STATE OF MICHIGAN

COURT OF APPEALS

P & R DEVELOPERS, L.L.C.,

Plaintiff/Counter-Defendant/Appellee,

and

ROGER MACLEOD,

Counter-Defendant-Appellee,

V

SCOTT T. BOSGRAAF TRUST U/A/D 2/25/88, by SCOTT T. BOSGRAAF, Trustee and Individually,

Defendant/Counter-Plaintiff/Appellant,

and

SUZANNE L. BOSGRAAF, Trustee,

Defendant-Appellant.

UNPUBLISHED
December 8, 2011

No. 297439
Ottawa Circuit Court
LC No. 08-063200-CH

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant/Counter-Plaintiff Scott T. Bosgraaf Trust U/A/D 2/25/88, by Scott T. Bosgraaf, trustee and individually, and Suzanne L. Bosgraaf, trustee (hereafter collectively "the Bosgraaf Trust"), appeal as of right the judgment for plaintiff/counter-defendant P & R Developers, L.L.C. (P & R) and counter-defendant Roger MacLeod, which was entered after the trial court granted P & R and MacLeod summary disposition. We affirm.

In 2003, the parties entered into a land contract for the purchase and sale of land which contained eight condominium units. The land contract provided for the Bosgraaf Trust to purchase the property for $1,350,000, payable in installment payments of $150,000 (or more) on August 20 of 2005, 2006 and 2007, and a final balloon payment of the balance due on or before

August 20, 2008. The obligation for the land contract was supported by a guaranty executed by Scott Bosgraaf. Plaintiff initiated the instant action when defendants defaulted on their obligations under the land contract and the guaranty (i.e., breach of contract), seeking foreclosure and enforcement of the guaranty.

The Bosgraaf Trust filed a counter-complaint asserting that a provision in the land contract allowed the Bosgraaf Trust to acquire title to specific condominium units prior to the total price being paid by making early payments and that despite its having made such payments, P & R has released title to only a portion of the units. The Bosgraaf Trust also alleged fraudulent inducement, fraudulent, innocent and negligent misrepresentation, and breach of contract on the part of P & R relating to the land contract concerning the condominium units as well as a separate real estate agreement entered into between the parties concerning a parcel of property the Bosgraaf Trust also purchased from P & R. The trial court ultimately granted summary disposition in favor of P & R and awarded it a judgment against the Bosgraaf Trust in the amount of $1,044,866.52, inclusive of late fees in the amount of $42,500, as authorized under the land contract. The Bosgraaf Trust appeals the trial court's interpretation of the parties' contract and its summary disposition order.

Contract interpretation is a question of law, which we review de novo on appeal. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). Similarly, a motion for summary disposition is reviewed de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). We consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion, *Coblentz*, 475 Mich at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Coblentz*, 475 Mich at 568.

On appeal, the Bosgraaf Trust first argues that the trial court erred in its determination that the Bosgraaf Trust failed to make its scheduled August 20, 2006 payment, thereby defaulting on the land contract. The Bosgraaf Trust contends that it sent P & R a check dated August 15, 2006, for $150,000 as an early release payment on condominium unit 8 and that the early release payment it made also served as a regular annual payment for that year. Therefore, according to the Bosgraaf Trust, a separate, regular annual payment was not due on August 20, 2006, contrary to the trial court's conclusion. We agree.

The land contract involving the condominium units in this case provides that the 2006 regularly scheduled annual payment shall be made on August 20, 2006. An addendum to the land contract also provides, however, that the Bosgraaf Trust has the right to have individual condominium units released from the contract under certain terms and conditions:

> So long as Buyer is not then in default under the Contract, and no act or omission has occurred which, upon the giving of notice or passage of time, would

> be a default under the Contract, Buyer shall be entitled to a release of a Unit upon making a principle payment on the Contract in an amount equal to Two Hundred Thousand Dollars ($200,000) for each of Units 2, 3 and 4 of the condominium, and One Hundred Fifty Thousand Dollars ($150,000) for each of the other Units in the condominium, plus any interest and other charges then accrued on the Contract, plus any Net proceeds (as defined below). Buyer may not apply the regularly scheduled installment payments under the Contract in order to obtain the release of a Unit. However any release payment made by [Buyer] shall apply to the next regularly-scheduled payment under the Contract, and the balance of the release payment shall be applied to the Contract balloon payment.

In essence, the contract assigned each unit a specific value, with the total value of the units equaling the total land contract price, and allowed for the individual units to be purchased and released from the contract piecemeal, under certain conditions, which shall be addressed later. The annual installments due were $150,000, the value assigned to the majority of the individual units.

It is undisputed that the Bosgraaf Trust mailed a $150,000 payment to plaintiff on August 15, 2006. The trial court, on reconsideration, found that pursuant to the mailbox rule the August 15, 2006 payment was considered paid when it was mailed on August 15, 2006 (see, *Birznieks v Cooper*, 405 Mich 319, 330-335; 275 NW2d 221 (1979)), and, as such, the Bosgraaf Trust could declare this to be an "early release payment." This conclusion has not been appealed. The plain language of the land contract further provides that "any release payment made by Buyer shall be applied . . . to the next unpaid installment due under the Contract." Not only is this language susceptible to only one meaning, because the contract is a zero interest contract, again with the annual installments equaling the value of the majority of the single units, it is logical that the early release payment would also serve as the annual payment. Accordingly, the trial court incorrectly concluded that although the early payment was a release payment, the Bosgraaf Trust defaulted by not making the regularly scheduled August 20, 2006 annual payment.

The Bosgraaf Trust also argues that P & R breached the agreement when it refused to transfer a deed to the Bosgraaf Trust after receiving the release payment for condominium unit eight. Under such circumstances, the Bosgraaf Trust argues that it was legally excused in withholding further payments until the breach was cured. Although the Bosgraaf Trust indicated that it considered the August 2006 payment to be a release payment, it did not meet all of the conditions necessary for the same to actually be an early release.

The early release provision of the contract provides as follows:

> If Buyer desires a release of a Unit, Buyer must provide written notice of such desire to Seller, together with a form of deed for the sale Unit to be signed by Seller, a copy of the sale contract and such additional information as Seller may reasonably request. Buyer shall bear all costs of accomplishing the release, including, without limitation, the cost of any title evidence desired by Buyer, but Seller shall pay the transfer taxes owing with respect to each deed.

The Bosgraaf Trust did not provide P & R with the required form of deed or sale contract, but rather requested P & R's assistance with drafting the required deed.[1] Because the Bosgraaf Trust did not provide the form of deed, which was required pursuant to the plain language of the land contract, it did not meet a condition precedent to having unit eight released. "A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999). We note that the trial court incorrectly concluded that the Bosgraaf Trust's failure to provide a form of deed constituted an insubstantial contract breach, rather than a failure to satisfy a condition precedent to P & R's performance. Moreover, it follows that P & R could not have breached the land contract by failing to present the Bosgraaf Trust with a deed because that was the responsibility of the Bosgraaf Trust pursuant to the terms of the land contract. *Id*. Accordingly, contrary to the Bosgraaf Trust's argument, P & R did not breach the land contract by failing to present the Bosgraaf Trust with a deed to unit eight and, thereby, did not provide an excuse for the Bosgraaf Trust to withhold future payments that became due.

Further, the Bosgraaf Trust was required to pay the outstanding balance on August 20, 2008, under the terms of the land contract. The failure of the Bosgraaf Trust to make such a payment constituted a breach of the land contract. Accordingly, the trial court correctly concluded that the Bosgraaf Trust defaulted by failing to pay the outstanding balance on the due date.

For all of these reasons, P & R was entitled to judgment in this case. Although the trial court incorrectly concluded that the Bosgraaf Trust defaulted under the terms of the contract by failing to make the regularly scheduled August 20, 2006 annual payment, and incorrectly concluded that the Bosgraaf Trust's failure to provide a form of deed was a breach, it correctly entered a judgment for P & R in this case. Thus, we affirm the trial court's decision because we affirm a trial court's decision where the trial court reached the correct decision albeit for the wrong reason. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Viewing the evidence in a light most favorable to the Bosgraaf Trust, there was no genuine issue of material fact that P & R was entitled to judgment as a matter of law on its complaint, and that P & R and MacLeod were entitled to judgment as a matter of law on the Bosgraaf Trust's counter-complaint on the issue of breach of contract. *Coblentz*, 475 Mich at 567-568.

The Bosgraaf Trust next argues that it has viable claims for fraud predicated on MacLeod's misrepresentation that the lease income for the separate parcel of property was $500,000 per year. According to the Bosgraaf Trust, the trial court erred when it reached a contrary conclusion based on an application of the integration clause in the contract. We disagree.

[1] Importantly, there was no sale contract because the Bosgraaf Trust was not planning to sell the lot to another party, but rather was planning to keep the lot for itself. Thus, it follows that the Bosgraaf Trust would only be required to provide a form of deed to P & R.

Generally, "an integration clause precludes admission of parol evidence that contradicts the written agreement." *UAW-GM Human Resource Ctr v KSL Rec Corp*, 228 Mich App 486, 498; 579 NW2d 411 (1998). Thus, an integration clause nullifies all prior or contemporaneous parol agreements. *Id*. at 499. However, "[p]arol evidence is generally admissible to demonstrate fraud, which, if proved, would render the contract voidable by the innocent party." *Hamade v Sunoco, Inc*, 271 Mich App 145, 169; 721 NW2d 233 (2006). Importantly, "in the context of an integration clause, which releases all antecedent claims, only certain types of fraud would vitiate the contract." *UAW*, 228 Mich App at 503. In fact, "when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself." *Id*.

Here, the Bosgraaf Trust contends there is no dispute that the contract contained a valid integration clause, and has provided evidence that P & R falsified and/or inflated the monthly lease payments that were received on the property prior to the sale. Reference is not made in the contract, however, to any lease payments, either expected or previously received. The Bosgraaf Trust contends that the integration clause has no preclusive effect because the misrepresentations are not oral representations contradicted by the agreements but instead go to the very heart of how Bosgraaf was induced into entering into the contract. As pointed out in *UAW*, 228 Mich App at 502, however, a contract with an integration clause nullifies *all* antecedent claims: "In our view, this includes any collateral agreements that were allegedly an inducement for entering into the contract." The contract has an explicit integration clause; therefore, the clause is conclusive that the contract is complete. Because the Bosgraaf Trust does not assert fraud with respect to the integration clause, parol evidence of alleged statements made before the signing of the contract is inadmissible. We find the trial court properly granted summary disposition because the integration clause precluded considering parol evidence of prior representations. *Hamade*, 271 Mich App at 169; *UAW*, 228 Mich App at 503.

The Bosgraaf Trust also argues that the trial court erred when it determined that the Bosgraaf Trust's fraud claims, which related to the discovery after the contract was entered into that a portion of the property had been contaminated, could not be maintained because of the integration clause in the contract. The Bosgraaf Trust's counterclaim provided that these allegations relating to contamination were based on verbal and written representations and promises made prior to entering into the sales contract. Accordingly, because the fraud that the Bosgraaf Trust alleges to have occurred involved prior or contemporaneous representations and promises, the integration clause nullifies all claims arising from those prior or contemporaneous representations and promises, unless the alleged fraud invalidated the integration clause itself. *Hamade*, 271 Mich App at 169; *UAW*, 228 Mich App at 498.

Again, the alleged fraudulent representations involved representations and promises relating to contamination of the premises and did not involve claims which would invalidate the integration clause itself. *UAW*, 228 Mich App at 498. Thus, the Bosgraaf Trust's fraud claim cannot be sustained. *Id*. Moreover, the Bosgraaf Trust was put on notice as to remedial action being taken by the Michigan Department of Environmental Quality, and also agreed in the contract that it could conduct its own environmental investigation within 30 days of closing and that the Bosgraaf Trust's failure to conduct such an investigation resulted in its waiver of any objection relating to the environmental condition of the property. The Bosgraaf Trust did not make such an investigation and, thereby, waived the right to raise claims arising from any

environmental contamination. For these reasons, there was no genuine issue of material fact whether P & R and MacLeod were entitled to summary disposition on the Bosgraaf Trust's fraud claim, which involved contamination on the property. *Coblentz*, 475 Mich at 567-568.

Finally, the Bosgraaf Trust argues that because there was no evidence before the trial court to support a claim that the contractual five percent late charge was reasonable, the trial court erred in granting P & R the requested late charge. Again, we disagree.

"The issue whether a liquidated damages provision is valid and enforceable is a matter of law that this Court reviews de novo." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 270; 715 NW2d 914 (2006). As stated by the Court in *Moore v St Clair Co*, 120 Mich App 335, 340; 328 NW2d 47 (1982) (quotations omitted):

> It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at [the] time [the] contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation.

See also *Solomon v Dep't of State Hwys & Transp*, 131 Mich App 479, 484; 345 NW2d 717 (1984).

In this case, at the time the contract was entered into, the damages to be sustained by P & R as the result of the Bosgraaf Trust's failure to pay any outstanding contract balance on August 20, 2008, would be uncertain and difficult to ascertain. *Id.*; *Moore*, 120 Mich App at 340. And, a five percent late fee is reasonable with regard to the possible injury that may be suffered by P & R as the result of the Bosgraaf Trust's failure to pay any outstanding balance on the due date. The balance owed on the due date was $850,000.00. As of the time of P & R's motion, over a year after the payment was due, the balance had not yet been paid. P & R thus lost the use of that money for over a year.

Moreover, the Bosgraaf Trust was well aware of the five percent late fee when it signed the contract and parties are generally free to agree to whatever they like. Respect for the freedom to contract necessarily entails that courts limit their role in contract disputes to enforcing all those, but only those, obligations assented to by the parties. *Wilkie v Auto–Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Accordingly, the parties' stipulation in their contract to a five percent late fee was enforceable. In sum, the trial court correctly awarded a five percent late fee of $42,500. See, *St Clair Med*, 270 Mich App at 270.

Affirmed.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause