STATE OF MICHIGAN

COURT OF APPEALS

M-D INVESTMENTS LAND MANAGEMENT, LLC, Plaintiff/Cross-Defendant-Appellee, v 5 LAKES ADJUSTING, LLC, Defendant/Cross-Plaintiff-Appellant.	UNPUBLISHED November 21, 2017 No. 336394 Isabella Circuit Court LC No. 2016-013010-CK

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant/cross-plaintiff, 5 Lakes Adjusting LLC (defendant), appeals by right the trial court's order granting plaintiff/cross-defendant M-D Investments Land Management, LLC (plaintiff), summary disposition in this declaratory action. The court ruled that the commercial public adjusting agreement that the parties signed was voidable at plaintiff's option because the contract form had not been approved by the commissioner of the Department of Insurance and Financial Services (DIFS) as required by MCL 500.1226(4).[1] Because plaintiff had properly voided the contract, defendant's cross-claim for breach of contract also failed. We affirm.

I. FACTS AND PROCEEDINGS

Plaintiff owned two commercial buildings located in Shepard, Michigan, which were destroyed by accidental fire on March 10, 2015. The buildings were insured by Home-Owners Insurance Company, and at the time of the fire, were occupied by several business and residential tenants. Plaintiff retained the services of defendant to adjust its fire insurance claim with Home-Owners on March 17, 2015. Plaintiff's principal, Michael Poff, signed the commercial public adjusting agreement at issue, which provided that defendant would be paid for its adjusting services 5 to 10 percent of any settlement that Home-Owners paid plaintiff on

[1] MCL 500.1226(4) provides in pertinent part, "An adjuster for an insured shall not provide his or her services to a client until the adjuster has contracted in writing, on a form approved by the commissioner, with the insured or his or her authorized representative."

the claim, which exceeded the $607,000 policy limits. Through October 2015, Home-Owners made some payments to plaintiff of approximately one-third the policy limits. Plaintiff paid defendant a percentage of these insurance payments according to the contract. Later, Poff notified defendant that it had retained attorneys Gruel, Mills, Nims & Pylman, PLLC (J. Paul Janes) to represent plaintiff in further efforts to complete its claim against Home-Owners. On January 13, 2016, Janes sent a letter to the insurance company regarding the specifics of plaintiff's claim and requesting payment of more than $405,000.00 to reach the policy limits.

On March 10, 2016, plaintiff filed this action seeking a declaration that the form contract that the parties signed on March 17, 2015 was contrary to public policy and therefore voidable at plaintiff's option because it had not been approved by the DIFS as required by MCL 500.1226(4). Plaintiff alleged it had exercised its option to void the contract, but that it did not seek damages or the return of any payments it had previously made to defendant. Rather, plaintiff requested the court to confirm its action of voiding the contract so that defendant could make no claim under it for a percentage of the anticipated $400,000 insurance settlement. On April 22, 2016, defendant filed its answer denying that the contract was void or voidable and also filing a cross-claim for breach of contract.

During discovery, plaintiff obtained on August 18, 2016, a certification by DIFS that it had diligently searched its records and failed to find any record that the contract form that defendant used in this case for use as a commercial public adjusting contract had ever been approved. On October 18, 2016, defendant answered a request to admit in part, as follows:

> Based on the August 18, 2016 certified statement that Plaintiff/Cross-Defendant has obtained from the Commissioner's office, it now appears to 5 Lakes that, due to an innocent technical oversight on the state's and/or 5 Lakes' part, a final approval was never recorded by the State; but the form as otherwise revised and approved was used thereafter by 5 Lakes, under the assumption it had been approved by the State.

On briefing and argument of plaintiff's motion for summary disposition, the trial court ruled that there was no disputed material fact that the contract form that the parties signed on March 17, 2015 had not been approved by the commissioner of the DIFS as required by MCL 500.1226(4), and as a result, the contract was voidable at plaintiff's option. The trial court entered its order granting plaintiff's motion for summary disposition on December 27, 2016. Defendant now appeals by right, arguing that the trial court erred by concluding its contract was unenforceable and, even if legally defective, defendant was entitled to equitable relief.

II. STANDARD OF REVIEW

The trial court's decision to grant summary disposition and any included questions of law such as the interpretation of a statute or construction of a contract are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence, the substance or content of which would be admissible at trial. *Maiden v Rozwood*, 461 Mich 109, 120-121: 597 NW2d 817 (1999); MCR 2.116(G)(6). The court must view the proffered evidence in the light most

favorable to the party opposing the motion to determine whether any material fact is disputed with evidentiary support. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004); MCR 2.116(G)(4). A trial court may grant the motion when the submitted evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *1031 Lapeer LLC v Rice*, 290 Mich App 225, 228; 810 NW2d 293 (2010). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A trial court's decisions regarding equitable issues are reviewed de novo, while any underlying factual findings are reviewed for clear error. *Reed Estate v Reed*, 293 Mich App 168, 173; 810 NW2d 284 (2011). A finding is clearly erroneous when the reviewing court on the basis of the entire record is left with the definite and firm conviction that the trial court made a mistake. *Id*. at 173-174. Whether the facts and circumstances of a particular case justify the granting of equitable relief is a question of law reviewed de novo. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008).

III. DISCUSSION

We affirm the trial court because it properly found from the undisputed evidence that defendant's public adjuster contract form did not comply with MCL 500.1226(4). Hornbook Michigan law states that "courts are to enforce [contracts] as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). Thus, a contract that is founded on an act prohibited by a statute, or otherwise is in violation of public policy, is void or voidable and unenforceable. *Jaenicke v Davidson*, 290 Mich 298, 304; 287 NW 472 (1939); *1031 Lapeer LLC*, 290 Mich App at 231-232. Consequently, the trial court properly granted summary disposition, declaring that plaintiff had lawfully exercised its option to declare the contract void.

In this case, the requirements of the statute are mandatory, "[a]n adjuster for an insured *shall not* provide his or her services to a client until the adjuster has contracted in writing, on a form approved by the commissioner[.]" MCL 500.1226(4) (Emphasis added); See *1031 Lapeer LLC*, 290 Mich App at 231 ("The word 'shall' is generally used to designate a mandatory provision."). The statute places the burden of compliance on the adjuster, and defendant's noncompliance, whether intentional or accidental, renders the contract void or voidable at the option of the innocent party, in this case, plaintiff. See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 536-553; 872 NW2d 412 (2015) (discussing at length the distinction between a contract that is void *ab initio* and one that is voidable). "[A] void contract exhibits a symmetrical unenforceability; both parties are equally denied the authority to enforce." *Id*. at 548. On the other hand, when a contract is voidable, the innocent party has the unilateral option to rescind the contract and avoid the obligation of performance, or to ratify the contract and render it enforceable. *Id*. Whether a contract made in violation of a statute is void or merely voidable depends on the wording of the statute and the purpose the Legislature intended the statute to further. *Id*. at 544-545. In this case, it is unnecessary to decide whether the contract was void *ab initio* or only voidable at the option of the innocent party because plaintiff only sought to confirm that it properly voided the contract going forward and that defendant could not enforce it.

Defendant presents several unpersuasive arguments that the trial court erred by granting plaintiff declaratory relief confirming that the contract was voidable at plaintiff's option. Defendant first argues that a violation of MCL 500.1226(4) is not enforceable by the innocent contracting party but only by the DIFS, citing MCL 500.1242(2) (giving the commissioner the authority to suspend or revoke an adjuster's license, after notice and hearing), and citing *Epps*, 498 Mich at 533, holding that "MCL 339.2412(1) does not afford a homeowner a separate and independent right to demand that an unlicensed builder return funds paid for work conducted when the builder lacked the requisite license." The *Epps* Court held that MCL 339.2412(1) did not expressly create a private cause of action for damages and one could not be inferred because the statute had its own enforcement mechanism (precluding an unlicensed builder from bringing any action for compensation); the statute could be enforced by public officers, the attorney general or a local prosecuting attorney; and the innocent party had common-law tort and contract remedies. *Epps*, 498 Mich at 534-536. One such common-law contract remedy, which plaintiff asserts in this case, is the option by the innocent party to void a contract that violates a statute. See *id*. at 538 n 15 ("Courts have long stated that illegal contracts are void."); see also *Jaenicke*, 290 Mich at 304; *1031 Lapeer LLC*, 290 Mich App at 231-232. But although no private action was available to the innocent homeowner in *Epps* and the statute could be enforced by public officials, the Court held "that contracts involving an innocent homeowner and an unlicensed residential builder are voidable." *Epps*, 498 Mich at 553. The Court limited its holding to MCL 339.2412(1), see *Epps*, 498 Mich at 553 n 31, but there is no reason to conclude that a contract that violates MCL 500.1226(4) is not also voidable by the innocent contracting party.

Defendant next argues that the illegality of the contract was cured under the doctrine of substantial compliance by obtaining the approval of DIFS for its commercial public adjusting agreement contract form after the fact. As explained in *Epps*, 498 Mich at 552, Michigan's doctrine of substantial compliance provides, in the context of an unlicensed builder, "if an unlicensed builder enters into a contract to provide building services but *subsequently* obtains the requisite license before he provides services for which the license is required, the contract has been deemed valid and enforceable by the builder." In this case, the contract was entered on March 17, 2015, plaintiff notified defendant it was terminating the contract at the end of 2015 or at the latest in January 2016, and defendant obtained approval of its contract form on October 11, 2016. Thus, in this case, defendant began and stopped providing services under the contract long before the DIFS approved the form. The after-the-fact approval of defendant's contract form by DIFS does not satisfy the doctrine of substantial compliance. *Id*.

Likewise, defendant's argument that plaintiff must do equity to obtain equitable relief is also unavailing. First, this argument is circular: it asserts that plaintiff cannot have the "equitable" relief of confirming that it lawfully voided the illegal contract because plaintiff must do equity by honoring the illegal contract. To accept defendant's argument would render MCL 500.1226(4) meaningless. In essence, it would grant defendant equitable relief from its own neglect of failing to obtain the approval of its contract form from the DIFS. "Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive." *Stokes v Millen Roofing Co*, 466 Mich 660, 671-672; 649 NW2d 371 (2002). Further, once the illegal nature of the contract is recognized, i.e., declaring that it is defective and properly voidable by the innocent party, "[n]o further relief was necessary, equitable or legal." *Id*. at 671. Thus, defendant's argument seeks to use "equity in a circumstance where no equity was required." *Id*. Defendant "cannot have equitable relief

because any such relief would allow equity to be used to defeat" the mandate of § 1226(4) that a contract to adjust an insurance claim be on a DIFS approved form. *Stokes*, 466 Mich at 673.

Similarly, defendant's assertion of various other equitable theories must fail. As noted, a party may not invoke equity to avoid the consequences of its conduct in violation of a statute. *Stokes*, 466 Mich at 671-673; *Jaenicke*, 290 Mich 298 ("Neither law nor equity will enforce a contract made in violation of . . . a statute or one that is in violation of public policy.").

In the end, defendant has failed to present any pertinent legal authority to support its claim that equity should assist it to avoid the consequences of violating the plain terms of MCL 500.1226(4). "Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive." *Stokes*, 466 Mich at 671-672. Defendant simply cannot be granted equitable relief because to do so would allow equity to defeat the statutory mandate that "[a]n adjuster for an insured shall not provide his or her services to a client until the adjuster has contracted in writing, on a form approved by the commissioner," MCL 500.1226(4). See *Stokes*, 466 Mich at 673; see also *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005) ("[I]f a court is free to cast aside, under the guise of equity, a plain statute . . . simply because the court views the statute as 'unfair,' then our system of government ceases to function as a representative democracy."). It also bears repeating during this "equity" discussion that defendant did not provide services or do anything more for plaintiff than that for which it was already paid. Any further recovery obtained for plaintiff came from the efforts of the third-party law firm hired after defendant was "finished" and because of defendant's failure to obtain the insurance proceeds plaintiff was owed.

We affirm. As the prevailing party, plaintiff may tax its cost under MCR 7.219.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Jane E. Markey