STATE OF MICHIGAN

COURT OF APPEALS

ELOISE BOYD,

Plaintiff-Appellant,

V

HUNTER POINTE CONDOMINIUM ASSOCIATION,

Defendant,

and

STATE FARM FIRE AND CAUSALITY COMPANY,

Defendant,

and

BELFOR INRECON,

Defendant-Appellee

UNPUBLISHED
February 15, 2011

No. 294811
Wayne Circuit Court
LC No. 08-122741-CK

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff Eloise Boyd appeals as of right from the trial court's order granting defendant Belfor Inrecon ("Belfor") summary disposition. On appeal, plaintiff argues that the trial court erred in concluding that she waived her right to pursue a remedy against Belfor. We affirm.

Plaintiff is the owner of a condominium located in the city of Westland. By virtue of owning her condominium, plaintiff belongs to the Hunter Pointe Condominium Association ("the Association"). Plaintiff's condominium unit was insured by State Farm Fire and Causality Company ("State Farm"). Pursuant to the insurance policy, the Association, not the individual unit owners, was the holder of the policy.

On July 3, 2003, plaintiff's condominium was substantially damaged by a fire. Pursuant to the Association's bylaws, plaintiff was required to appoint the Association as attorney-in-fact to interact with State Farm regarding the coverage of the fire damage. It appears that State Farm disbursed insurance proceeds to the Association. Belfor was subsequently engaged to conduct the necessary repairs, though it is unclear who actually hired the company. However, it is undisputed that plaintiff never contracted with Belfor to conduct the repairs. The Association was to oversee Belfor to ensure that the work was completed. Belfor completed numerous repairs and last worked on the condominium unit on July 16, 2004. Plaintiff received her certificate of occupancy in the same month.

Following Belfor's work on the unit, plaintiff apparently expressed her displeasure with the quality and extent of the repairs. Plaintiff asserts that Belfor received money for repairs that it never completed. Consequently, plaintiff had certain repairs completed that she felt Belfor should have initially done. For example, plaintiff felt that Belfor should have installed laminate flooring instead of carpet and that she was entitled to new windows. Plaintiff apparently paid for some of these repairs and upgrades with her own money. State Farm indicated in a letter to the Association, that Belfor would "work with" plaintiff "in paying her what is owed" for the upgrades she completed herself. Furthermore, as a result of her displeasure with the work, plaintiff consulted with a building contractor to evaluate the work that was done by Belfor. That contractor prepared a list of additional repairs that he believed were still necessary.

On October 20, 2004, several parties met to discuss plaintiff's complaints regarding her condominium repairs. While little detail regarding that meeting is present in the record, it is clear that it resulted in an agreement that provided in relevant part:

> Mrs. Boyd will be paid in full when she receives [her] check from State Farm. This is in total payment. No funds are due to Mrs. Boyd from Belfor. Belfor will finish the following items: Supply 2 remote garage door openers, Drywall touch ups, Handles on garage door, Repair holes in garage walls-no paint.

The above agreement was signed by plaintiff and her brother, as well as a representative from Belfor.

Plaintiff filed her complaint on September 8, 2008. The complaint named the Association, State Farm and Belfor as defendants. The complaint alleged that Belfor provided a standard warranty for the workmanship of its work and that it breached that warranty when it failed to repair the condominium unit in a workmanlike manner. The complaint further asserted that Belfor agreed to make additional improvements after the fire restoration was completed and that those additional improvements were never completed or were not completed in a substantially workmanlike manner.

On July 28, 2009, Belfor filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). Belfor asserted that plaintiff's claim against Belfor must fail because the October 20, 2004 agreement, which was signed by plaintiff, constituted a release that settled all claims. Further, Belfor argued that any claim for breach of contract must fail where plaintiff admitted that she did not have a contract with Belfor. Finally, because any warranty

flowed from the contract, Belfor argued that plaintiff did not have standing to pursue an implied warranty claim.

Plaintiff filed her response to Belfor's summary disposition motion on August 28, 2009. Plaintiff asserted that because she was the intended beneficiary of the contract between the Association and Belfor, she was permitted to enforce the terms of that contract and to seek a remedy for Belfor's inadequate performance. Regarding the alleged release, plaintiff argued that the language of the agreement was ambiguous. Plaintiff asserted that the agreement was not intended to be a release, but rather a supplemental list to another list of work that was to be done on her unit.

The trial court held a hearing on the motion for summary disposition on September 4, 2009. At the hearing, the parties primarily focused on whether the October 20, 2004 document constituted a waiver. Plaintiff argued that because the agreement was not an explicit waiver, it was ambiguous and the trial court should look to her deposition testimony to determine the meaning of the document. The trial court disagreed and reasoned that the document explicitly provided that plaintiff would not pursue any funds from Belfor. Consequently, the court granted Belfor's motion for summary disposition.

On appeal, plaintiff asserts that the trial court erred in concluding that plaintiff, pursuant to the October 20, 2004 agreement, abandoned her right to seek further funds or repairs from Belfor. We disagree.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo.[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997). Furthermore, the trial court's decision was the product of contractual interpretation. "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

As described above, plaintiff has alleged that Belfor failed to provide all of the repairs necessary to restore her condominium and that much of the work Belfor actually performed was haphazard or inadequate. A review of plaintiff's complaint and her deposition testimony demonstrates that plaintiff seeks damages for the repairs that she has already paid for, and for

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[1] We note that Belfor initially sought summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). At the hearing on Belfor's motion, it is clear that the court considered evidence outside of the pleadings. Furthermore, the court expressly commented on its view of whether there was a genuine issue of material fact. Consequently, we conclude that the grant of summary disposition was pursuant to MCR 2.116(C)(10) and will review the holding accordingly.

those that she feels she will need to pay for, as a result of Belfor's alleged poor workmanship. The trial court concluded that the October 20, 2004 agreement unambiguously provides that Belfor is not required to make any payment to plaintiff and that it is only required to complete the repairs specified in that agreement. In contrast, plaintiff testified that prior to signing the agreement in question, she handed a Belfor representative a list of repairs that were still required. She asserts that the October 20, 2004 agreement merely represents additions to the list that she had already prepared for Belfor.

It is well-established that where contractual language is unambiguous, extrinsic evidence is not permitted to demonstrate the intent of the parties. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). There are two types of contractual ambiguities: patent and latent. *Id*. A patent ambiguity is apparent on the face of a document. *Id*. In contrast, a latent ambiguity occurs when a contract appears facially unambiguous, but "other facts create the 'necessity for interpretation or a choice among two or more possible meanings.'" *Id*. at 668, quoting *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575, 127 NW2d 340 (1964). Where a party alleges the existence of a latent ambiguity "a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation." *Id*. If an examination of the extrinsic evidence demonstrates the existence of a latent ambiguity, a court is then permitted to consider the evidence to ascertain the intended meaning of the contractual language. *Id*.

The trial court concluded that because the October 20, 2004 agreement was facially unambiguous, extrinsic evidence was not permitted to demonstrate intent. In so concluding, the trial court failed to conduct the proper analysis required to determine whether a latent ambiguity exists. *Shay*, which was decided after the trial court's ruling, requires this Court to examine extrinsic evidence to determine whether the October 20, 2004 agreement contains a latent ambiguity. Specifically, plaintiff alleged that the agreement is latently ambiguous because extrinsic evidence demonstrates that the agreement was only intended to be a supplemental list to the list of repairs that she had already provided to Belfor. To determine the validity of this claim, this Court must examine the list of repairs that plaintiff purports was being supplemented. Such an analysis reveals that plaintiff's characterization of the October 20, 2004 agreement is without merit. The other list states that Belfor is required to touch-up the drywall in the condominium, provide two garage door openers, provide garage door handles and fix holes in the garage walls. If that agreement was truly intended to only be a supplement to the list already provided to Belfor, it would follow that the improvements appearing on the October 20, 2004 agreement would not also appear on the list that was previously provided to Belfor. However, a review of the list that was allegedly provided to Belfor demonstrates that each of the items on the agreement in question does appear on the original list. As a result, the extrinsic evidence plaintiff relies on does not demonstrate that the October agreement can be read as a supplemental agreement. Therefore, no latent ambiguity exists and the extrinsic evidence cannot be consulted in construing that agreement.

Although the trial court technically did not conduct as thorough of an analysis as required by our Supreme Court, it nonetheless correctly concluded that the October 20, 2004 agreement unambiguously provides that Belfor does not owe plaintiff any funds and that it is only responsible for conducting a very limited number of repairs. While plaintiff alleges in her brief

that the repairs detailed in that agreement were not properly completed, her complaint does not seek relief on that ground. Rather, she initially sought damages in response to Belfor's alleged failure to properly complete all the necessary repairs that were detailed in the extensive list discussed above. When viewing the evidence in the light most favorable to plaintiff, it is evident that plaintiff contractually agreed that Belfor was not required to make the vast majority of the repairs on that list or make any payments to plaintiff. Consequently, there is no genuine issue of material fact and Belfor was properly granted summary disposition.

Because we determine that the October 20, 2004 agreement precludes the present litigation, it is not necessary for this Court to address plaintiff's arguments regarding breach of warranty and her claimed status as a third-party beneficiary.

Affirmed.

/s/ Michael J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause