STATE OF MICHIGAN

COURT OF APPEALS

FLEET BUSINESS CREDIT, LLC,

Plaintiff,

v

KRAPOHL FORD LINCOLN MERCURY COMPANY,

Defendant/Third-Party Plaintiff-Appellee.

and

THOMAS KRAPOHL,

Defendant,

and

MARKET SCAN INFORMATION SERVICES, INC.

Third-Party Defendant-Appellant.

UNPUBLISHED
September 28, 2004

No. 249825
Isabella Circuit Court
LC No. 02-001208-CK

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

I. FACTS AND PROCEDURAL HISTORY

This appeal arises out of third-party plaintiff Krapohl Ford Lincoln Mercury Co.'s (Krapohl Ford) breach of contract claim against third-party defendant Market Scan Information Services, Inc. (Market Scan). The jury returned a verdict in favor of Krapohl Ford. Market Scan now appeals from that judgment, and challenges the trial court's denial of its motion for directed verdict and its motion for judgment notwithstanding the verdict (JNOV), and we reverse and remand.

Krapohl Ford is an automotive dealership located in Mt. Pleasant. Market Scan develops and sells software for use in automotive dealerships. In August 2000, representatives of Market Scan contacted Krapohl Ford regarding licensing a computer software system known as Lease Prophet II. At the time, Krapohl was using a computerized inventory program known as the Reynolds and Reynolds Inventory System (RRIS). Krapohl Ford wanted to use the two systems together in calculating lease payments. On August 28, 2000, Krapohl Ford entered into a written contract to license the Lease Prophet II software from Market Scan.

Alleging dissatisfaction with the software, Krapohl Ford filed its third-party cross-complaint against Market Scan for breach of the license agreement and breach of warranty, and sought rescission of the agreement.[1] According to Krapohl Ford, Market Scan represented that the Lease Prophet II system would interface with the RRIS and be able to transfer inventory information sufficient to calculate an accurate vehicle lease payment without the need for manual input of any data. However, Krapohl Ford stated that the two programs could not be adequately interfaced, and Krapohl Ford was later informed that it would be required to perform a daily manual input to keep the program updated. Krapohl Ford alleged that it relied to its detriment on Market Scan's false representation regarding the necessity of manual input of data.

Market Scan says that the trial court committed reversible error when it denied Market Scan's motion for directed verdict and allowed Krapohl Ford's third-party breach of contract claim to go to the jury because the language of the contract is "clear and unambiguous,"[2] and states that Krapohl Ford was required to manually verify the vehicle information, and because the written contract, by its terms, was intended to and did in fact constitute the complete expression of the parties' agreement.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's rulings on a motion for a directed verdict and on a motion for JNOV, and "the evidence and all legitimate inferences [are viewed] in the light most favorable to the nonmoving party." *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Only if the evidence so viewed fails to establish a

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[1] In September 2000, Fleet Business Credit, LLC ("Fleet") and Krapohl Ford also entered into a lease for certain computer equipment necessary to utilize the Lease Prophet II software. After installation and attempted implementation of the new equipment and software, Krapohl Ford was dissatisfied with the system's performance and stopped making payments on the computer equipment. Fleet filed a complaint against Krapohl Ford, alleging breach of the lease for failure to make the required lease payments and seeking to enforce the agreement. Krapohl Ford then filed its third-party complaint against Market Scan. Fleet and Krapohl Ford stipulated to dismissal of only Fleet's claims based on a settlement reached between those parties wherein Krapohl Ford paid $52,000 to Fleet. Accordingly, Fleet is not a party to this appeal.

[2] *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), quoting *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947) (quoting *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 [1941]) (internal quotation marks omitted; alteration added by *UAW-GM, supra*).

claim as a matter of law should either motion be granted. *Id.* Further, the proper interpretation of a contract is a question of law subject to de novo review. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

III. ANALYSIS

When the meaning of a contract is disputed, our primary goal in the interpretation of a contract is to ascertain and honor the intent of the parties. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998); *Zurich Ins Co v CCR & Co*, 226 Mich App 599, 603; 576 NW2d 392 (1997). In determining the parties' intent, the court looks to the words of the instrument. *UAW-GM*, *supra* at 491. When the words used by the parties "are clear and unambiguous and have a definite meaning," the "[c]ourt does not have the right to make a different contract for the parties or look to extrinsic testimony to determine their intent." *Id.*, quoting *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947) (quoting *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 [1941]) (internal quotation marks omitted; alteration added by *UAW-GM, supra*).

Consistent with these principles of contract interpretation, the parol evidence rule provides that, "'[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.'" *Id.* at 492, quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). Accord MCL 440.2202. The rule acknowledges that "'disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts.'" *UAW-GM*, *supra* at 492, quoting Fried, Contract as Promise (1981), p 60.

Generally, where, as here, a contract contains an explicit merger clause, which nullifies all antecedent agreements, parol evidence is not admissible to determine whether a contract is integrated. *UAW-GM, supra* at 494, 495-502. Although an exception to the parol evidence rule is recognized for fraud that invalidates a merger clause (i.e., "fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause"), this Court has specifically rejected the conclusion that extrinsic evidence is admissible to demonstrate that false representations were made on which the plaintiff relied and were "an inducement for entering into the contract." *Id.* at 502, criticizing *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 98; 380 NW2d 60 (1985). As this Court observed in *UAW-GM, supra*:

> In the context of a contract that included a merger clause, parol evidence regarding false representations in a collateral agreement that induced the plaintiff to enter into the contract would vary the terms of the contract.
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> * * *
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> [F]raud 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. [*UAW-GM, supra* at 502, 503.]

Accordingly, when a contract contains a valid merger clause, the only fraud that can invalidate the contract is where "'one party induces the other to suppose that the antecedent agreement is

included in the writing,'" or where one party induces the other "'to forget that agreement and to execute an incomplete writing, while describing it as complete.'" *Id*., quoting 3 Corbin, Contracts, § 578, p 411.

Viewing the evidence in the appropriate light, it is clear that Krapohl Ford has failed to allege the type of fraud that could vitiate the contract. Any antecedent representations regarding manually inputting data were contradicted and superseded by the written terms of the contract. The license agreement states that Market Scan assumed no responsibility for errors or omissions because it was Krapohl Ford's responsibility to "manually verify lease data." Further, the agreement contains a clear merger clause that states that the agreement "supersedes and takes precedence over any and all previous agreements or representations including but not limited to those that may have been written, verbal, implied, suggested, hinted or otherwise communicated in any fashion."[3] There is no evidence that Krapohl Ford was fraudulently induced to believe that any of the antecedent agreements regarding inputting data were included in the contract. Nor is there any evidence that Market Scan induced Krapohl Ford to forget any antecedent agreement and to execute an incomplete writing that was represented to be complete. *Id*. Rather, the pleadings and proffered evidence relate only to alleged fraud in the inducement, which is clearly nullified by the merger clause. *Id*.

Krapohl Ford asserts that Market Scan also made post-contract representations, during training sessions, that manual entry of data would be unnecessary. At trial, Krapohl Ford used this extrinsic evidence in support of its claim of fraud in the inducement. As discussed above, this evidence is inadmissible to explain the original written agreement. This evidence would have been relevant to show that the original contract had been modified from its original terms, but Krapohl Ford did not argue below or on appeal that the written contract was amended by subsequent oral modifications. Because this theory was not presented to the trial court for its consideration, nor raised on appeal, it was not preserved for appellate review. *Peterman v DNR*, 446 Mich 177, 183; 521 NW2d 499 (1994).[4]

Accordingly, the trial court erred in allowing Krapohl Ford to present extrinsic evidence to support its allegations of fraud in the inducement. The type of fraud alleged by Krapohl Ford is not the type of fraud that can "invalidate a contract with a valid merger clause." *Id*. at 505. Because we find this issue dispositive, we decline to address Market Scan's other arguments related to trial.

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[3] Indeed, while not necessary to the analysis of this issue, we note that it was unreasonable for Krapohl Ford to rely on the oral representations made by the Market Scan reps given that the license agreement contains a clear and valid merger clause. See *Novak*, *supra* at 689-691; *UAW-GM*, *supra* at 505 n 9.

[4] On appeal, Krapohl Ford further maintains that this parol evidence can be admitted to explain and define trade terms and to prove an ambiguity. However, this issue also was not raised in the trial court, and is therefore not preserved for appellate review. *Peterman*, *supra* at 183.

Reversed and remanded for entry of judgment in Market Scan's favor. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad