STATE OF MICHIGAN

COURT OF APPEALS

AMY P. BEAUCHAMP and SAMUEL BEAUCHAMP, Plaintiffs-Appellants, v JESSE C. SCHRAMM, LAURA SCHRAMM, and 301 GARFIELD STREET, INC., Defendants-Appellees.	UNPUBLISHED September 23, 2014 No. 313377 Marquette Circuit Court LC No. 10-048212-CK

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting judgment in favor of plaintiffs against defendant 301 Garfield Street, Incorporated (Garfield). Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants Jesse and Laura Schramm (hereafter defendants). We agree and reverse.

In a land contract dated March 1, 2007, defendants agreed to purchase from plaintiffs vacant land (subject property) located in Marquette, Michigan. The land contract provided that, generally, "Buyer shall not assign, sell, or convey all or any portion of Buyer's interest in the Premises or in this Agreement without Seller's prior written consent." But the land contract also contained an exception to the consent requirement permitting the buyer to assign its interest to:

> a. a partnership, corporation, or other business entity in which Buyer, at the time of transfer and at all times after, has a controlling interest, or a trust of which Buyer is the trustee;
>
> b. a partnership, corporation, or other business entity in which a close relative of Buyer, at the time of transfer and at all times later, has a controlling interest.

On July 1, 2010, plaintiffs sent defendants notice that the land contract was in default, which resulted in accelerating the entire balance due and foreclosing on the land contract. On July 29, 2010, plaintiffs filed this action against defendants alleging a count of breach of contract seeking the contract price, interest and other damages, and a count to foreclose the land contract.

On October 1, 2010, Jesse Schramm filed articles of incorporation as Garfield's sole director and shareholder. On the same day, by quit claim deed, defendants conveyed their interest in the land contract to Garfield. On October 7, 2010, defendants answered plaintiffs' complaint and asserted as an affirmative defense that they were no longer a proper party, having conveyed their interest in the subject property to Garfield. On October 18, 2010, plaintiffs amended their complaint, adding Garfield as a defendant. On January 24, 2011, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(9) (failure to state a valid defense) and MCR 2.116(C)(10) (no genuine issue of material fact). On January 26, 2011, defendant moved for summary disposition pursuant to MCR 2.11(C)(7) (claim barred) and MCR 2.116(C)(10).

On March 8, 2011, the trial court granted summary disposition in favor of plaintiffs as to Garfield. But on March 11, 2011, the trial court granted summary disposition in favor of defendants, noting that plaintiffs' claims against defendants for personal liability and any deficiency judgment after foreclosure sale were dismissed.

The trial court did not specify under which court rule it granted summary disposition in favor of defendants. We treat the motion as having been granted pursuant to MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10), considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We must review the record to determine whether any genuine issue of material fact existed and whether the successful party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ." *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007). Moreover, the construction and interpretation of an unambiguous contract, as well as whether contract terms are ambiguous, present questions of law subject to review de novo. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

As a preliminary matter, we conclude that defendants' argument that plaintiffs' breach of contract claim is moot has no merit. Defendants argue that because plaintiffs elected to proceed with foreclosure, they cannot maintain a breach of contract. The land contract provided a purchase price of $200,000, exclusive of interest. At the foreclosure sale, plaintiffs purchased the property for $151,600, rendering defendants potentially liable for a deficiency balance plus costs and interest. Actions at law are permitted for deficiencies arising from statutory foreclosure absent contractual language to the contrary. See, e.g., *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 108-110; 812 NW2d 799 (2011), remanded on other grounds 493 Mich 859 (2012), and *New York Life Ins Co v Erb*, 276 Mich 610, 613; 268 NW 754 (1936). In this case, the land contract expressly reserved plaintiffs' right to pursue both foreclosure and money damages, so plaintiffs' breach of contract claim is not moot.

The parties agree that because defendants defaulted on the land contract, plaintiffs were entitled to both foreclose on the property and seek damages. The question on appeal is whether the defendants are personally liable.

In granting summary disposition in favor of defendants, the trial court relied on *Klager v Robert Meyer Co*, 415 Mich 402; 329 NW2d 721 (1982), rejecting plaintiffs' reliance on *Cinderella Theatre v United Detroit Theatres Corp*, 367 Mich 424; 116 NW2d 825 (1962). We conclude that the facts of this case are closer to those in *Cinderella Theatre* and this conclusion is reinforced by the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31 *et seq*.[1]

As in *Cinderella Theatre*, defendants employed the contract's assignment clause to assign their interest without plaintiffs' consent to Garfield, an insolvent corporation. The *Cinderella Theatre* case involved the long term lease of a movie theater. When the theater's losses became particularly heavy for a two-year period, the defendant assigned its interest in the theater to a dormant wholly owned subsidiary corporation. *Cinderella Theatre*, 367 Mich at 426. The trial court determined that the undercapitalized subsidiary was formed for the sole purpose of receiving the assignment and that defendant made the assignment with no good faith intention to operate the theater. *Id*. at 428-429. Although the lease appeared to permit the assignment, the trial court set the assignment aside as not within the parties' original intention. *Id*. at 429. Our Supreme Court affirmed, noting that the case was one of "incorporating for the purpose of avoiding a present and existing liability[.]" *Id*. at 434, 444. The Court later elucidated its holding in *Cinderella Theatre* "that a proper construction of the assignment clause required the implication of a covenant restricting lease assignment to only solvent assignees." *Klager*, 415 Mich at 414.

In *Klager*, the defendants specifically obtained the plaintiffs' written consent, as required under the lease agreement, prior to assignment. Indeed, the defendants had the option of rescinding the lease, but the plaintiffs consented to the assignment to the undercapitalized corporation apparently knowing its purpose was to insulate the defendants from personal liability. *Klager*, 415 Mich at 405-406, 418. Thus, "[t]he plaintiffs were not victimized by an abuse of the corporate form" but instead "[t]he defendants merely exercised their bargaining power." *Id*. at 413. Thus, the Court upheld the assignment because it "was not a fraud or an attempt to evade the law, but only a means for perpetuating the original understanding of the parties." *Id*. at 414. Further, the plaintiffs did not prove "fraud or other violation of law," nor was a preexisting obligation assigned to the corporation. *Id*. at 412.

In the present case, the land contract expressly allowed defendants to assign their interest, with or without plaintiffs' consent, to a corporation in which defendants had a controlling interest, or in which a "close relative" of defendants had a controlling interest. Also, the terms of

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[1] While plaintiffs failed to specifically plead or argue the UFTA below, it patently applies to the dispute that was argued below. That parties fail to cite law pertinent to their cases does not preclude this court from either recognizing its existence or applying it. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003) ("[C]ourts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.") and *Rory v Continental Ins Co*, 473 Mich 457, 461, 491; 703 NW2d 23 (2005). See also *People v Rao*, 491 Mich 271, 289 n 4; 815 NW2d 105 (2012), quoting *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47, 59 (2002): " '[A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle.' "

the land contract do not specifically provide that an assignee corporation be solvent or properly capitalized. Nevertheless, the original agreement of the parties was that defendants would be personally liable on the contract. Unlike *Klager*, but like *Cinderella Theatre*, the assignment at issue was made after the contract was in default, i.e., defendants attempted to transfer liability on a preexisting debt for which this lawsuit was initiated. Garfield was formed, and the assignment was made for the sole purpose of protecting defendants from personal liability on the debt. Also, unlike *Klager*, the assignment in this case was presumptively fraudulent and in violation of the law.

The UFTA provides, in relevant part, that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, . . . if the debtor made the transfer . . . [w]ith actual intent to hinder, delay, or defraud any creditor . . . ." MCL 566.34(1)(a). In determining whether "actual intent" exists under this subsection, consideration may be given to several factors, including whether "the debtor had been sued or threatened with suit" "[b]efore the transfer was made or obligation was incurred[.]" MCL 566.34(2)(d); see also, *Regan v Carrigan*, 194 Mich App 35; 486 NW2d 57 (1992). Here, defendants incorporated Garfield and transferred their interest in the land contract *after* plaintiffs filed suit. These facts support a conclusion that defendants transferred their interest in the land contract to Garfield with the actual intent to defraud in violation of the UFTA. One of the remedies available under the UFTA is the "[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." MCL 566.37(1)(a).

Thus, consistent with the original intent of the parties that defendants were to be personally liable on the contract, we construe the land contract as permitting defendants to assign, without plaintiffs' consent, defendants' "interest in the Premises and the Personal Property" under the contract. But defendants may not assign their personal liability under the contract without plaintiffs' consent, especially where such assignment would be a fraudulent transfer as to plaintiffs.

We reverse and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

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Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

Riordan, P.J. (*dissenting*)

I respectfully dissent. The trial court properly granted judgment in favor of plaintiffs against defendant 301 Garfield Street, Incorporated (Garfield) and in favor of defendants Jesse and Laura Schramm in their individual capacities.

The contract for the sale of the vacant land provided that, generally, "Buyer shall not assign, sell, or convey all or any portion of Buyer's interest in the Premises or in this Agreement without Seller's prior written consent." However, paragraph 10 of the contract contained the following exception to the consent requirement:

> The consent requirement above does not apply in certain limited relationships. Buyer, with or without Seller's consent, may assign, sell, or convey all or any portion of Buyer's interest in the Premises and the Personal Property or under this Agreement to
>
> a. a partnership, corporation, or other business entity in which Buyer, at the time of transfer and at all times after, has a controlling interest, or a trust of which Buyer is the trustee;
>
> b. a partnership, corporation, or other business entity in which a close relative of Buyer, at the time of transfer and at all times later, has a controlling interest.

On October 1, 2010, Garfield filed incorporation documents with the Michigan Department of Energy, Labor & Economic Growth that identified defendant Jesse Schramm as

the registered agent and sole incorporator. Jesse Schramm testified that he has been Garfield's sole director and shareholder since its incorporation. In a quit claim deed dated October 1, 2010, defendants conveyed their interest in the subject property to Garfield. The deed was recorded by the Marquette County Register of Deeds on October 5, 2010. While the land contract may have been in default at the time of the transfer, there was no contractual provision between the parties which prohibited the transfer of the property to Garfield in the event the Schramms were in default. Further, there is no evidence in the record indicating that the transfer was made for the purpose of defrauding plaintiffs.

If a land contract is unambiguous, we must enforce its terms as written. See *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012).[1] The express terms of the land contract at issue required plaintiffs' consent for certain assignments and not for others. The contract expressly allowed defendants to assign their interest, without plaintiffs' consent, to a corporation of which the property buyer or close relative had a controlling interest. There was no contractual limitation on whether such a transfer was made before or after a default on the contract. Because we must enforce the clear and unambiguous language of the contract as the parties wrote it and mutually assented to, I would find that the Schramms committed no breach by assigning their property interest to Garfield.

In order for plaintiffs to prevail in this case, we must find that the parties had an implied covenant restricting assignment to only solvent entities, as was found in the contract at issue in *Cinderella Theatre v United Detroit Theatres Corp*, 367 Mich 424; 116 NW2d 825 (1962). However, if a land contract is unambiguous, we must enforce its terms as written, and not find an implied covenant. See *Greenville Lafayette*, 296 Mich App at 291. While the drafting of contracts may sometimes be imperfect, it often may be the case that the imperfection is the

[1] Courts must read contracts as a whole and "accord their terms their plain and ordinary meaning." *Scott v Farmers Ins Exchange*, 266 Mich App 557, 561; 702 NW2d 681 (2005). "[C]ourts must also give effect to every word, phrase, and clause in a contract and 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 NW 2d 447 (2003). A clear and unambiguous contractual provision is to be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). "Clear and unambiguous language may not be rewritten under the guise of interpretation," *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997), and "[c]ourts must be careful not to read an ambiguity into a policy where none exists." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 519; 556 NW2d 517 (1996). An ambiguity exists when two provisions irreconcilably conflict, or when a term is equally susceptible to more than one meaning. *Coates*, 276 Mich App at 503. "However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear." *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).

consequence of a compromise between the parties. As such, it is not the function of courts to disregard the words adopted by the parties to a contract.

The land contract at issue expressly allowed the defendants to assign, sell, or convey their interest in the parcel, with or without plaintiffs' consent, to a corporation in which defendants had a controlling interest, or in which a "close relative" of defendants had a controlling interest. It is undisputed that Jesse Schramm had, at all relevant times, the controlling interest in Garfield and, as Jesse's wife, Laura Schramm was a "close relative" of Garfield's sole owner. Unlike *Cinderella Theatre*, there is no evidence in the record that Garfield was formed for a fraudulent purpose.[2] Further, unlike *Cinderella Theatre*, the assignors of the land contract in this case did not continue to use the real property as an on-going, commercial entity with the purpose of the transfer to a subsidiary being solely to obtain relief for a related business operating on the premises.

Contrary to plaintiffs' assertion, the terms of the land contract do not provide that an assignee corporation be solvent or properly capitalized. Nor does the land contract make the Schramms personally liable on the debt. Such provisions could have been included had the parties so intended. However, the parties chose not to. It is not the role of the Court to speculate as to the reasons the provisions were not included. Our role is to review the plain language of the contract. We simply should not now conclude that the parties intended language absent from the land contract to be included. By the terms of the land contract, at worst, the plaintiffs are back in the position they occupied before entering the agreement, they own and are in possession of the vacant parcel known as Garfield. They also are entitled to keep all payments that the Schramms made to them prior to the transfer of the property to 301 Garfield Street.

Plaintiffs next contend that the trial court should have considered the contract negotiations, i.e., parol evidence, which, in their view, may present material questions of fact. As discussed above, the land contract was unambiguous. Therefore, the trial court did not err in failing to look beyond its plain language in granting summary disposition in favor of defendants. See *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005).

While it may be tempting to invoke Uniform Fraudulent Transfers Act (UFTA), MCL 566.31 *et seq.*, I would not do so since there was no fraudulent transaction here. We are left to speculation as to why the plaintiffs did not insist that paragraph 10 of the land contract be inoperational in the event of the Schramms' default. But, the plaintiffs agreed to the contract as it was written. We cannot now use the UFTA to re-write it.

[2] Also, unlike in *Cinderella Theatre*, the plaintiffs/appellants here have not raised an argument concerning piercing the corporate veil.

Therefore, I would affirm the trial court.

/s/ Michael J. Riordan