered into a Residential Construction Contract and Purchase Agreement with Lofts on the Nine for the purchase of a condominium unit. In May 2008, Flowers entered into a separate Residential Construction Contract and Purchase Agreement with Lofts on the Nine for the purchase a condominium unit.

It is undisputed that both Akey’s and Flowers’ transactions used the same standard contract form that Lofts on the Nine used for all of its condominium sales in the building. In both contracts, Lofts on the Nine is identified as the “Builder/Developer.” Thus, pursuant to the plain terms of the contract, Lofts on the Nine, as the builder/developer, was responsible for construction of the condo units: “Builder/Developer shall construct the [condominium]”

Both Akey’s and Flowers’ condominiums were sufficiently complete in May 2009 to allow the parties to proceed with the closing of the purchase transactions. However, in April 2009, Flowers had notified Lofts on the Nine that he would not be closing on the condominium purchase. Similarly, in June 2009, after Lofts on the Nine had notified Akey that the condominium was ready for closing, Akey notified Lofts on the Nine that he would not be closing on his condominium purchase.

Lofts on the Nine commenced two separate actions in August 2009, to obtain specific performance of Akey’s and Flowers’ respective contract obligations.

Akey moved for summary disposition, arguing that Lofts on the Nine was statutorily barred from bringing its complaint because it did not have a residential builders license. That is, Akey argued that, as an unlicensed residential builder, Lofts on the Nine was statutorily prohibited from maintaining an action for compensation for work performed while unlicensed. And Akey argued that, because Lofts on the Nine was unlicensed, the purchase agreement was void and unenforceable.

Lofts on the Nine responded, arguing that, despite the language in the purchase agreement identifying Lofts on the Nine as the “Builder/Developer,” Lofts on the Nine was not, and was never intended to be, the party responsible for the actual construction of the project. And indeed, Lofts on the Nine never did perform any construction on the project; as stated, Ronnisch Construction, a licensed residential builder, secured the building permit and performed the construction. Lofts on the Nine pointed out that Akey knew this when he entered into the purchase agreement. Indeed, as stated, as architect on the condominium project, Akey, through AZD Associates, provided Ronnisch Construction with the plans for construction. Lofts on the Nine contended that the agreement with Akey was in substantial compliance with the law because it contracted with a licensed residential builder to perform the construction.

After hearing oral arguments on the motion, the trial court found, without elaboration, that it was bound by this Court's decision in *Bernard F Hoste, Inc v Kortz*.¹ Accordingly, the trial court granted Akey's motion for summary disposition in October 2009. Lofts on the Nine appealed to this Court shortly thereafter.

Flowers then moved for summary disposition, arguing that, like Akey, his purchase contract was void and unenforceable because Lofts on the Nine did not have a residential builders license. The trial court found that there was no latent ambiguity in the purchase contract and that, therefore, the parole evidence rule limited the court's review to interpreting the contract on its face. The trial court thus found that Lofts on the Nine was the responsible contracting party and, as such, it was required to be a licensed residential builder. The trial court granted Flowers' motion for summary disposition in January 2010. Lofts on the Nine appealed to this Court shortly thereafter.

In this consolidated appeal, we now consider Lofts on the Nine's appeals from the two lower court actions.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.² The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.³ The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.⁴ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁵ “[T]he court is not permitted to assess credibility, or to determine facts on a motion for summary judgment.”⁶

This Court reviews de novo the trial court's ruling on a motion for summary disposition.⁷ If a contract's language is clear, its construction is a question of law that is subject to this Court's

¹ *Bernard F Hoste, Inc v Kortz*, 117 Mich App 448; 324 NW2d 46 (1982).

² *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

³ MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

⁴ *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

⁵ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

⁶ *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 265; 632 NW2d 126 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

⁷ *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009).

de novo review.⁸ Further, the proper interpretation of a statute is a question of law that is subject to this Court's de novo review.⁹

B. LEGAL STANDARDS

The Occupational Code defines the term “residential builder” as follows:

a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for . . . compensation . . . undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, [or] construction . . . of, a residential structure or combination residential and commercial structure; . . . or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property.^[10]

And § 2412(1) of the Occupational Code states:

A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.^[11]

Thus, “[u]nder the statute, a builder may not bring an action for collection of compensation unless it can prove that it possesses the license ‘required by this article.’”¹² “The effect of this provision is to preclude noncomplying contractors from recovering on their residential building or alteration contracts even where the contract has been complied with in all respects, thereby in some instances bestowing a substantial windfall to the party claiming the defense.”¹³ And “[t]he courts of this state have consistently upheld this harsh penalty for noncompliance[.]”¹⁴

⁸ *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

⁹ *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

¹⁰ MCL 339.240I(a).

¹¹ MCL 339.2412(1).

¹² *Stokes v Millen Roofing Co*, 466 Mich 660, 664; 649 NW2d 371 (2002).

¹³ *Robert H Pastor Bldg & Real Estate Dev Co v Cole*, 127 Mich App 168, 172; 339 NW2d 11 (1983).

¹⁴ *Id.*

C. ANALYSIS

We note that, despite its stated reliance on *Bernard F Hoste, Inc v Kortz*, the trial court may have misspoken and actually meant to rely on this Court's decision in *Brummel v Whelpley*, which was presented during the lower court proceedings and, in fact, is dispositive in this case.¹⁵

In *Brummel*, the plaintiff was a licensed real estate broker who owned a vacant lot.¹⁶ The plaintiff negotiated to sell the lot to the defendants and to then build a house on the lot for them.¹⁷ But because the plaintiff himself was not a licensed builder, he hired a licensed builder to construct the house.¹⁸ After the builder completed construction of the house, a dispute arose between the plaintiff and the defendants over the workmanship.¹⁹ Therefore, the defendants refused to complete the transaction or pay the plaintiff the balance owing on the house.²⁰ The plaintiff then sued for specific performance of the contract or, in the alternative, for damages.²¹ The defendants moved for a summary disposition, contending that the plaintiff was not a licensed residential builder as required under MCL 338.1501 *et seq.* (subsequently repealed and replaced by MCL 339.2401 *et seq.*).²²

In reaching its holding, this Court first noted that there were no Michigan cases that dealt with the issue at hand; thus, this Court found it helpful to look to interpretation of a similar Arizona statute. In doing so, this Court found significant the Arizona Court of Appeals decision in *Miller v Pima County Superior Court*.²³

In *Miller*, the Arizona Court dealt with the question whether “a subdivider-owner of real property who hires a licensed contractor to construct dwellings in a subdivision owned by him and who contracts with members of the general public for the sale of such dwellings [is] required to be licensed as a contractor[.]”²⁴ The purchasers argued that the subdivider-owner, as signatory to the construction contract, was a “contractor” within the meaning of the state statute, as

“a person, firm, partnership, corporation, association or other organization . . . who, for . . . compensation other than actual wages, *undertakes to or offers to*

¹⁵ *Brummel v Whelpley*, 46 Mich App 93; 207 NW2d 399 (1973).

¹⁶ *Id.* at 95.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 94.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Miller v Pima County Superior Court*, 446 P2d 699 (Ariz App, 1968).

²⁴ *Id.* at 700.

undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or *by or through others*, construct . . . any building . . . or other structure, project, development or improvement, or to do any part thereof[.]”^[25]

Similar to Loft on the Nine’s argument herein, the subdivider-owner contended that he was not a contractor, but “rather a person engaged in the sale of real estate, who although agreeing that a structure would be built upon [the] parcel . . . , did not agree to *personally* construct the structure[.]”²⁶ The *Miller* Court, however, was not persuaded by the subdivider-owner’s argument. Instead, it held:

We are of the opinion that under the facts of this case, the owner-subdivider comes within the definition of “contractor” set forth above. The contract does not purport to include “the performance of acts by a licensed contractor.” The “undertaking” as to construction of the condominium villa was the subdivider’s, i.e., he was the only one to whom the buyer, under the contract, could look for performance.^[27]

Relying on the above rationale from *Miller*, the *Brummel* Court reasoned that, as signatory to the contract, the plaintiff-real estate broker was the only person to whom the defendants could look for performance.²⁸ Therefore, this Court held that the contract was void and unenforceable.²⁹

Here, like the real estate broker in *Brummel* and the subdivider-owner in *Miller*, Lofts on the Nine contracted with Akey and Flowers as the “Builder/Developer” of the condominium project and, as such, agreed to be responsible for construction of the condo units. Like the contract in *Miller*, the Residential Construction Contract and Purchase Agreement here did not purport to include the performance of a third-party licensed contractor. Thus, the undertaking³⁰ of the construction of the condominiums was Lofts on the Nine’s. As in *Brummel*, Lofts on the Nine “was the only one to whom the buyer, under the contract, could look for performance.”³¹

²⁵ *Id.* at 701, quoting ARS 32-1101 (emphasis by *Miller*).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Brummel*, 46 Mich App at 96.

²⁹ *Id.*

³⁰ See MCL 339.2401(a) (defining a “residential builder” as “a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for . . . compensation . . . *undertakes with another or offers to undertake or purports to have the capacity to undertake with another* for the erection, [or] construction . . . of, a residential structure or combination residential and commercial structure[.]”)

³¹ *Brummel*, 46 Mich App 96.

Accordingly, we conclude that the trial court properly granted summary disposition to Akey and Flowers in each of the lower court actions.

We affirm.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder