STATE OF MICHIGAN

COURT OF APPEALS

BALLARD MANAGEMENT COMPANY LLC,

Plaintiff-Appellee,

v

ROBERT P. FOSNAUGH PSYCHIATRIC AND REHABILITATION CENTER PC, and MARCIA FOSNAUGH AVIS,

Defendants-Appellants.

UNPUBLISHED
October 27, 2022

No. 355147
Macomb Circuit Court
LC No. 2019-000939-CH

Before: LETICA, P.J., and SERVITTO and HOOD, JJ.

PER CURIAM.

Defendants appeal as of right the trial court order granting summary disposition in favor of plaintiff. We affirm.

On November 20, 2014, plaintiff and defendants entered into a land contract wherein defendants purchased the Harrison Professional Plaza in Harrison Township, Michigan from plaintiff. As set forth in the contract, the purchase price was $750,000 at 10% interest. Defendants were to provide a down payment of $2,500 and then pay $7,500 per month from December 1, 2014 through December 1, 2017. Defendants were additionally to pay plaintiff a one-time payment of $100,000 on or before April 1, 2015 and were to pay the entire unpaid balance owing on December 1, 2017. In addition to the above, defendants were to pay all property taxes (except for those outstanding on the date the contract was signed), and to buy and keep fire and extended coverage insurance on the property in the name of plaintiff. The land contract provided that if defendants failed to comply with any of the above terms, they would be considered in default on the contract and plaintiff would be entitled to serve a notice of default on defendants, give them 15 days to cure the default, and then sue on the contract and take possession of the premises.

According to plaintiff, defendants failed to comply with the terms of the land contract. Specifically, they failed to make the required monthly payments and to pay the insurance and real estate taxes. Plaintiff thus sent defendants a notice of default on December 15, 2016. Thereafter, although defendants indicated that they would cure the defaults, they did not, leading plaintiff to

send defendants a final notice of default on July 13, 2017. When defendants still failed to cure the default, plaintiff filed a complaint for foreclosure of the land contract against defendants. According to plaintiff, after assurances from defendants that they would pay off the land contract, plaintiff agreed to dismiss the 2017 lawsuit and, in fact, did so. However, defendants still apparently failed to make the required payments or pay off the land contract. Thus, on March 11, 2019, plaintiff filed the instant complaint for foreclosure of the land contract and for money damages against defendants.

Plaintiff thereafter moved for summary disposition under MCR 2.116(C)(10). Plaintiff asserted that by 2017, defendants had undisputedly only paid the initial $2,500.00 down payment on the land contract, had not paid the real estate taxes on the property, and had not paid for insurance on the property. Defendants responded that there was a question of fact as to whether the land contract had been rescinded and replaced by a purchase agreement, and that because discovery was incomplete, summary disposition would be premature.

The trial court found that there was no evidence presented that plaintiff agreed to rescind the land contract and replace it with a purchase agreement and thus granted summary disposition in plaintiff's favor. The trial court also entered a judgment of foreclosure, indicating that defendants were jointly and severally liable to plaintiffs for $1,440,885.63 plus any taxes and insurance paid by plaintiff to preserve the property before or during the applicable redemption period. This appeal followed.[1]

Defendants first assert that further discovery would have shown that plaintiff was attempting to foreclose upon land that either was not the subject of the land contract, and/or was owned by a party not part of that land contract. Specifically, plaintiff did not own one of the parcel numbers referenced in the land contract. Defendants thus claim that the subject of the land contract was ambiguous and summary disposition was inappropriate. We disagree.

As noted by plaintiff, the first time defendants raised any issue regarding ownership of the property was on the day of the motion hearing, which was untimely. Moreover, the trial court did not address the issue. It is thus unpreserved. In civil cases, we are not required to consider unpreserved issues. *Coates v Bastian Bros*, Inc, 276 Mich App 498, 509–510; 741 NW2d 539 (2007). We may, however, overlook preservation requirements if, among other reasons, the issue involves a question of law, and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pines Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008). Because this issue presents a question of law and the necessary facts have been presented, we elect to review it. Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Seay*, 335 Mich App 715, 719; 967 NW2d 883 (2021).

Summary disposition is appropriate under MCR 2.116(C)(10) where there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and

[1] In a November 8, 2021 sheriff's report of sale, it is stated that the property was sold at a foreclosure sale on October 8, 2021 to plaintiff for $425,000.

other admissible documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Buhl v City of Oak Park*, 507 Mich 236, 242; 968 NW2d 348 (2021).

We review de novo questions of contract interpretation. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Id*. If a contract is ambiguous, that is, subject to more than one meaning, the meaning of the ambiguous contract is a question of fact that must be decided by the jury. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 469; 663 NW2d 447 (2003).

Defendants insist that the land contract at issue ambiguously refers to two parcels: 12-30-151-004 (which plaintiff owns) and 12-30-151-005 (which plaintiff does not own). Defendants then pivot that claim to further argue that the reference to both parcels makes plaintiff's actions in entering into the land contract false pretenses, renders the contract invalid and illegal, and makes plaintiff the first one to breach the land contract. Defendants' arguments have no basis in fact or logic.

The November 20, 2014 land contract provides, in relevant part:

> 1. **Sale of the Premises.** Seller agrees to sell the real estate located in the Township of Harrison, County of Macomb, State of Michigan, commonly known as 26755 Ballard Harrison Township, MI 48045, Parcel Identification Number 12-30-151-004, and more specifically described on the attached Exhibit A together with all fixtures, improvements, appurtenances, tenements, and hereditaments located on the real estate (the "Premises") subject to a certain Mortgage Lien held by Talmer Bank (as described in Section 5 hereof), and subject to any and all easements and restrictions of record and to zoning laws and ordinances affecting the premises. Seller makes no representations or warranties regarding the condition or title of the premises nor the suitability of the Premises for Buyer's intended uses.

Clearly, the parcel subject to the land contract is parcel 12-30-151-004, which plaintiff undisputedly owns. That parcel number is referred to as "the premises" at the beginning of the land contract and the land contract thereafter indicates the terms and conditions upon which "the premises" is conveyed.

Exhibit A, attached to the land contract, is the only place that references parcel 12-30-151-005. Exhibit A sets forth the legal description of the property subject to the land contract, and then further identifies the property as follows:

> Parcel Identification Number: 12-30-151-004
>
> Manatron Number: 0001-0049-00
>
> Together with an easement for ingress and egress 22.0 feet in width, lying 11.00 feet either side of any parallel to the following described centerline . . .

Exhibit A thereafter sets forth the legal description of the property through which the easement passes and identifies that property as "Parcel Identification Number: 12-30-151-005."

It is patently obvious by the language above that the premises conveyed (parcel 12-30-151-004) in the land contract contains only an easement for ingress and egress through parcel 12-30-151-005. The legal description of parcel 12-30-151-005 is provided only to identify the specific parcel of property over which parcel 12-30-151-004 has ingress and egress. The sheriff's report of sale for the property contains the exact same legal description and the property sold at auction was parcel 12-30-151-004, with its corresponding easement for ingress and egress through parcel 12-30-151-005. All of defendants' arguments based on a purported ambiguity or illegality due to a reference in Exhibit A to parcel number 12-30-151-005 fail for lack of merit.

Defendants next claim that summary disposition was premature because it was granted prior to the completion of discovery and discovery would establish that the land contract was rescinded on or about November 20, 2015. Discovery would also establish that thereafter, the parties negotiated and agreed to enter into a purchase agreement for the property (as well as other properties) thereby reaching a new agreement, and acting and relying upon it. According to defendants, a novation of the land contract occurred via the purchase agreement between the parties dated November 10, 2017. We disagree.

Defendants are correct in that "[a]s a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete." *Vill of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), quoting *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). But summary disposition may be appropriate before discovery is complete "where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Id.*, quoting *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992).

Addressing plaintiff's claim that the land contract was rescinded on or about November 20, 2015, we note a November 20, 2015, letter to plaintiff from defendants wherein defendants assert that "timely disposition of the mortgage lien has not been made" and that "[i]f you desire to reaffirm the land contract, you must do so by performing the terms in paragraph 5 of the land contract." The letter further states, "Otherwise, [defendants] declare that this contract is null and void and seek restitution of amounts or improvements made believing that [plaintiff] would perform the agreed terms in paragraph 5 of the land contract . . . ." Plaintiff denied ever receiving the letter.

Regardless, we note that the land contract actually states:

> 5. **Mortgage Lien on the Premises**. Seller has fully disclosed to Buyer that there is an existing mortgage lien on the Premises held by Talmer Bank ("Mortgagee"). Buyer agrees and acknowledges that this Agreement is expressly contingent on the approval and consent of Mortgagee to this transaction, including Mortgagee's waiver of any "due on sale" provisions contained in the original loan documents with Seller. Seller will exercise all reasonable efforts to obtain Mortgagee's consent to the transaction contemplated herein, but Buyer understands and agrees that the same may not be possible. If Seller cannot obtain Mortgagee's

> consent within a reasonable time from the date of execution, this Agreement shall be deemed null and void and all payments made by Buyer hereunder to Seller shall be returned in full with no further liability to either party.

As can be seen above there is no disposition of the mortgage lien requirement in the land contract. Plaintiff only needed to obtain the consent of the lienholder to enter into the land contract. We also note that the November 20, 2015 letter indicates that if plaintiff wanted to reaffirm the land contract, it could do so by complying with paragraph 5 of the land contract. Only if plaintiff failed to do so ("otherwise") would defendants declare the land contract null and void. There is no evidence provided by the parties showing whether the lienholder consented to the transaction. However, there is also no claim that defendants at any time did, in fact, declare the land contract null and void.

Plaintiff also points out that defendants submitted a bill of restitution to the trial court seeking purported expenditures it had made on the property from November 2015 through 2016. As indicated by plaintiff, had the land contract, in fact, been declared null and void by defendants on November 20, 2015, they would not have incurred any expenses related to the property after that date. Finally, defendant Marcia Avis (president and CEO of defendant rehab center and signor of the land contract), emailed plaintiff's counsel on July 20, 2017, indicating that defendants had updated plaintiff's principal "as to the status of the funding to address the taxes for the property." The statement does not comport with the land contract being null and void. The purchase agreement defendants claim replaced the land contract was dated November 2017. If defendants were attempting to obtain funds to address taxes on the property in July 2017, defendants believed they had an interest in and obligation on the property that pre-dated the purchase agreement.

As to the validity of the purchase agreement, plaintiff admits that the parties contemplated entering into a purchase agreement that would encompass the property at issue and engaged in negotiations concerning a purchase agreement. Indeed, both parties provided a "Real Estate Purchase Agreement" concerning the land contract parcel (12-30-151-004) as well as other properties. According to defendants, the purchase agreement acted as a novation to the land contract. We disagree.

A novation is "the act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party." Black's Law Dictionary (11th ed.). A novation requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one. *Matter of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986). And, the statute of frauds states:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. [MCL 566.106]

"To comport with [MCL 566.106], a writing transferring an interest in land (other than leases not exceeding one year) must be certain and definite with regard to the parties, property, consideration, premises, and time of performance. By its terms, the statute requires as an essential term that the writing be signed by the parties to be charged." *McFadden v Imus*, 192 Mich App 629, 633; 481 NW2d 812 (1992). In the absence of required signatures, the contract for the sale of the land is void. *Id*. Here, the purchase agreement is not signed by plaintiff. The lack of signatures on the purchase agreement renders the purchase agreement void.

While defendants are correct in that the "parties' consent does not have to be in writing, but may be implied from the facts and circumstances of the transaction," *Matter of F Yeager Bridge & Culvert Co*, 150 Mich App at 410, the facts and circumstances in this case establish that, at most, the parties were in the midst of negotiating the purchase agreement. Defendants have not asserted that plaintiff signed the agreement, nor have they asserted that the parties reached agreement on all essential parts of the purchase agreement. In fact, the purchase agreement at issue contains a multitude of handwritten notes, changes, and line draw-throughs. No "clean" purchase agreement has been provided, strongly indicating that the parties were still negotiating the terms of a potential sale of the property when plaintiff filed its first complaint against defendants on August 8, 2017.

Defendants also assert that plaintiff agreed to dismiss the 2017 case because the purchase agreement was meant to take the place of the land contract, and plaintiff generally agrees that defendants offered to purchase additional properties from plaintiff and assured plaintiff they were obtaining global funding for the same. However, the Macomb County register of actions shows that the 2017 action was dismissed on February 21, 2018 for lack of progress, not due to agreement of the parties or voluntary dismissal by plaintiff.

As to whether summary disposition was premature due to discovery having not been completed, we note that plaintiff filed its complaint against defendants in March 2019. On April 24, 2020, a discovery order was entered, providing that discovery would close on August 24, 2020. A hearing on plaintiff's motion for summary disposition was held on May 4, 2020, and the trial court did not issue an opinion and order on the motion until July 20, 2020. Defendants have provided no explanation or argument as to why they did not conduct any discovery prior to plaintiff filing its motion for summary disposition or prior to the trial court's issuance of the opinion and order resolving plaintiff's motion. Because this is essentially a contract action, all parties also presumably had most, if not all, of the documentation and evidence necessary to support their positions prior to the 2019 lawsuit having been filed.

Finally, in order to survive a motion for summary disposition brought under MCR 2.116(C)(10) "the nonmoving party must produce evidence showing a material dispute of fact left for trial . . . ." *Grable*, 240 Mich App at 563. While plaintiff attached the land contract, correspondence between the parties concerning the land contract, and the marked-up real estate purchase agreement to their motion, defendants attached no documentary evidence whatsoever in response to plaintiff's motion for summary disposition. The grant of summary disposition was

thus not premature and was appropriate based on the record.

Affirmed. Plaintiff being the prevailing party, it may tax costs. MCR 7.219.

/s/ Anica Letica
/s/ Deborah A. Servitto
/s/ Noah P. Hood