[Cite as *Westwinds Dev. Corp. v. Outcalt,* 2009-Ohio-2948.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

WESTWINDS DEVELOPMENT CORP., et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-G-2863**
- vs -	:	
JON OUTCALT, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 07 M 000767

Judgment: Affirmed.

Harold Pollock, Harold Pollock Co., L.P.A., 5900 Harper Road, #107, Solon, OH 44139 (For Plaintiffs-Appellants).

Timothy G. Warner, and *Wesley P. Lambert,* Speith, Bell, McCurdy & Newell Co., L.P.A., 925 Euclid Avenue, #2000, Cleveland, OH 44115, and *Robert P. Duvin,* Littler, Mendelson, P.C., 1100 Superior Avenue, 20th Floor, Cleveland, OH 44114 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.,

{¶1} Appellants, Westwinds Development Corp. ("the seller"), Westwinds Building Corp. ("the builder"), and their sole owner, appellant, Michael Healey, appeal the judgment of the Geauga County Court of Common Pleas granting the motion for judgment on the pleadings filed by appellees, Jon Outcalt and his wife Jane Outcalt ("the buyers"). At issue is whether appellants' claims pursuant to a purchase agreement

between the seller and the buyers are barred by the doctrine of merger by deed. For the reasons that follow, we affirm.

{¶2} On February 20, 2004, the buyers entered a purchase agreement with the seller, a real estate developer, to purchase sublot four in a residential subdivision owned by the seller in Pepper Pike, Ohio.

{¶3} Pursuant to the purchase agreement, the buyers agreed to purchase the undeveloped sublot for $550,000. The agreement recited it was the parties' intent that the buyers would enter a contract with the seller's affiliate the builder, a general contractor, to build a residence on the property. The contract provided that "[d]uring the period prior to Closing," the buyers would negotiate with [the builder] in an "effort to agree upon a construction contract." The closing was to take place on the first of the following to occur: July 1, 2004 or 14 days after the buyers entered a construction contract with the builder.

{¶4} The contract provided that if on or before seven days prior to closing, the buyers and the builder had not entered a construction contract, "either party shall have the right to terminate this Agreement by notice to the other."

{¶5} Shortly after entering the purchase agreement, the buyers began the construction process. They retained an architect to prepare plans and specifications for the residence. They cleared trees, excavated the garage foundation, hired a landscape architect, and paid the seller $30,000 for pre-construction management services. Although numerous drafts of a construction contract between the buyers and the builder were exchanged, they had not reached an agreement by the closing date, July 1, 2004. Despite this fact, the seller proceeded with the sale, which closed on March 17, 2005.

The buyers paid the purchase price of $550,000, and the seller transferred the property to them by deed. After the closing of the sale, the buyers and the builder continued to negotiate a construction contract.

{¶6} In October 2005, the relationship between the buyers and the seller began to deteriorate. On May 26, 2006, the seller asked the buyers to sell sublot four back to it; however, the parties were unable to agree to a price. Ultimately, the buyers did not enter a construction contract with the builder, and they sold their lot to a third party.

{¶7} On July 23, 2007, appellants filed a complaint in the trial court against the buyers alleging: the buyers breached the purchase agreement by failing to enter a construction contract with the builder (count one); the buyers breached an implied covenant of good faith by not entering a construction contract with the builder (count two); fraud (count three); and intentional interference with contracts and/or business opportunities (count four). Appellants prayed for damages in excess of $25,000.

{¶8} In October 2007, the buyers filed their answer and counterclaims and a motion for judgment on the pleadings. Appellants filed their reply to the counterclaims and their opposition to the buyers' motion.

{¶9} On December 19, 2007, the trial court entered judgment granting the buyers' motion in part. The court found that the seller agreed to sell the lot to the buyers. It was the parties' intent that the buyers would negotiate a contract to be entered in the future with the builder to build a residence on the property. However, the buyers did not enter a construction contract with the builder. The court found that either party had the right to terminate the contract. However, the seller did not exercise its right to terminate the contract, and instead allowed the sale to close on March 17, 2005.

The trial court found that the seller waived its right to cancel the contract or assert a breach of contract by allowing the sale to close, knowing the buyers had not entered a construction contract with the builder. The court further found the parties' stated intent that the buyers would enter an agreement with the builder to construct their residence was an unenforceable agreement to agree.

{¶10} The trial court dismissed appellants' fraud claim because the parties' negotiations concerning the sale of the property were incorporated into a complete written purchase agreement, and the seller was not entitled to rely on any prior, inconsistent oral representations. The court found that the parties' obligations under the purchase agreement merged with the conveyance. The court also found that by proceeding with the sale, the seller waived any right to assert a breach of the purchase agreement.

{¶11} The court found appellants' contract-interference claim failed because the seller did not allege any contract was breached by a third party.

{¶12} The court dismissed all claims asserted by the builder and Michael Healey on the ground that they were neither parties to the purchase agreement nor intended beneficiaries.

{¶13} The court found the only claim that survived the buyers' motion was the seller's claim for business interference. The case proceeded on this claim until September 12, 2008, when the court entered an order, on agreement of the parties, dismissing with prejudice this remaining claim. The court made a finding that there was no just reason for delay under Civ.R. 54(B), thereby rendering its December 19, 2007

judgment a final order. The court stayed the proceedings on the buyers' counterclaims pending appeal.

{¶14} Appellants appeal the trial court's judgment asserting five assignments of error. For clarity of analysis, we consider the assignments of error out of order. For their first assigned error, appellants allege:

{¶15} "THE TRIAL COURT ERRED IN GRANTING APPELLEES JUDGMENT ON THE PLEADINGS WHERE THE PLEADINGS WERE NOT CLOSED, DISCOVERY NOT COMPLETED, THE EVIDENCE WAS NOT FULLY DEVELOPED, AND WHERE GENUINE ISSUES OF FACT PRECLUDED THE GRANTING OF SAID MOTION."

{¶16} As noted supra, the trial court dismissed the claims of the builder and Healey on the ground that they were neither parties to the purchase agreement nor intended beneficiaries. Appellants have not assigned as error the trial court's dismissal of these claims. As a result, their dismissal is not properly before us and cannot be considered on appeal. App.R. 16(A)(3) and (7); *Schwab v. Delphi Packard Elec. Sys.,* 11th Dist. No. 2002-T-0081, 2003-Ohio-4868, at ¶14.

{¶17} However, even if appellants had assigned as error the dismissal of the builder and Healey's claims, such challenge would lack merit. In Ohio, only a party to a contract or an intended third-party beneficiary may bring an action on a contract. *Matheny v. Ohio Bancorp* (Dec. 30, 1994), 11th Dist. No. 94-T-5022, 1994 Ohio App. LEXIS 6007, *10. For a third-party beneficiary to be an intended beneficiary, the contract must have been entered into by the parties *directly or primarily* for the benefit of that person. *Hines v. Amole* (1982), 4 Ohio App.3d 263, 268, citing *Cleveland Metal Roofing & Ceiling Co. v. Gaspard* (1914), 89 Ohio St. 185. If the third party merely

receives an incidental or an indirect benefit, this is not sufficient to provide it with a cause of action. *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40.

{¶18} Courts look to the language of a contract to determine whether the contract was made for the direct or incidental benefit of a third party. *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App.3d 96, 100.

{¶19} Appellants failed to allege any facts in their complaint to support an argument that the builder or Michael Healey was an intended third party beneficiary of the purchase agreement. As a result, there is no set of facts that would have entitled either the builder or Healey to relief. See *Sony Elecs. v. Grass Valley Group*, 1st Dist. Nos. C-010133, C-010423, 2002-Ohio-1614, 2002 Ohio App. LEXIS 1304, *13. In *Sony Elecs*., the court held that for an alleged third party beneficiary to maintain a claim as such, it must have alleged facts indicating that the contracting parties entered into the contract directly or primarily for its benefit. Id. at *11-*12.

{¶20} In *Sony*, the court held that a provision in a contract to construct a football stadium requiring Sony electronic parts be installed in the production-control room, did not make Sony a third party beneficiary. Likewise, here, although the proposed builder was designated in the purchase agreement, that did not make it a third party beneficiary.

{¶21} We therefore hold the trial court did not err in finding that neither the builder nor Healey was an intended third-party beneficiary.

{¶22} Turning now to appellants' first assignment of error, a motion for judgment on the pleadings is the same as a motion to dismiss filed after the pleadings are closed and raises only questions of law. The pleadings must be construed in a light most

favorable to the party against whom the motion is made. *Vaught v. Vaught* (1981), 2 Ohio App.3d 264, 265; *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165-166. Pursuant to Civ.R. 12(C), judgment on the pleadings is proper where the court construes as true the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the plaintiff and concludes that the plaintiff can prove no set of facts to support the claim for relief. *Engleman v. Cincinnati Bd. of Edn*. (June 22, 2001), 1st Dist No. C-000597, 2001 Ohio App. LEXIS 2728, *5, jurisdictional motion overruled (2001), 93 Ohio St.3d 1452; *State ex rel. Midwest Pride IV, Inc. v. Pontious,* 75 Ohio St.3d 565, 570, 1996-Ohio-459.

{¶23} We review de novo the granting or denial of a motion for judgment on the pleadings. *Euvrard v. Christ Hospital & Health Alliance* (2001), 141 Ohio App.3d 572, 575, jurisdictional motion overruled (2001), 92 Ohio St.3d 1433.

{¶24} First, we note that appellants offer no argument in support of their assignment of error that the pleadings were not closed, discovery was not completed, and the evidence was not fully developed. As a result, this issue is not properly before us and cannot be considered on appeal. App.R. 16(A)(7). In any event, based on our review of the record, all pleadings had been filed in this case. Moreover, since a motion for judgment on the pleadings is determined by the pleadings alone, discovery and evidentiary materials are irrelevant.

{¶25} Instead, appellants argue that material issues of fact exist so that judgment on the pleadings was not appropriate. Appellants argue that fact issues exist as to (1) whether appellants or the buyers were responsible for the delay in the

construction of the residence and (2) whether appellants or the buyers were responsible for the buyers' failure to enter into a construction contract.

{¶26} This court has held that material facts are those that might affect the outcome of the suit under the governing law of the case. *Coleman v. Barnovsky*, 11th Dist. No. 2004-T-0101, 2005-Ohio-5867, at ¶13. The issues cited by appellants are not material to the determination of this action because, under the express terms of the contract, either party had the right to terminate the purchase agreement for any reason if the buyers had not entered a construction contract prior to closing. The parties did not condition the right to cancel the contract on the fault of either party. Thus, the seller had the right to cancel the purchase agreement since no construction contract had been entered, but instead chose to proceed with the closing. As a result, the delay in building the residence or the fault of either party for the nonexistence of a construction contract is not material.

{¶27} We therefore hold there were no issues of material fact, and the trial court did not err in granting the buyers' motion for judgment on the pleadings.

{¶28} Appellants' first assignment of error is not well taken.

{¶29} For their fourth assigned error, appellants assert:

{¶30} "THE TRIAL COURT ERRED IN HOLDING THAT THE AGREEMENT REGARDING A CONSTRUCTION CONTRACT WAS AN UNENFORCEABLE AGREEMENT TO AGREE WHERE [THE BUYERS] HAD TAKEN ACTIONS THAT MANIFESTED THEIR INTENTION TO BE BOUND."

{¶31} Appellants argue the trial court erred in finding that the provision in the purchase agreement obligating the buyers to negotiate a future construction contract

with the builder was an unenforceable agreement to agree. As a result, they argue the court erred in dismissing their claim for breach of contract. The Supreme Court of Ohio addressed the enforceability of agreements to enter future contracts in *Normandy Place Associates v. Beyer* (1982), 2 Ohio St.3d 102. The Court held:

{¶32} "*** It is thus not the law that an agreement to make an agreement is per se unenforceable. The enforceability of such an agreement depends rather on whether the parties have manifested an intention to be bound by its terms and whether these intentions are *sufficiently definite to be specifically enforced*." (Emphasis added.) Id. at 105-106.

{¶33} The Supreme Court reaffirmed its holding in *Beyer* in *M.J. DiCorpo, Inc. v. Sweeney,* 69 Ohio St.3d 497, 1994-Ohio-316. In *M.J. DiCorpo, Inc*., the Court addressed the agreement to agree at issue in that case, as follows:

{¶34} "Here, the express terms of the letter of intent clearly indicate that that document was nothing more than an agreement to principles which were subject to further negotiation and a detailed and definitive merger agreement. While the letter may have provided the basic framework for future negotiations, the letter itself did not address *all the essential terms* of the merger. Thus, the letter of intent is not a legally enforceable contract." (Emphasis added.) Id. at 503.

{¶35} This court adopted the Supreme Court's holding in *M.J. DiCorpo, Inc.* in *Convenient Food Mart, Inc. v. Con. Inc*., *No. 3-007* (Sep. 30, 1996), 11th Dist. No. 95-L-093, 1996 Ohio App. LEXIS 4338. *11-*12.

{¶36} In *Weston, Inc. v. Brush Wellman, Inc.* (Jul. 28, 1994), 8th Dist. No. 65793, 1994 Ohio App. LEXIS 3349, the court held:

{¶37} "Where an agreement contemplates further action toward formalization or if an obligation to become binding rests on a future agreement to be reached by the parties, so that either party may refuse to agree, there is no contract. In other words, as long as both parties contemplate that something remains to be done to establish a contractual relationship, there is no binding contract." Id. at *14.

{¶38} In the instant case, the purchase agreement contained a promise by the buyers to negotiate a contract to be entered in the future with the builder to construct a residence on the property. However, the purchase agreement does not contain any of the usual terms found in a construction contract, such as the design to be built, the materials to be used, the price of the project, or the timetable for completion. In fact, appellants concede in their appellate brief that none of the usual terms found in a construction contract was set forth in the purchase agreement. As a result, the purchase agreement does not contain terms that are "sufficiently definite to be specifically enforced." It merely sets forth a general obligation that the buyers pursue negotiations with the builder prior to closing with a view toward entering a future construction contract.

{¶39} Appellants argue the buyers manifested their intent to be bound by a construction contract with the builder by taking certain steps consistent with construction of a residence, such as retaining an architect, clearing trees, and excavating the garage foundation. However, appellants do not cite any authority in support of this argument. They have therefore failed to properly present the issue on appeal. App.R. 16(A)(7). In any event, such conduct is not a substitute for definite contract terms. If we were to

accept appellants' argument, we would be required to draft the construction contract for the parties and impose terms to which they have not agreed.

{¶40} Because the purchase agreement does not manifest an intent by the parties that was sufficiently definite to allow for the specific enforcement of a construction contract, we hold the trial court did not err in finding the buyers' promise to negotiate a construction contract was not an enforceable contract.

{¶41} Appellants' fourth assignment of error is not well taken.

{¶42} For their fifth assigned error, appellants contend:

{¶43} "THE TRIAL COURT ERRED IN FINDING APPELLANTS' FRAUD CLAIM WAS BARRED WHERE THE CLAIM WAS BASED ON FRAUDULENT INDUCEMENT AND PAROL EVIDENCE WAS ADMISSIBLE TO ESTABLISH THE CLAIM."

{¶44} Appellants argue the trial court erred in dismissing their fraud claim. The trial court found:

{¶45} "*** Plaintiffs have shown no fraud since all operative representations were incorporated into what appears to be a complete, unambiguous Purchase Agreement. There can be no inducement by alleged fraudulent oral representations when they are superseded by the terms of a written contract. And, "fraud" with respect to failing to enter into the construction contract is a mischaracterization. There was no duty to enter into a construction contract, as aforesaid."

{¶46} First, we note that appellants do not dispute they were aware of the circumstances allegedly forming the basis of their fraud claim prior to closing on the sale of the property. The "representations" on which appellants claim to have relied to support their fraud claim are that the buyers allegedly said: (1) they would allow the

builder to build their residence; (2) they would construct a residence on the property in a prompt manner; (3) they would retain an architect to prepare plans and specifications for a residence; and (4) the closing of the sale and execution of the construction contract would take place by July 1, 2004.

{¶47} It is well settled in Ohio that "[a] party to an executory contract procured by false representations who, after knowledge that the representations are false and fraudulent, performs or *** completes performance of the contract and accepts payment according to its terms thereby waives the fraud." *The Baltimore & Ohio R.R. Co. v. Jolly Bros. & Co.* (1904), 71 Ohio St. 92, at paragraph two of the syllabus.

{¶48} This rule has been applied against purchasers of real property. *Keller v. Citizens Discount Corp*. (1957), 104 Ohio App. 206.

{¶49} As of the date of closing, March 17, 2005, the seller was aware that the sale had not closed by July 1, 2004 and that the buyers had not signed a construction contract by that date. Despite this knowledge, the seller proceeded with closing of the sale. As a result, it waived any right to assert a claim based on fraudulent inducement.

{¶50} However, even if appellants had not waived this claim, it would still be meritless since any alleged misrepresentations by the buyers were superseded by the parties' purchase agreement under the parol evidence rule.

{¶51} The Ohio Supreme Court addressed the admissibility of parol evidence in the context of a claim of fraudulent inducement in *Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7, as follows:

{¶52} "The parol evidence rule states that '*** the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of

prior or contemporaneous oral agreements, or prior written agreements.' 11 Williston on Contracts (4 Ed. 1999) 569-570, Section 33:4. ***

{¶53} "***

{¶54} "Nevertheless, the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement. *Drew v. Christopher Constr. Co., Inc.* (1942), 140 Ohio St. 1, *** paragraph two of the syllabus. See, also, *Union Mut. Ins. Co. of Maine v. Wilkinson* (1871), 80 U.S. (13 Wall.) 222, 231-232 ***.

{¶55} "***

{¶56} "However, *the parol evidence rule may not be avoided 'by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing.* Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.' *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, *** paragraph three of the syllabus. *** [A] fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is [sic] exactly what the Parol Evidence Rule was designed to prohibit.' Shanker, Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds *** (1989), 23 Akron L.Rev. 1, 7.

{¶57} "*** *Unless the false promise is *** consistent with the written instrument, evidence thereof is inadmissible*.' *Alling v. Universal Mfg. Corp*. (1992), 5 Cal. App. 4th

1412, 1436 ***. By the same token, '*if the written contract provides for the doing of an act on a certain condition, the promisee cannot show that the promise was an absolute one merely by claiming fraud* ***.' Annotation, [Parol-Evidence Rule; Right to Show Fraud in Inducement or Execution of Written Contract (1928),] 56 A.L.R. [13,] at 47-48." (Emphasis added.) *Galmish* at 27-30.

{¶58} Thus, parol evidence can only be introduced to challenge a written contract when the alleged oral misrepresentations are *consistent* with the written contract. Moreover, a promisee cannot transform a conditional promise into an absolute one by claiming fraud.

{¶59} In the instant case, appellants assert the buyers made a prior absolute promise that they would allow the builder to build their residence. However, the purchase agreement by its terms merely obligated the buyers to negotiate a construction contract with the builder "prior to closing." Thus, under the parol evidence rule, evidence of the buyers' alleged misrepresentation would not be admissible to vary the terms of the purchase agreement. Appellants cannot transform the buyers' conditional promise into an absolute one simply by claiming fraud. *Galmish* at 30.

{¶60} We therefore hold that, even if appellants had not waived their fraud claim, the trial court did not err in finding that the buyers' alleged misrepresentations were superseded by the written purchase agreement.

{¶61} Further, we observe appellants failed to allege their fraud claim with particularity as required by Civ.R. 9(B). That rule provides:

{¶62} "In all averments of fraud ***, the circumstances constituting fraud *** shall be stated with particularity. ***"

{¶63} This court set forth guidelines to determine whether a fraud claim meets the Civ.R. 9(B) requirement of particularity in *Johnson v. F & R Equipment Co*. (Sept. 27, 1996), 11th Dist. Nos. 94-T-5092, 94-T-5142 and 94-T-5147, 1996 Ohio App. LEXIS 4211, as follows: "'(1) plaintiff must specify the statements claimed to be false; (2) the complaint must state the time and place where the statements were made; and, (3) plaintiff must identify the defendant claimed to have made the statement.'" Id. at *6, quoting *Korodi v. Minot* (1987), 40 Ohio App.3d 1, 4.

{¶64} In their complaint, appellants failed to allege the circumstances in which the false representations attributed to the buyers were allegedly made. Appellants failed to allege which aspects of the buyers' representations were false. They failed to allege who, as between the buyers, allegedly made the statements or when or where they were made. They failed to allege the person or entity to whom these statements were made. In addition, appellants failed to allege how the seller was induced to enter the purchase agreement, how any or all of the appellants were prejudiced, or the damages any one or more of them sustained.

{¶65} We hold appellants failed to allege with particularity the circumstances concerning their fraud claim and the trial court did not err in dismissing that claim.

{¶66} Appellants' fifth assignment of error is not well taken.

{¶67} For their second assigned error, appellants contend:

{¶68} "THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS WAIVED THEIR CLAIM AGAINST [THE BUYERS] FOR FAILURE TO ENTER INTO A CONSTRUCTION CONTRACT WHERE THE LOT SALE PURCHASE AGREEMENT WAS NEVER INTENDED TO INCORPORATE SAID AGREEMENT, WHERE PAROL

EVIDENCE WAS ADMISSIBLE TO ESTABLISH THE INTENT OF THE PARTIES, AND WHERE THE PURCHASE AGREEMENT PRECLUDED A WAIVER UNLESS IN WRITING AND SIGNED BY THE PARTIES."

{¶69} Appellants argue the trial court erred in finding they had waived any claim based on the buyers' failure to enter a construction contract with the builder by proceeding with the sale without a construction contact having been entered. They argue they should have been permitted to present parol evidence to show the buyers' obligation to negotiate a construction contract survived closing for two reasons.

{¶70} First, they argue the purchase agreement is ambiguous as to whether the buyers' obligation to negotiate a construction contract survived the transfer of sublot four. However, appellants failed to allege in their complaint that the purchase agreement is ambiguous. They also failed to assert a claim for reformation of the purchase agreement or any other claim premised on the alleged ambiguity of that agreement. The argument is therefore not supported by the record and not properly before us. App.R. 16(A)(7).

{¶71} Second, appellants argue the purchase agreement was not integrated because it did not include the terms of a construction contract. However, as appellants concede on appeal, the purpose of the purchase agreement was to provide the terms of the purchase and sale of real estate, not the construction of a residence. Appellants concede all terms of the real estate transaction were included in the purchase agreement. Here, the purchase agreement also included terms regarding the buyers' duty to negotiate a construction contract prior to closing. As a result, the purchase agreement did not require the terms of the construction contract to be included for the

purchase agreement to be an integrated contract. Restatement (Second) of Contracts, Sec. 235.

{¶72} Moreover, the purchase agreement expressly provided that *"[d]uring the period prior to Closing*, Buyer will work with Builder in a diligent effort to agree upon a construction contract." (Emphasis added.) Thus, according to the clear and unambiguous provisions of the purchase agreement, the only period during which the buyers were obligated to negotiate with the builder was prior to closing. As a result, any alleged prior oral representations of the buyers promising they would continue to negotiate a construction contract after closing were inadmissible to vary or contradict the express terms of the written purchase agreement. *Galmish*, supra.

{¶73} Further, the complaint itself demonstrates appellants waived the right to pursue a breach-of-contract claim against the Outcalts. Waiver is the voluntary relinquishment of a known right. *National City Bank v. Rini*, 11th Dist. No. 2004-P-0051, 2005-Ohio-4041, at ¶24, citing *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 435, 2000-Ohio-213. The waiver of a contract provision may be express or implied by conduct of a party that is inconsistent with an intent to claim a right. *Rini*, supra; *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751.

{¶74} Under the purchase agreement, the seller had the right to cancel the contract if the buyers had not entered a construction contract by July 1, 2004. By that date, no construction contract had been entered, yet the seller proceeded to closing. By its conduct, the seller waived any right to require the buyers to enter a construction contract.

{¶75} Appellants argue that under the contract, waiver only applies if the waiver is in writing. The contract provides that any term or condition of the contract "may be waived in writing." However, that provision does not preclude a court from determining that the attendant facts and circumstances result in waiver.

{¶76} Appellants also argue that because the contract provided for alternative dates for closing, the contract contemplated negotiations for the construction contract "might continue" so that there was no waiver. Appellants' argument fails for two reasons. First, the fact that the buyers "might continue" to negotiate with the builder post-closing does not mean that the buyers were contractually obligated to do so. Second, no matter which of the two alternative closing dates are used, the purchase agreement expressly provides the obligation of the buyers to negotiate a construction contract exists only prior to closing.

{¶77} Contrary to appellants' argument, the fact that the buyers and the builder exchanged drafts of a construction contract after closing does not demonstrate the buyers were contractually required to continue negotiations. It merely demonstrates the buyers continued their efforts to enter a construction contract after their contractual obligation to do so expired. By allowing the sale of the real estate to close without a construction contract in place, appellants waived the right to enforce that provision.

{¶78} Next, appellants argue the trial court erred in finding that the buyers' obligation to negotiate a construction contract was extinguished under the merger doctrine. We do not agree.

{¶79} It is well-settled that when a deed is delivered and accepted without qualification pursuant to a real estate purchase agreement, the agreement merges with

the deed and no separate cause of action under the contract exists. *Nelson v. Nelson*, 11th Dist. No. 2007-G-2758, 2007-Ohio-6246, at ¶22. "Where a deed is delivered and accepted without qualification pursuant to agreement, no cause of action upon the prior agreement thereafter exists." *Fuller v. Drenberg* (1965), 3 Ohio St.2d 109, at paragraph one of the syllabus.

{¶80} Under the merger doctrine, upon closing of a real estate transaction, the parties are limited to the express covenants in the deed. 37 *Robinwood Associates v. Health Industries, Inc.* (1988), 47 Ohio App.3d 156, 157-158.

{¶81} The deed by which the seller conveyed title to the property to the buyers does not include a provision requiring that they negotiate a construction contract with the builder. Nor does the deed include a general provision that the obligations contained in the purchase agreement survive in the deed. Therefore, once the deed for sublot four was accepted by the buyers, their obligation as set forth in the purchase agreement to negotiate with the builder was extinguished by merger.

{¶82} Appellants attempt to avoid the application of the merger doctrine by arguing that the narrow exception to the doctrine applicable to collateral agreements applies. This exception applies only to agreements that are collateral to, i.e., outside, the conveyance. Provisions in the contract that are collateral to and therefore independent of the main purpose of the transaction are not merged in the deed. *McAtee v. Ram Exterminators, Inc.* (Oct. 27, 1989), 6th Dist. No. L-88-418, 1989 Ohio App. LEXIS 4029, *10. An agreement is collateral if it does not concern the title, occupancy, size, enjoyment, possession, or quantity of the parcel of land conveyed. *Mayer v. Sumergrade* (1960), 111 Ohio App. 237, 239. If the agreements concern the

use or enjoyment of the land, they are not collateral to the purchase agreement and are merged upon acceptance of the deed. For example, agreements in purchase contracts to pay for damage to the property after closing are regarded as relating to the use, occupancy, or enjoyment of the land and are therefore not collateral. As a result, they are merged in the deed. See, e.g., *McAtee,* supra.

{¶83} The provision at issue, i.e., the buyers' agreement to negotiate a contract with the builder to build a residence on the property concerned the occupancy, enjoyment, or possession of the parcel of land conveyed. Therefore, the agreement to negotiate a construction contract was not a collateral agreement, and any prior obligation of the buyers to negotiate was extinguished under the merger doctrine.

{¶84} We therefore hold that the trial court did not err in finding that the provision in the purchase agreement requiring the buyers to negotiate a construction contract with the builder was extinguished on closing by the merger doctrine.

{¶85} Appellants' second assignment of error is not well taken.

{¶86} For their third assignment of error, appellants allege:

{¶87} "THE TRIAL COURT ERRED IN FINDING APPELLANTS' CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH SUBSUMED INTO THE CLOSING OF THE PURCHASE AGREEMENT."

{¶88} Appellants argue the trial court erred in dismissing their claim premised on the buyers' alleged breach of an implied covenant of good faith in negotiating with the builder. We do not agree.

{¶89} In *Lakota Loc. School Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 646, the Sixth Appellate District held that the covenant of good faith is part

of a contract claim, and does not stand alone as a separate cause of action from a breach of contract claim. Accord *Interstate Gas Supply, Inc. v. Calex Corp*., 10th Dist No. 04AP-980, 2006-Ohio-638, at ¶98.

{¶90} Because we hold, supra, the trial court did not err in dismissing appellants' claim for breach of contract, appellants cannot maintain a separate claim based on the alleged breach of an implied covenant of good faith.

{¶91} Appellants also argue that because the buyers continued to exchange drafts of a construction contract with the builder after closing, "the [buyers] are estopped to deny that their obligation to negotiate a construction contract in good faith was continuing." Again, we do not agree.

{¶92} Equitable estoppel precludes recovery when a party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment. *The Glidden Co. v. Lumbermens Mut. Cas. Co*., 112 Ohio St.3d 470, 479, 2006-Ohio-6553.

{¶93} Appellants failed to allege in their complaint that estoppel applies to their claim for the breach of an implied covenant of good faith. They also failed to allege that any or all of the appellants changed their position in reliance on the exchange of drafts of a construction contract between the buyers and the builder after closing. Appellants are therefore precluded from asserting the application of this doctrine here. App.R. 16(A)(7).

{¶94} We hold the trial court did not err in dismissing appellants' claim based on the alleged breach of the implied covenant of good faith.

{¶95} Appellants' third assignment of error is not well taken.

{¶96} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶97} I respectfully dissent.

{¶98} The majority contends that appellants' claims pursuant to the purchase agreement between the seller and the buyers are barred by the doctrine of merger by deed. I disagree.

{¶99} '"The doctrine of 'merger by deed' holds that whenever a deed is delivered and accepted 'without qualification' pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants only. *37 Robinwood Associates v. Health Industries* (1988), 47 Ohio App.3d 156, 157-158 ***. A deed is not unqualifiedly accepted if it is accepted under protest and with a reservation of rights. *Fuller v. Drenberg* (1965), 3 Ohio St.2d 109 ***, paragraph one of the syllabus; *Brumbaugh v. Chapman* (1887), 45 Ohio St. 368 ***; *37 Robinwood Associates v. Health Industries, Inc.* supra. at, 157-58 ***; *Zander v. Blumenthal* (1964), 1 Ohio App.2d 244, 249 ***.

{¶100} "In explaining the underpinnings of the doctrine of merger by deed, the author of a prominent treatise noted the following: 'In reality, this doctrine is merely an application of the contract doctrine of integration. Under this doctrine, all prior documents are considered to be integrated into the final contract, and only the provisions contained in the final contract are part of the agreement. This doctrine is the combined result of the parole evidence rule and the rule of interpretation which seeks to determine the intentions of the parties. Thus, if it can be shown that the parties actually intended that the provisions of a prior agreement continue in force, then the provisions do so continue. Similarly, the merger doctrine should only be applied as a canon of construction that attempts to arrive at the true intention of the parties to a deed.' *Judy Newman v. Group One,* Highland App. No. 04CA18, 2005 Ohio 1582 (quoting 14 Powell on Real Property (1995) 81A-136, Section 81A.07[1][d])." (Parallel citations omitted.) *Suermondt v. Lowe*, 165 Ohio App.3d 427, 2006-Ohio-224, at ¶19-20.

{¶101} In the instant case, I do not believe that the doctrine of merger by deed applies. The contract provision that requires the buyers to negotiate a construction in good faith is independent and collateral to the contractual provisions relating to title. The contract does not contemplate that a construction contract with the builder would be completed, if at all, prior to closing. Rather, the language relating to the closing date specifically contemplates negotiations for a construction contract after the closing date. Also, the purchase agreement does not provide that the builder's obligation to proceed with the closing on Lot 4 was contingent upon the construction being executed. Thus, the doctrine of merger by deed does not operate to extinguish appellants' claims.

{¶102} For the foregoing reasons, I dissent.