STATE OF MICHIGAN

COURT OF APPEALS

CHARLES JENSON and ANNE JENSON,

Plaintiffs-Appellants/Cross-Appellees,

v

WILLIAM B. GALLAGHER REVOCABLE TRUST and WILLIAM B. GALLAGHER, individually and as trustee of the WILLIAM B. GALLAGHER REVOCABLE TRUST,

Defendants-Appellees/Cross-Appellants,

and

TIM J. MITCHELL and CRESSY AND EVERETT, INC.,

Defendants-Appellees.

UNPUBLISHED
February 18, 2014

No. 312739
Cass Circuit Court
LC No. 12-000048-CZ

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Plaintiffs appeal from an order of the circuit court granting summary disposition in favor of defendants. The Gallagher defendants cross-appeal, challenging the trial court's denial of sanctions. We reverse and remand.

This dispute arises from the sale of real property located near Dewey Lake in Silver Creek Township. Plaintiffs claim[1] that, while viewing the property, it was represented to them that the property included fifty feet of lake frontage. In fact, the "Agent Detail Report" states

[1] Because of the procedural posture of this case, for purposes of this appeal only we are accepting as true plaintiffs' factual representations. Defendants are, of course, free to challenge those factual assertions in future proceedings in this case.

that the property is lakefront with fifty feet of frontage.[2] They were informed that there were two undeveloped roads, Maple and Evergreen, bordering the property. According to plaintiffs, it was represented to them that the two roads ended where they intersected, which caused about twenty feet of the beach to be public property, but that it left over fifty feet of beach as their private beach if they bought the lakefront lots.[3] Plaintiffs decided to purchase the property. An agreement was entered into and the transaction was completed.

According to plaintiffs, approximately a year later their neighbor informed them that they did not in fact own any lake frontage, which William Gallagher knew because of previous litigation between Gallagher and the neighbor. Plaintiffs then consulted with the Cass County Road Commission and were informed that Maple Street did not end at the intersection with Evergreen, and ran the entire length of the beach. Plaintiffs then contacted the township assessor, who confirmed that the property had been assessed as lakefront property, but that that classification was incorrect. The assessor then had the property reclassified as not being lake front property and the assessment was substantially reduced, from $227,000 to $125,700.

Plaintiffs filed the instant action, alleging fraud. The Gallagher defendants moved for summary disposition, arguing that based upon the merger and integration clauses in the purchase agreement, plaintiffs would not be able to establish the essential element of reasonable reliance. The trial court agreed and granted summary disposition. The trial court denied defendants' request for sanctions.

Plaintiffs raise two arguments on appeal. First, plaintiffs argue that reasonable reliance is no longer an element of fraud in Michigan and, second, that in any event the clauses in the purchase agreement do not bar plaintiffs' fraud claim. Plaintiffs' first argument is based upon the Supreme Court's recent decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). We agree with defendants that plaintiffs misread *Titan*. *Titan* did not involve consideration of whether reliance on a misrepresentation must be reasonable. Rather, it involved the question whether, in the context of an insurance application, the insurer cannot disclaim liability to a third party when the fraud in the application was "easily ascertainable." *Id.* at 550. The Supreme Court rejected the "easily ascertainable" rule. *Id.* at 564. At best, assuming that *Titan* can be applied outside the context of the claim of a third-party and fraud in an insurance application, it could be relied upon by plaintiffs only to say that their claim cannot be barred because it was possible for them to have "easily ascertained" that the property did not include lake frontage.

But more to the point is that, while the trial court's opinion does speak in terms of "reasonable reliance," the focus is on the integration clause. That is, the trial court held that there could be no reasonable reliance on statements made to plaintiffs while viewing the property

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[2] Though the report also contains the disclaimer that the "information contained herein should be deemed reliable but not guaranteed, all representations are approximate, and individual verification is recommended."

[3] The transaction involved the sale of several separately platted lots.

because of the following clause in the purchase agreement: "It is further understood that no representations or promises have been made to Buyer by real estate brokers or sales persons or by the Seller other than those contained in this agreement or as otherwise made or given by the Seller to the Buyer in the written disclosure statement." While the trial court stated that the integration clause "leaves no doubt that there cannot be, by operation of law, any reasonable reliance on any earlier representations or claimed misrepresentations," it would be equally true that the integration clause would leave no doubt there can be no reliance (reasonable or unreasonable) on any earlier representations if, in fact, that is the effect of the integration and merger clauses. For the reasons to be discussed below, we conclude that it is not.

The real question in this case is that raised in plaintiffs' second argument: does the integration/merger clauses preclude consideration of any alleged representations other than those contained in the purchase agreement or written disclosure statement in determining whether the element of reliance can be established. We agree with plaintiffs that, if the facts are as plaintiffs allege, the integration and merger clauses do not preclude a claim of fraud.

Sellers primarily rely on two cases from this Court, *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486; 579 NW2d 411 (1998), and *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145; 721 NW2d 233 (2006). In *UAW-GM*, the plaintiff had entered into an agreement with the defendants' predecessor in interest to hold a convention at the defendants' property, Doral Resort and Country Club, several months in the future. That agreement contained a merger clause that stated that the agreement constituted "a merger of all proposals, negotiations and representations with reference to the subject matter and provisions." *UAW-GM*, 228 Mich App at 488. The plaintiff contended that, although not contained in the agreement, the defendants' agent had promised to provide a union-represented hotel. *Id.* At the time the agreement was entered into, the hotel did have a unionized work force. But between the time of entering into the agreement and the convention, the hotel was sold to the defendants and the unionized employees were replaced with a nonunionized work force. *Id.* at 488-489. The plaintiff cancelled the event and sought the return of their deposit. The defendants counterclaimed for damages. In addition to an analysis of the effect of the merger clause on the contract itself and whether parol evidence could be introduced to alter the terms of the contract, the Court also considered the effect of the merger clause on the plaintiff's claim of fraud. When that discussion is carefully reviewed, we see that it does not support defendants' position.

The Court in *UAW-GM*, 228 Mich App at 503, first notes that "[p]arol evidence is generally admissible to demonstrate fraud." The Court then, after quoting 3 Corbin, Contracts, § 578, p 411, goes on to discuss what evidence of fraud remains admissible despite a merger clause and which is not:

> In other words, while parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, 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, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. [228 Mich App at 503.]

Ultimately, the Court determines that there were no allegations of fraud that would invalidate the contract or the merger clause. *Id.* at 504-505. Indeed, the Court notes that the plaintiff's allegation really do not make out a claim of fraud at all. *Id.* at 505 n 9. Turning to the case at bar, plaintiffs do allege a fraud that would invalidate the contract: that defendants' active fraud induced them to enter into the contract in the first place.

Turning to *Hamade*, this case is slightly more helpful to defendants. In that case, the plaintiff had operated a Sunoco franchise for a number of years. While negotiating a new franchise agreement with Sunoco, he had requested that a clause be put in the agreement that another Sunoco station would not be opened within a certain distance of the plaintiff's station. The defendant's agent told Hamade that he did not have to worry about that because Sunoco "would never do that." *Hamade*, 271 Mich App at 159. The final agreement did not contain an exclusive territory clause, though it did contain a merger clause. Approximately three years later, the defendant granted a new Sunoco franchise at a location one mile from Hamade's station on the same road. After some additional difficulties, Hamade filed suit against Sunoco alleging various counts, including fraud. The essence of the plaintiff's claim was that he was fraudulently induced into executing an incomplete agreement because of the assurance that he did not need an exclusive territory clause. *Id.* at 168. This Court, relying in large part on the *UAW-GM* decision, concluded that the plaintiff's claim could not survive the integration clause because he could not show that he was defrauded into believing that there was no integration clause or that the contract did, in fact, include an exclusive territory clause. *Id.* at 170-171. That is, the plaintiff knew that he was signing an agreement that did not contain an exclusive territory clause. Any misrepresentation related to persuading him that he did not need such a clause.[4]

In the case at bar, the misrepresentation did not concern the need for a particular clause in the contract. Rather, it went directly to plaintiffs' desire in purchasing the property at all. That is, it fraudulently induced them to sign the contract.

Not being persuaded by the cases relied upon by defendants, we turn to those relied upon by plaintiffs. Specifically, plaintiffs direct our attention to this Court's decision in *Barclae v Zarb*, 300 Mich App 455; 834 NW2d 100 (2013), and a magistrate's decision in *Star Ins Co v United Commercial Ins Agency, Inc*, 392 F Supp 2d 927 (ED Mich, 2005). With respect to *Barclae*, it is not directly controlling. First, the Court considered any fraud present in that case to be silent fraud, which is not the case here. And, second, because the Court determined that the plaintiffs' claim failed for other reasons, ultimately its discussion of fraud is mere dicta. But its discussion is nevertheless informative.

First, relying on *Titan, supra*, and 3 Corbin, Contracts, § 480, p 431, it notes that fraud in the inducement to sign a contract will vitiate the contract despite an integration clause. *Barclae*,

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[4] Although not a basis of the Court's decision in *Hamade*, we note that it is questionable whether there was, in fact, fraud. It is unclear that the defendant's representative knew that Sunoco would, three years later, grant a new franchise a mile away. And his statement that Sunoco "would never do that" might be properly categorized as a statement of opinion rather than of fact.

300 Mich App at 480. Second, it specifically noted that parol evidence may be introduced to establish the fraud in the inducement despite an integration clause. *Id.* at 482. Third, it quoted favorably from the magistrate's decision in *Star, supra.*

Turning to *Star*, the nature of the alleged fraud is not spelled out in the opinion. But the effect of the integration or merger clause is, as well as the proper interpretation of our opinion in *UAW-GM*. Like the Court in *Barclae*, we will quote from *Star* at length:

> It is true that a merger clause can be worded so as to preclude a party to a contract from bringing forth evidence of prior or even contemporaneous collateral *agreements* between the parties to the contract, even when such agreements were allegedly an inducement for entering into the contract. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502; 579 NW2d 411 (1998). In the *UAW-GM* case, the representation was that the hotel had all union employees. Yet, Defendant in the present case has not alleged that there were collateral agreements between the parties in this matter outside of the parties' written contracts. Defendant has alleged that Plaintiffs and Third-Party Defendant made fraudulent misrepresentations which induced it to enter into the contract in the first instance and to remain in the contract instead of exercising the termination option.
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> There is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract. It is only the latter that are eviscerated by a merger clause, even if such were the product of misrepresentation. It stretches the *UAW-GM* ruling too far to say that any pre-contractual factual misrepresentations made by a party to a contract are wiped away by simply including a merger clause in the final contract. Such a holding would provide protection for disreputable parties who knowingly submit false accountings, doctored credentials and/or already encumbered properties as security to unknowing parties as long as they were savvy enough to include a merger clause in their contracts. In fact, the *UAW-GM* court considered the effect of fraud allegations on a contract with a merger clause and determined that evidence was admissible to prove fraud that would "invalidate the merger clause itself, i.e., fraud relating to the merger clause *or fraud that invalidates the entire contract including the merger clause.* 3 Corbin, Contracts, § 578." *Id.* at 503. Further, the section of Corbin On Contracts cited by *UAW-GM*, § 578, states that a merger clause "even though it is contained in a complete and accurate integration does not prevent proof of fraudulent misrepresentations by a party to the contract, or of illegality, accident or mistake." 6 Corbin, Contracts, § 578, p. 114 (reprinted as published in the 1960 edition of Volume 3). *Corbin* goes on to explain
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> Fraud in the inducement of assent . . . may make the contract voidable without . . . showing that the writing was not agreed on as a complete integration of its terms. In such case the offered testimony may not vary or contradict the terms of the writing, although it would be admissible even if it did so; it *merely*

> *proves the existence of collateral factors that have a legal operation of their own*, one that prevents the written contract from having the full legal operation that it would otherwise have had. This is not varying or contradicting the written terms of agreement, although it does vary or nullify in part their legal effect.
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> 3 Corbin, Contracts § 580, p. 142 (emphasis added).
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> In sum, the *UAW-GM* court did not bar a fraud claim in all cases in which the underlying contract has a merger clause, the court simply held that in that case the "plaintiff made no allegations of fraud that would invalidate the contract or the merger clause." *Id.* at 505. [*Star*, 392 F Supp 2d at 928-929.]

The magistrate, 392 F Supp 2d at 929-930, then goes on to explain the role of merger clauses in these types of disputes:

> The key element in cases involving a merger clause is whether one justifiably relied on the representations of another when the parties' written agreement clearly stated that by signing the document they were agreeing that the document made up the parties' entire agreement regarding the terms of the contract and its performance standards. The Michigan courts have said that, as it pertains to representations regarding additional agreements or contractual terms, a party would not be justified in relying on them where there is a merger clause. The reasoning behind this is clear, one should not be heard to complain that they relied on oral promises regarding additional or contrary contract terms when there is written proof, signed by both parties, to the contrary. Yet, a party could still justifiably rely upon representations made by another party regarding things outside the scope of the contractual terms, such as the other party's solvency, indebtedness, experience, clientele, client retention rate, business structure, etc. If these representations are false when they are made, not merely opinion and not future promises, they could constitute fraud in the inducement. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 554-555; 487 NW2d 499 (1992).

In sum, what is important is whether plaintiffs are "attempting to introduce new or different contract terms" or are "alleging collateral factors that have a legal operation of their own." *Star*, 392 F Supp 2d at 930.

Defendants suggest that plaintiffs are, in fact, attempting to introduce new or different terms into the contract, namely a "guarantee" of lake frontage. We disagree with this characterization. Plaintiffs are not seeking such a "guarantee" (which apparently defendants have no ability to satisfy). Rather, they are taking the position that they were fraudulently induced to enter into the contract in the first place because it was falsely represented to them that what they were buying was lake frontage. In a variation of this argument, defendants also argue that plaintiffs never requested a clause in the agreement that granted 50 feet of lake frontage nor were they mislead into believing that the contract contained such a promise. But, again, this is not the point. That argument might have some merit had, for example, plaintiffs only clearly bought back lots and, during the negotiations, defendants had promised that that they would

permit plaintiffs access to the lake across defendants' lake front lots and that promise never found its way into the contract and defendants refused access. That would present a situation similar to *Hamade*—that plaintiffs were induced to believe that future events would happen (or not happen) and that no clause in the contract was necessary to ensure that. Here, though, the situation is that it is alleged that defendants misrepresented what was being sold in order to induce plaintiffs to enter into the agreement in the first place.

In light of our conclusion in this case, we need not address plaintiffs' argument relating to the effect of the closing documents nor do we need to address the issue raised in the cross-appeal regarding the trial court's denial of sanctions. Also, we note that defendants state that they had additional grounds that entitled them to summary disposition, which were not addressed by the trial court. Defendants are, of course, free to raise those issues again on remand.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs may tax costs.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering