

STATE OF MICHIGAN
COURT OF APPEALS

RALPH ROBERTS REALTY, LLC,

Plaintiff/Counterdefendant-
Appellant,

v

KEVIN SCHIERLINGER, TERESA
SCHIERLINGER, 13134 TK, LLC, 4476
NEWCASTLE GROUP, LLC, 29923 EMILY,
LLC, and KNS CAPITAL, LLC,

Defendants/Counterplaintiffs-
Appellees.

UNPUBLISHED
November 21, 2019

No. 346053
Oakland Circuit Court
LC No. 2017-161042-CB

Before: JANSEN, P.J., and BOONSTRA and LETICA, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

I. RELEVANT FACTUAL BACKGROUND

In May 2010, plaintiff and Kevin Schierlinger entered into discussions for Kevin to participate in a real estate investment program run by plaintiff. The terms of the investment program were outlined in a written acquisition agreement, but plaintiff and Kevin failed to sign the agreement. Under the terms of the agreement, plaintiff would identify properties for Kevin to purchase as investment properties. If Kevin chose to purchase a property, plaintiff would purchase the property on Kevin's behalf, and would title the property in either Kevin's name, or in the name of Kevin's designated entity. Plaintiff would receive \$5,000 for this service. The agreement went on to provide that plaintiff retained an exclusive right to sell any property obtained for Kevin, and would receive a "commission" of 7% of the gross sale of any property sold. The remaining proceeds of the sale, after deducting costs incurred by Kevin, would be split evenly between plaintiff and Kevin. If the property were sold for a profit of less than \$1,000, the proceeds would not be split. In the event that any property acquired by plaintiff for Kevin was

not sold within five years of the agreement, plaintiff would be entitled to 50% of the property's gross sale price premised on a valuation of the property.

Plaintiff purchased seven properties for Kevin under the agreement, and deeded the properties in the names of defendants: 13134 Stratford Drive, Sterling Heights, Michigan for \$37,011 and titled in the name of 13134 TK, LLC, a limited liability company owned by Kevin; 27691 Harrison Woods, Harrison Township, Michigan for \$13,357 and titled in Kevin's name; 4310 Leroy Ct., White Lake, Michigan for \$33,938.40 and titled in the name of Newcastle Group, LLC, a limited liability company owned by Kevin; 29923 Emily Lane, Unit 114, Chesterfield Township, Michigan for \$20,001 and titled in Teresa Schierlinger's name; 36006 Kettering Court, Clinton Township, Michigan for \$7,475.23 and titled in Kevin's name; 2140 Garfield, Ferndale, Michigan for \$22,501 and titled in Teresa's name; and 58765 Chennault, Lenox, Michigan for \$14,781 and titled in the name of RRR, LLC. The title for the Chenault property was subsequently conveyed to KNS, LLC, a limited liability company owned by Kevin.

Five years later, the properties had not been sold, and Kevin refused to pay plaintiff under the agreement. Plaintiff filed a complaint in September 2017, and alleged that it was entitled to 50% of the properties' equity values under the terms of the agreements. Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and argued that the agreements were unenforceable under the statute of frauds because they granted a conveyance of land to plaintiff and plaintiff sought commissions for the sales of real estate. The trial court agreed that the statute of frauds barred plaintiff's claim, and granted summary disposition in favor of defendants. This appeal followed.

II. STANDARD OF REVIEW

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The trial court, however, failed to specify under which subsection of MCR 2.116(C) it granted summary disposition. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). Under MCR 2.116 (C)(10), summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Because the terms of the agreements determined whether they violated the statute of frauds, the agreements' terms were material facts and summary disposition under MCR 2.116(C)(10) would have been erroneous. See *Patrick*, 322 Mich App at 605. Thus, we find that the trial court granted summary disposition to defendants under MCR 2.116(C)(7) and (8).

A trial court's summary disposition ruling is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or

content of the supporting proofs must be admissible in evidence Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.

* * *

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Furthermore, “[i]ssues of statutory interpretation are reviewed de novo.” *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). When the language of a statute is clear and unambiguous, this Court “will apply the statute as written and judicial construction is not permitted.” *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). Similarly, “questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo.” *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Finally, this Court also reviews de novo the question whether the statute of frauds bars a contract claim. *Kloian v Domino’s Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006).

III. ANALYSIS

“The starting point in analyzing oral statements for contractual implications is to determine the meaning that reasonable persons might have attached to the language, given the circumstances presented.” *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 640; 473 NW2d 268 (1991). Furthermore, “[t]he ‘overreaching principle of contract interpretation is that the court looks to all the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent.’” *Id.* at 641. Plaintiff alleges that the terms of the written and unsigned acquisition agreement attached to its complaint represent the terms of the agreements at issue in this case. Contracts attached to a pleading are considered part of the pleading. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). Thus, to determine the terms of the agreements, we will rely on traditional contractual interpretation rules used for written contracts.

“In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument.” *Rory*, 473 Mich at 464. “A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases used in the contract.” *Auto Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015). “[C]ontracts must be read as a whole,” *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 447; 886 NW2d 445 (2015), giving “effect to every

word, phrase, and clause,” while taking pains to “avoid an interpretation that would render any part of the contract surplusage or nugatory,” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

“The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice.” *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 526-527; 644 NW2d 765 (2002). In relevant part, MCL 566.132 states:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

* * *

(e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

Similarly, MCL 566.106 requires contracts establishing an interest in land to be in writing:

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.

Contracts that fall within any portion of the statute of frauds are unenforceable. See, e.g., *Kelly-Stehney & Assoc, Inc v MacDonald’s Indus Products, Inc*, 265 Mich App 105, 110-114; 693 NW2d 394 (2005) (holding that an oral contract was unenforceable because it fell within one portion of the statute of frauds). The writing requirement of the statute of frauds, however, “may be satisfied by several writings made at different times” and can also be satisfied by a series of writings, rather than one single writing establishing all the terms of the contract in question. *Id.* at 111-114.

Plaintiff and defendants agree that there was no writing in this case. Thus, the agreements’ terms determine whether they fall within the statute of frauds. Two types of contracts that fall within the statute of frauds are relevant in this case: (1) contracts paying a commission for the sale of land, MCL 566.132(1)(e), and (2) contracts creating an interest in land, MCL 566.106. If the agreements fall within either of these areas then they fall within the statute of frauds and are unenforceable. See MCL 566.106; MCL 566.132; *Kelly-Stehney & Assoc, Inc*, 265 Mich App at 110-114.

Generally, “agreements to share profits and losses arising from the purchase and sale of real estate are not contracts for the sale or transfer of interests in land and need not be in writing.” *In re Handelsman*, 266 Mich App 433, 440; 702 NW2d 641 (2005) (citation and quotation marks omitted). However, the properties in this case have not been sold, and plaintiff

is not attempting to collect a share of profits generated by the sale of a property. Instead, plaintiff is attempting to collect 50% of the properties' equity values.

When used in terms of real property, Black's Law Dictionary defines "equity" as "[t]he amount by which the value of or an interest in property exceeds secured claims or liens; the difference between the value of the property and all encumbrances on it." *Black's Law Dictionary* (11th ed); see also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining equity as "the money value of a property or of an interest in a property in excess of claims or liens against it."). As explained by our Supreme Court in *Lookholder v Ziegler*, 354 Mich 28, 36 n 7; 91 NW2d 834 (1958):

The general rule is, that the word "interest" is broader and more comprehensive than the word "title." It embraces both legal and equitable rights. It covers rights in property less than title thereto, rights different from title, rights which may be enforced, legal rights.

Interest, in common speech in connection with land, includes all varieties of titles and rights. When given its plain and natural meaning it comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right. [Citations and quotation marks omitted.]

The agreement here purportedly established that plaintiff was entitled to 50% of the properties' equity values at the expiration of the agreement's five-year term, even if the properties were not sold. The agreement additionally established that plaintiff could record a claim of interest in the properties to "provide notice to third parties of [plaintiff's] interest in the [properties]." Based on the foregoing, the alleged agreement granted plaintiff an interest in the properties, and indeed, plaintiff is seeking 50% of the properties' equity. Thus, plaintiff's claim is premised on an interest in land, and falls within the statute of frauds. Accordingly, the trial court did not err by granting summary disposition to defendants because the statute of frauds rendered the agreement unenforceable.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark T. Boonstra
/s/ Anica Leticia