STATE OF MICHIGAN

COURT OF APPEALS

BUTTON REALTY, LLC, Plaintiff-Appellant,	UNPUBLISHED September 22, 2011
v	No. 297863 Oakland Circuit Court
CHARTER TOWNSHIP OF COMMERCE and COUNTRY HILLS DEVELOPMENT, LLC, Defendant-Appellee.	LC No. 10-106745-CZ

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Plaintiff Button Realty, LLC, appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(4) in favor of defendant Commerce Charter Township and granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Country Hills Development, LLC. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of the sale of land by plaintiff to defendant Country Hills Development, LLC [hereinafter referred to as Country Hills]. On March 19, 2004, plaintiff entered into a purchase agreement with Lincorp, in a representative capacity on behalf of Country Hills, for the sale of 34.41 acres of land. The sale of the 34.41 acres of unimproved land ("Phase 2") was part of a larger purchase by Country Hills of seventeen unsold improved sites (the developer sites) from a different seller in the existing Country Hills Condominium Project ("Phase 1") that was adjacent to plaintiff's property.[1] The purchase agreement provided that Country Hills was to purchase plaintiff's property on land contract for the purpose of developing a single-family residential project. The purchase agreement provided Country Hills with a one-year period following the effective date of the purchase agreement to obtain site plan approval for Phase 2 including, but not limited to, approval for not less than seventy single family residences with pressure sewer and city water. The purchase agreement further provided that the parties would enter into a land contract for the purchase of the unimproved land within thirty

[1] Certain third parties owned 14 sites within the condominium project.

days of such approval. The purchase agreement required that the land contract permit Country Hills

> to undertake all activities it deems reasonably required to develop Phase 2 as a single family residential development consistent with and meeting all of the requirements of Purchaser's intended use, including, but not limited to, . . . utilities and water lines, . . .

Further, the purchase agreement provided that plaintiff "shall agree to the creation and/or imposition of any special assessment district(s) for the water and/or sewer system(s).

According to plaintiff's complaint, Country Hills petitioned defendant Commerce Charter Township ("the township") "to establish a special assessment district to finance the extension of and connection of the Township's public water system" to serve the project. On January 11, 2005, the township board adopted two resolutions that confirmed (a) the Special Assessment Roll for the Special Assessment District Designated as the Central West Water Main Special Assessment District, and (b) the Special Assessment Roll for the Special Assessment Designated as the Central West Water Main Capital Charges Special Assessment District (collectively the "SAD's"). The special assessment rolls approved by the township board included plaintiff's property.

On June 28, 2005, plaintiff and Country Hills executed a land contract for the sale of plaintiff's property in accordance with the terms and conditions of the purchase agreement. Country Hills thereafter submitted an application to the township to conditionally rezone the property to permit the single-family residential density proposed by Country Hills to be developed on the property. The township board approved Country Hill's conditional zoning application and, on July 11, 2006, Country Hills and the township entered into a development agreement.

The development agreement provided that certain recited undertakings and forbearances "shall be undertaken as a condition to Township's rezoning of Unimproved Property." However, the parties agreed that

> If the undertakings have not been completed within fifteen years of the date of this Agreement, . . . the zoning classification of the Undeveloped Property shall revert back to the Existing Classification.
>
> It is acknowledged and agreed that the Township has not required the Undertakings. The Undertakings have been voluntarily offered by Developer in order to provide an enhanced use and value of the Development, and to protect the public safety and welfare, and to induce the Township to rezone the Unimproved Property to the Proposed Classification so as to provide material advantages and development options for the Developer.

Country Hills defaulted on its land contract with plaintiff and the property went back to plaintiff before the completion of the extension of the public water and sewer lines throughout the development.[2]

On January 8, 2010, plaintiff filed the present action in circuit court. With regard to the township, plaintiff alleged that the special assessments imposed by the township for the purpose of extending the public water and sewer lines do not confer any benefit on plaintiff's property because the extension does not meet the boundary of plaintiff's property and, therefore, plaintiff's property lacks access to the public water and sewer system. Plaintiff sought to have the SAD's declared invalid and unenforceable as a matter of law against plaintiff's property and to enjoin the township from pursuing the foreclosure and/or forfeiture of plaintiff's property as a result of the nonpayment of the special assessments. Plaintiff also alleged that it did not receive notice of the special assessment hearing and, therefore, that the special assessments levied against plaintiff's property are invalid as a matter of law. Plaintiff further alleged that its due process rights were violated as a result of the lack of notice regarding the special assessment hearings. With regard to Country Hills, plaintiff alleged that Country Hills breached its contract with the township by "failing to extend the public water and sanitary sewer main infrastructure to Plaintiff's Property and install all internal water and sewer lines on Plaintiff's Property that would be necessary to service the proposed residential development." Plaintiff alleged Country Hill's contractual obligations to the township conferred a direct benefit on plaintiff and that plaintiff is a third-party beneficiary of the obligations of Country Hills in the development agreement.

In lieu of an answer, the township filed a motion for summary disposition pursuant to MCR 2.116(C)(4). The township argued that the Michigan Tax Tribunal has exclusive jurisdiction to decide whether the special assessments were properly imposed on plaintiff's property. Country Hills also filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Country Hills argued that plaintiff is not a third party beneficiary of the development agreement between the township and Country Hills and, further, that Country Hills was not in breach of the development agreement because (1) the agreement provided that Country Hills had at least fifteen years to perform the undertakings, and (2) the agreement did not *require* Country Hills to perform the undertakings.

A hearing was held on the motions for summary disposition on April 14, 2010. The trial court ruled as follows:

> This case concerns plaintiff, Button Realty LLC's property located in Commerce Township. Plaintiff disputes a special assessment leveled on the property. The Court first addresses the defendant Township's Motion for Summary Disposition.

[2] According to Country Hills' motion for summary disposition, it installed sewer lines and certain paving before the economy soured and the property went back to plaintiff.

This defendant argues that the issues raised by the plaintiff against it are within the exclusive jurisdiction of the Michigan Tax Tribunal. Thus, this court lacks subject matter jurisdiction to adjudicate these claims. This Court agrees.

Here, based on the applicable case law and Statute, the issues of whether a local municipality followed the requisite statutory procedures, and whether a particular property is adequately benefitted by a special assessment, are within the exclusive jurisdiction of the Michigan Tax Tribunal. MCL 205.731, and *Michigan Adventure, Inc v Dalton Twp,* a recent Michigan Court of Appeals case, decided January 14, 2010, docket number 283770.

Furthermore, plaintiff's argument that they are left without a forum in which to challenge the validity of the special assessment district, was posed by a plaintiff and rejected by the Court of Appeals in *Anderson v Selma Twp,* 95 Mich App 112, 1980. Therefore, the defendant township's Motion for Summary Disposition is granted.

Next, the court addresses the defendant, Country Hills' Motion for Summary Disposition. Plaintiff's claim against this defendant is set forth under count four, a Breach of Contract. The contract at issue is a development agreement into between the co-defendants. Defendant Country Hills argues that it is not in breach of the development agreement at issue. Defendant further argues that the plaintiff is not a third-party beneficiary of the subject agreement. This court agrees.

Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning. *Haywood v Fowler,* 190 Mich App 253, page 258, 1991.

The court finds that under the plain language of the development agreement, defendant Country Hill (sic) is not in breach, and the plaintiff is not a third-party beneficiary of the agreement. First, Country Hills is not in breach of the agreement, in as much as its undertakings under the agreement are conditional. Based on the clear language of the agreement, the undertakings of the developer are merely conditions of the agreement that may be satisfied at the option of a developer, if at all.

A condition is distinguished from a promise in that it creates no right or duty in and of itself, but is merely a limiting or modifying factor. The courts may not turn a condition precedent into an independent agreement. *Knox v Knox,* 337 Mich 109, page 118, 1953.

Furthermore, under the agreement, defendant Country Hills has until January 21, 2021, to perform the undertakings. Thus, again, Country Hills cannot be in breach of the agreement.

Secondly, plaintiff is not a third-party beneficiary of the agreement. Not everyone who benefits in some way from a contract can be classified as a third-

party beneficiary so as to be able to stand in the promisee's shoes and recover under the contract. *Reith Riley Construction Co, Inc v Dep't of Transportation*, 136 Mich App 425, page 430 (1984).

The fact that a third-party is incidentally benefitted does not give that third-party –does not give that third person rights as a third-party beneficiary. *Alcona Community Schools v State* (ph), 216 Mich App 202, page 205, 1996.

Here, the development agreement does not require that the defendant, Country Hills, do something directly for the plaintiff. MCL 600.1405, Section 1(a). Also *Schmalfeldt v North Pointe Ins Co*, 468 Mich 222, 2003.

Plaintiff is not even named in the agreement, therefore the defendant Country Hill's motion is granted.

II

Plaintiff first argues that the trial court erred by concluding that the Michigan Tax Tribunal has exclusive jurisdiction to hear plaintiff's challenge to the township's inclusion of plaintiff's property in the townships SAD's. We review de novo a trial court's grant of summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

"This Court reviews a trial court's grant of summary disposition pursuant to MCR 2.116(C)(4) 'to determine if the moving party was entitled to judgment as a matter of law, or if affidavits or other proofs demonstrate there is an issue of material fact.'" *Genesis Center, PLC v Financial and Ins Services Comm'r*, 246 Mich App 531, 540; 633 NW2d 834 (2001), quoting *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

Plaintiff's claims with regard to the township are that the special assessment is invalid because plaintiff did not receive written notice of the special assessment proceedings and that the special assessment did not confer any benefit to plaintiff's property. Plaintiff does not dispute that the Michigan Tax Tribunal "has exclusive and original jurisdiction over" . . . a "proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization under the property laws of this state." MCL 205.731(a). Plaintiff also acknowledges that "the Michigan Supreme Court has held that the Michigan Tax Tribunal has exclusive and original jurisdiction over decisions related to special assessments under ad valorem property tax laws . . ." *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982). See also *Michigan's Adventure, Inc v Dalton Twp*, 287 Mich App 151; 782 NW2d 806 (2010). Indeed, plaintiff concedes that "At first blush, it appears that the trial court's decision comports with the statute and foregoing caselaw suggesting that the Michigan Tax Tribunal possesses exclusive and original jurisdiction to hear plaintiff's claims."

Plaintiff asserts, however, that the township failed to follow the required statutory procedures for giving notice[3] to property owners of a special assessment district and, consequently, plaintiff was not able to timely invoke the jurisdiction of the Michigan Tax Tribunal. At the time the SAD was approved in 2005, MCL 205.735(3) provided in relevant part that "the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 35 days after the final decision, ruling, determination, or order that the petitioner seeks to review." Plaintiff contends that if it files an appeal of the special assessment with the Michigan Tax Tribunal, the appeal will "undoubtedly be dismissed for lack of jurisdiction because it was not timely filed under MCL 205.735," thereby leaving plaintiff without a forum in which to litigate its claims against the township and denying it of due process if not given an opportunity to be heard. Plaintiff's argument is misplaced.

In *Anderson v Selma Twp*, 95 Mich App 112; 290 NW2d 97 (1980), the township board approved a special assessment district for public improvements. Although the township clerk executed an affidavit that he properly mailed notices of the SAD to all affected owners of property and published notice in a local newspaper, the plaintiff property owners alleged that no notice of the meeting to affirm the assessment procedure was ever given. The property owners brought suit in circuit court, seeking injunctive relief. The circuit court dismissed for lack of subject matter jurisdiction. The property owners thereafter petitioned the Michigan Tax Tribunal for relief. The tribunal found that the property owners had failed to timely file a petition before the tribunal pursuant to MCL 205.735(3).

On appeal, this Court reversed the decision of the tribunal dismissing the plaintiffs' claim under the statute of limitations and ordered further proceedings in the tribunal. The majority remanded the case back to the tribunal for a determination on the issue of whether the petitioners received personal notice of the special assessment hearing. Specifically, the court stated, "In the present case, plaintiffs' claim that they never received personal notice of the special assessment hearing, if believed, is sufficient to challenge their individual assessments." *Anderson*, 95 Mich App at 117. This Court held that before the tribunal can decide if the plaintiffs' claim was timely filed, the tribunal must first decide if the SAD was legitimately ratified by the township. In order to determine whether the SAD was legitimately ratified as to the plaintiffs, the tribunal must first determine if the township followed the statutory requirements and gave the plaintiffs notice. Thus, this Court remanded the matter to the tribunal to give the plaintiffs a hearing on the issue of notice:

> However, based on the record, we are unable to conclude that the January 8, 1977, confirmation was valid with respect to the plaintiffs. In order to have a

[3] Under MCL 41.721, townships have the authority to make certain improvements to land and to defray the costs of these improvements by collecting special assessments from those property owners who benefit as a result. MCL 41.724 outlines the requirements for a township board to proceed depending on the type of improvement desired, and mandates that a property owner receive notice, as outlined in MCL 41.724a, and a hearing in which he or she has the opportunity to contest the assessment.

> legitimate ratification, the county clerk is required to give both personal notice and notice by publication of the special assessment hearing at which the confirmation will take place. Failure to do so will not invalidate the entire assessment, but will only affect the assessment on property where the owners or interested party did not receive notice.
>
> In the present case, plaintiffs' claim that they never received personal notice of the special assessment hearing, if believed, is sufficient to challenge their individual assessments. . . . The Michigan Tax Tribunal's order did not resolve this dispute, nor did it indicate whether the issue of notice had even been considered. . . .
>
> In the absence of a ruling on the validity of the January 8, 1977, confirmation, we are unable to conclude whether the statute of limitations has been met. We remand this case to the Michigan Tax Tribunal for a more particularized explanation as to the finality of the January 8, 1977, confirmation and the satisfaction of statutory notice requirements.
>
> If the special assessment was validly confirmed in 1977, then the jurisdiction of the tribunal was not timely invoked. If it was never so confirmed, then the plaintiffs have thirty days after the special assessment roll is approved to appeal the special assessments levied against their properties. [*Anderson*, 95 Mich App at 117-118; internal citations and footnotes deleted.]

The clearest holding in *Anderson* is that lack of notice would have been sufficient to excuse the plaintiffs' failure to protest and timely file an appeal. In the present case, plaintiff asserts that the township did not abide by the statutory notice requirements of MCL 41.724a and asserts that its property is not properly benefited by the SAD. Both of these issues are within the exclusive jurisdiction of the Michigan Tax Tribunal. The tribunal must first determine whether the township abided by the statutory notice requirements in MCL 41.724a before it can determine whether the statute of limitations has been met. In other words, if the township did not comply with MCL 41.724a, the special assessment was not validly confirmed with regard to plaintiff's property and plaintiff's claims against the township would not be barred by the statute of limitations. The trial court properly granted summary disposition pursuant to MCR 2.116(C)(4) in favor of the township.

III

Plaintiff next argues that the trial court erred by granting summary disposition in favor of Country Hills on the ground that there was no genuine issue of material fact that plaintiff was not in breach of the development agreement between the township and Country Hills and that plaintiff is not a third-party beneficiary of the development agreement.

A review of the trial court's ruling reveals that the court considered evidence outside the pleading in deciding Country Hills' motion. Because the trial court relied on evidence beyond the pleadings, it appears that it granted the motion under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

A motion under MCR 2.116(C)(10) considers whether there is a genuine issue of fact for trial and is decided on the basis of the evidence submitted by the parties. MCR 2.116(G)(4) and (5), and (I)(1). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A contract is a bargained for exchange of obligations entered into by choice by parties who have mutually agreed to all essential terms and the relationship is governed by those terms. *Ford Motor Co v Bruce Twp*, 264 Mich App 1, 12; 689 NW2d 764 (2004), rev'd on other grounds 475 Mich 425; 726 NW2d 247 (2006). Michigan law requires that a party claiming a breach of contract prove the terms of the contract, that the opposing party breached the terms, and that the breach caused an injury. *In re Brown*, 342 F3d 620, 628 (CA 6, 2003).

A contract must be interpreted according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). When the language of the contract is clear and unambiguous, interpretation is limited to the actual words used, and an unambiguous contract must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

Plaintiff contends that Country Hills breached the development agreement by failing to "construct and install the necessary infrastructure to connect Plaintiff's Property and the Country Hills Condominium project to the Township's water and sewer lines." A review of the development agreement, however, reveals that Country Hills was not *required* to perform the undertakings set forth in the agreement. The agreement specifically states that

> the Township has not required the Undertakings. The Undertakings have been voluntarily offered by the Developer in order to provide an enhanced use and value of the Development . . . and to induce the Township to rezone the Unimproved Property to the Proposed Classification so as to provide material advantages and development options for the Developer.

The plain language of the agreement provides that Country Hills had the option to make the undertakings, but had no obligation to do so. In other words, if Country Hills desired to have the property permanently rezoned, it first had to satisfy the conditions in the development agreement. The undertakings are merely "conditions" of the agreement that may be satisfied at the option of Country Hills. In that regard, the Supreme Court held in *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953):

> A condition precedent is a fact or event which the parties intend must exist or must take place before there is a right of performance. A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. If the condition is not fulfilled, the right to enforce the contract does not come into existence.

Additionally, the agreement provides that Country Hills had at least fifteen years (from the effective date of July 11, 2006) to perform the undertakings. In the event Country Hills declined to exercise its option to perform the undertakings, the agreement provides the exclusive remedy:

> If the undertakings have not been completed within fifteen years of the date of this Agreement, unless such time is extended after application by Developer and approval by Township . . . , the zoning classification for the undeveloped property shall revert back to the Existing Classification.

Thus, Country Hills cannot be in breach of the agreement because the fifteen year performance period has not expired. Furthermore, Country Hills cannot be in breach of the agreement because the agreement simply affords Country Hills with the option to fulfill various conditions which, if satisfied, would make the conditional zoning classification permanent. Lastly, the exclusive remedy for declining to fulfill the undertakings within the fifteen-year time period is that the conditional zoning classification would revert back to its original classification. The trial court properly concluded that there was no genuine issue of material fact with regard to whether Country Hills was in breach of the agreement.

Plaintiff also argues that the trial court erred by granting summary disposition in favor of Country Hills on the ground that plaintiff is not a third-party beneficiary of the development agreement between the township and Country Hills. Even if plaintiff can demonstrate that it is a third-party beneficiary of the development agreement between Country Hills and the township, it would merely gain the rights of the promisee – the township – as against Country Hills. MCL 600.1405. For the reasons stated above, Country Hills is not in breach of the development agreement with the township.

Further, the trial court properly concluded that plaintiff is not a third-party beneficiary of the development agreement. In MCL 600.1405, the Legislature has defined, in relevant part as follows, who may claim third-party beneficiary status with respect to an agreement entered into by other parties:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

Our Supreme Court has interpreted this statutory language as follows:

> In describing the conditions under which a contractual promise is to be construed as for the benefit of a third party to the contract in § 1405, the Legislature utilized the modifier "directly." Simply stated, section 140 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person. This language indicates the Legislature's intent to assure that contracting parties are clearly

> aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. [*Koenig v South Haven*, 460 Mich 667, 676-677; 597 NW2d 99 (1999).]

When determining whether MCL 600.1405 applies to a purported third-party beneficiary, "a court should look no further than the form and meaning of the contract itself" and should view the contract objectively." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). This Court has noted that in order to be a third-party beneficiary of a contract, a party must not only be in a position to benefit from the performance of the contract, but there must be "an express promise to act to the benefit of the third party." *Kisiel v Holz*, 272 Mich App 168, 171; 725 NW2d 67 (2006).

After reviewing the language of the development agreement between Country Hills and the township in light of these governing principles, there is no support for plaintiff's contention that it qualifies as a third-party beneficiary of the agreement. The development agreement does not establish that Country Hills undertook a promise "directly" to or for plaintiff. Plaintiff cannot establish that the language of the development agreement between the township and Country Hills demonstrated an undertaking by Country Hills for the benefit of plaintiff. At best, plaintiff qualifies as an incidental beneficiary in the event of a default by Country Hills of the land contract between Country Hills and plaintiff. Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under MCL 600.1405. *Schmalfeldt*, 469 Mich at 429.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot