STATE OF MICHIGAN

COURT OF APPEALS

PETER HANNI and GONELLAS FOODS, INC.,

Plaintiffs/Intervening-Defendants/Appellees,

and

HANA HANNI,

Plaintiff-Appellee.

v

GEORGE YONO,

Intervening-Plaintiff/Appellant,

and

YPSILANTI SHOPPING CENTER, L.L.C. and JONATHAN YONO,

Defendants.

UNPUBLISHED
January 29, 2013

No. 305771
Wayne Circuit Court
LC No. 09-022159-CK

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent. The majority concludes that, because the parties' stock purchase agreement contains an integration clause, the parol-evidence rule precludes intervening plaintiff George Yono from presenting extrinsic evidence to establish an exception to the parol-evidence rule: that the agreement is a sham not intended to create legal relations between the parties. The majority further concludes that the parties' stock purchase agreement is valid and that Yono "transferred all of his Gonellas stock when he signed the integrated agreement." In my opinion, the majority misconstrues Michigan law concerning the application of the parol-evidence rule. Under Michigan law, the presence of an integration clause is, subject to certain limited exceptions, conclusive regarding whether a written agreement is integrated; however, the presence of an integration clause does not extinguish the potential applicability of an exception to the parol-evidence rule to attack the validity of the agreement as a whole, such as when the agreement is a sham, illegal, or the product of mistake or, in limited circumstances, fraud.

Therefore, I would conclude that, although the stock purchase agreement contains an integration clause, the parol-evidence rule does not preclude Yono from presenting extrinsic evidence to establish that the agreement is a sham. Furthermore, I would hold that a genuine issue of material fact regarding whether the stock purchase agreement is a sham or a valid contract precluded summary disposition in favor of plaintiff/intervening defendants Peter Hanni and Gonellas Foods, Inc. Accordingly, I would reverse the trial court's judgment and remand for further proceedings.

This Court has summarized the parol-evidence rule as follows: '"[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous."' *UAW-GM Human Resources Ctr v KSL Recreation Corp*, 228 Mich App 492, 502; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). Our Supreme Court has explained that there are several well-established exceptions to the parol-evidence rule, pursuant to which parol evidence may be used to establish the following: (1) the writing is a sham not intended to create legal relations; (2) the writing is of no efficacy or effect because of fraud, illegality, or mistake; (3) the writing is not integrated; and (4) the writing is only partially integrated. *NAG Enterprises, Inc v All State Indus, Inc*, 407 Mich 407, 410-411; 285 NW2d 770 (1979). For the parol-evidence rule to apply, a contract must be integrated. *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 167; 721 NW2d 233 (2006). Our Supreme Court has explained that whether a contract is integrated is the "*threshold question*" to the application of the parol-evidence rule. *NAG Enterprises*, 407 Mich at 410 (emphasis added); see also *Farm Credit Servs of Mich's Heartland, PCA v Weldon*, 232 Mich App 662, 669; 591 NW2d 438 (1998) ("A finding that the parties intended a written instrument to be a complete expression of their agreement concerning the matters covered is a prerequisite to the application of the parol evidence rule."). The parol-evidence rule does not apply if a contract is not integrated. See *Hamade*, 271 Mich App at 167. Generally, to determine whether a contract is integrated, parol evidence may be considered, *NAG Enterprises*, 407 Mich at 410-411, unless the contract includes an integration clause, *UAW-GM*, 228 Mich App at 502. In *UAW-GM*, this Court held as follows when addressing the effect of an integration clause on the threshold question of whether a written agreement is integrated:

> when the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that *the agreement is not integrated* except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete "on its face" and, therefore, parol evidence is necessary for the "filling of gaps." [*UAW-GM*, 228 Mich App at 502, quoting 3 Corbin, Contracts, § 578, p 411 (emphasis added).]

As this Court's holding in *UAW-GM* illustrates, whether a written contract contains an integration clause is relevant only to the threshold issue of whether a contract is integrated to trigger the application of the parol-evidence rule. The majority, however, relies on *UAW-GM* to conclude that the integration clause in the parties' stock purchase agreement precludes consideration of parol evidence to prove that the agreement is a sham. Although this Court's decision in *UAW-GM* eliminates the integration exceptions to the parol-evidence rule when a written agreement contains an integration clause (subject to certain exceptions), *UAW-GM* does not stand for the proposition that the presence of an integration clause in an agreement prohibits

a party from using parol evidence to attack the validity of the agreement as a whole, such as when it is a sham, illegal, or the product of mistake or, in certain cases, fraud. Our holding in *UAW-GM* was limited to the rule that a written agreement is conclusively integrated when it includes an integration clause, except in cases of fraud that invalidate the integration clause or where the agreement is obviously incomplete on its face. See *id.* at 493-502.[1] Since our decision in *UAW-GM*, this Court has explained that "[d]espite the existence of a merger clause, parol evidence is admissible for purposes of demonstrating that the agreement is void or voidable . . . ." *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006), quoting Calamari & Perillo, The Law of Contracts (4th Ed) § 9.21, pp 340-341; see also generally *Hamade*, 271 Mich App at 167-168 (explaining that parol evidence may be presented to attack the validity of a contract as a whole).[2] This is basic hornbook law. See Corbin on Contracts, § 28.21 ("Written contracts frequently contain merger clauses stating that the writing contains the entire contract and that no representations other than those contained in the writing have been made. Despite the existence of a merger clause, parol evidence is admissible for purposes of demonstrating that the agreement is void or voidable . . . ."); Calamari & Perillo, The Law of Contracts (4th ed), § 9.21, pp 340-341 (stating the same); Restatement Contracts, 2d, § 214(d)-(e) comment c ("What appears to be a complete and binding integrated agreement may be a forgery, a joke, a sham, or an agreement without consideration, or it may be voidable for fraud, duress, mistake, or the like, or it may be illegal. Such invalidating causes need not and commonly do not appear on the face of the writing. They are not affected even by a 'merger'

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[1] In *UAW-GM*, neither party denied that a valid contract existed; rather, they disagreed "only with respect to the particular terms of the contract." *UAW-GM*, 228 Mich App at 503 n 7. The plaintiff "made no allegations of fraud that would invalidate the contract or the merger clause itself," *id*. at 505, and there was "no indication that the integration clause itself [was] void for any reason," *id*. at 507. *UAW-GM* made clear that integration clauses "preclude courts from looking outside the contract to interpret the contract." *Id*. at 507. In the case before us, the parties do not dispute the terms of their written agreement or whether it is integrated; rather, they dispute whether it is a valid contract.

[2] See also *Uskiewicz v City of Alpena*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 285834), slip op at 1, 3 (stating that, with respect to a written agreement containing an integration clause, parol evidence "is admissible even in this case involving an unambiguous, fully integrated written contract in an effort to show that the contract was a sham, illegal, or the product of fraud or mistake"); *Markham v Sunoco Oil Co*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2008 (Docket No. 272163), slip op at 2, 6 ("Because the 1998 Agreement [containing an integration clause] is unambiguous and fully integrated, the parol evidence rule applies and extrinsic evidence could not be admitted unless plaintiffs demonstrated that the contract was a sham, illegal, the product of mistake, or that the statement should be admitted under some other recognized exception."). Although we are not bound by unpublished opinions of this Court, MCR 7.215(C)(1), we may consult them as persuasive authority, *Hicks v EPI Printers, Inc*, 267 Mich App 79, 87 n 1; 702 NW2d 883 (2005). I find the above cases persuasive because they correctly explain the nature of the sham exception in the face of an integration clause even after this Court's ruling in *UAW-GM*.

clause."). "[P]arol evidence is always competent to show the non-existence of a contract. Oral evidence is admissible, as between the parties to a written agreement … to show that the writing was a sham not intended to create legal relations." *Tepsich v Howe Constr Co*, 377 Mich 18, 23; 138 NW2d 376 (1965).[3] Indeed, the parol-evidence rule does not apply unless there is a valid contract. See *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 627; 692 NW2d 388 (2004) (explaining that the parol-evidence rule did not apply because a valid contract was never formed). A sham agreement is not intended to be binding, does not create legal relations, and is entirely void. *Tepsich*, 377 Mich at 23-24. The parol-evidence rule, therefore, cannot logically apply to preclude a party from demonstrating that what is purported to be a valid contract is actually a sham. See *id.*; *Blackburne*, 264 Mich App at 627.

Accordingly, I would conclude that, although the stock purchase agreement contains an integration clause, the parol-evidence rule does not preclude Yono from presenting extrinsic evidence to establish that the stock purchase agreement is a sham.

Furthermore, contrary to the majority's conclusion that the stock purchase agreement is valid and that "Yono transferred all of his Gonellas stock when he signed the integrated agreement," I would conclude that a genuine issue of material fact exists regarding whether the parties intended the stock purchase agreement to create a binding contract for a sale of stock or simply a sham agreement to satisfy a bank's condition for securing a loan for Gonellas, i.e., a sham agreement to essentially defraud the bank. The record evidence in this case supports either scenario such that reasonable minds could differ regarding this factual issue. Notably, Yono is not entitled to relief in either scenario, and Hanni is only entitled to relief if the stock purchase agreement is valid. In the event that the stock purchase agreement is a valid contract intended by the parties to transfer Yono's stock to Hanni, Hanni is entitled to Yono's stock.[4] But, if the stock

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[3] It is worth noting that the sham exception to the parol-evidence rule applies to a contest between the parties to a written agreement and their privies, but the agreement remains enforceable with respect to innocent third parties. See *Tepsich*, 377 Mich at 23.

[4] The majority's conclusion that "Yono transferred all of his Gonellas stock when he signed the integrated agreement" is at odds with both the express language of Yono's stock certificate and section 3(a) of Gonellas's bylaws. Yono's stock certificate states that the stock is "transferable only on the books of the Corporation by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed." Similarly, section 3(a) of Gonellas's bylaws require that a transfer of stock

> be made on the share records of the Corporation only by the holder of record thereof, in person or by his duly authorized attorney, upon surrender for cancellation of the certificate or certificates representing such shares, with an assignment or power of transfer endorsed thereon or delivered therewith, duly executed, with such proof of the authenticity of the signature and of authority to transfer and of payment of transfer taxes as the Corporation or its agents may require.

purchase agreement is a sham, neither Yono nor Hanni would be entitled to relief from the court because both parties would have unclean hands by entering into a sham agreement to obtain a loan by defrauding the bank. See *Attorney General v PowerPick Club*, 287 Mich App 13, 52; 783 NW2d 515 (2010) ("It is well settled that one who seeks equitable relief must do so with clean hands. . . . A defendant with unclean hands may not defend on the ground that the plaintiff has unclean hands as well."); *Turok v Dombrowski*, 341 Mich 562, 569; 67 NW2d 798 (1954) ("We do not aid one of two parties guilty of complicity in fraud, but leave them where their own actions left them.").

For these reasons, I would reverse and remand for further proceedings.

/s/ Jane M. Beckering

The record is devoid of any evidence that Yono surrendered his stock in accordance with the terms of his certificate and the bylaws. See generally *Allied Supermarkets, Inc v Grocer's Dairy Co*, 45 Mich App 310, 315; 206 NW2d 490 (1973) ("The bylaws of a corporation, so long as adopted in conformity with state law, constitute a binding contract between the corporation and its shareholders."), citing *Cole v Southern Mich Fruit Ass'n*, 260 Mich 617, 618, 621-622; 245 NW 534 (1932). Instead, the record evidence shows that, about four years after the stock purchase agreement was made, Hanni had Gonellas's accountant make stock certificates to reflect that all of Gonellas's stock was in Hanni's name.