STATE OF MICHIGAN

COURT OF APPEALS

GRAND POINTE PROPERTY, L.L.C., JASON KISHMISH, and TALAL YATOOMA, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED January 17, 2013
v SEC GRAND POINTE, L.L.C., Defendant-Appellant/Cross-Appellee,	No. 301293 Kent Circuit Court LC No. 08-013530-CZ
and SMK BREADS, L.L.C., ROBERT BENNETT, MARY B. BENNETT, and MARK EDDY, Defendants.	

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

This appeal arises from the purchase and sale of a shopping center. Shortly after the sale finalized, the shopping center's anchor tenant, a café-bakery called Atlanta Bread, went out of business. The purchasers promptly discovered that the shopping center's previous owners had been well aware of Atlanta Bread's precarious financial condition and knew that the restaurant owner intended to close the enterprise almost immediately after the sale. In fact, the sellers had entered into several undisclosed side agreements with Atlanta Bread's owner designed to disguise the tenant's economic misfortunes. The buyers filed suit, asserting a variety of claims including that the sellers had materially misrepresented the shopping center's financial condition. A jury found that the sellers had committed fraud and awarded the buyers $630,000 in damages.

The sellers assert that the trial court erred by failing to dismiss the case based on a merger clause and a violation of the tender-back rule, and by allowing the buyers to present expert

testimony in support of an unpleaded claim for silent fraud. We find none of these challenges meritorious, and affirm.[1]

I. UNDERLYING FACTS AND PROCEEDINGS

Plaintiffs Jason Kishmish and Talal Yatooma are business partners and investors in real estate. In the fall of 2006, they learned that the principals of defendant SEC Grand Pointe, L.L.C., which owned the Grand Pointe shopping center in Grandville, had expressed interest in selling the property. Plaintiffs inspected Grand Pointe, believed it "looked like a great property," and commenced negotiations to purchase it. On January 11, 2007, Kishmish, Yatooma and SEC executed a purchase and sale agreement for Grand Pointe. The contract set forth a purchase price of $6,225,000, and contemplated that the sale would close only after the buyers received several documents detailing the income generated by the shopping center's tenants.[2] Plaintiffs intended to finance most of the purchase price, and to use the rental income to pay the mortgage.

A. The Purchase and Sale Agreement Parameters

The purchase and sale agreement conditioned the shopping center's sale on plaintiffs' "sole and absolute satisfaction or waiver" of several "due diligence" conditions, including receipt of the leases for the shopping center's tenants, a certified "rent roll," and tenant estoppel certificates. SEC agreed to warrant the accuracy of the leases and the rent roll, and affirmatively represented in the purchase and sale agreement that none of the tenants' leases had been amended, modified, or supplemented, except as would be noted in the forthcoming rent roll. SEC further agreed not to amend or modify any lease before the deal closed, and to refrain from executing certain other agreements concerning the property:

> (iv) Seller will not enter into any amendment to or modification of any of the Leases prior to the Closing date which will reduce, forgive or postpone or anticipate any rents or which would otherwise materially affect the value of the Shopping Center Property, without Purchaser's consent . . . .
>
> (v) From the date of this Agreement to the Closing date, Seller shall conduct its business involving the Shopping Center Property in the ordinary course, and during said period will:
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> * * *

[1] Plaintiffs cross-appealed the trial court's pretrial ruling that the crime-fraud exception to the attorney-client privilege did not apply to SEC's communications with its attorney. Because we have affirmed the jury's judgment, any consideration of that issue would be *obiter dictum*. We acknowledge, however, that this issue may be relevant in the ongoing litigation between the parties. We therefore direct the trial court to carefully reconsider the issue should it arise again.

[2] Kishmish and Yatooma subsequently formed plaintiff Grand Pointe Property, L.L.C., and assigned to it their individual interests in the shopping center property.

> (B) refrain from entering into any contracts or other commitments regarding the Shopping Center Property other than in the ordinary and usual course of business, without the prior written consent of Purchaser[.]

The purchase agreement also contained an integration clause:

> This written Agreement, including all exhibits attached hereto and documents to be delivered pursuant hereto, shall constitute the entire agreement and understanding of the parties, and there are no other prior or contemporaneous written or oral agreements, undertakings, promises, warranties, or covenants not contained herein.

It took months for the necessary documentation to be gathered and reviewed by plaintiffs, their counsel, and counsel for the lender. During this lengthy hiatus, the closing date was extended four times. When the deal finally reached fruition, the picture painted by the leases, rent roll, and tenant estoppel certificates was of a financially healthy enterprise. The reality, however, was quite different.

B. Atlanta Bread's Financial Deterioration

SMK Breads, L.L.C., doing business as an Atlanta Bread franchise, occupied approximately 20 percent of Grand Pointe. As the shopping center's anchor tenant, Atlanta Bread paid approximately 29 percent of the property's total rental income. When Robert and Mary Bennett initially signed Atlanta Bread's 2003 lease, they personally guaranteed it for 120 months.

In the fall of 2006, Robert Bennett informed SEC that Atlanta Bread was in deep financial trouble. This revelation roughly coincided with plaintiffs' initial expression of interest in purchasing the shopping center. A month or two before SEC signed the purchase and sale agreement, Bennett engaged in a lengthy discussion with Jeffrey Smith, SEC's property manager and one of its owners. Bennett advised Smith that he was not "hitting [his] break-even numbers" and had unsuccessfully offered to sell his franchise back to the franchisor. At that point, Atlanta Bread owed two months' rent.

Smith told Bennett that SEC was interested in leasing the shopping center's "far end-cap unit" to a Jimmy Johns restaurant. Bennett voiced his opposition to this plan, reminding Smith that Atlanta Bread's lease afforded Bennett the power to veto a competing tenant in that space. Bennett then asked Smith for some concessions, including a renegotiated personal guaranty. He withheld Atlanta Bread's rent payments while negotiations proceeded.

By December 2006, Bennett and SEC reached a partial compromise. SEC agreed to reduce Bennett's personal guaranty to one year contingent on payment of five months' outstanding rent, in exchange for Bennett's willingness to "sign off" on the proposed Jimmy Johns' tenancy. Bennett agreed to both conditions but insisted on further reduction of his personal guaranty.

Bennett kept his promise to pay the outstanding rent. The manner in which he did so, however, supplies part of the foundation for plaintiffs' fraud claim. On December 31, 2006, less

than two weeks before plaintiffs and SEC executed the purchase and sale agreement, Bennett signed a promissory note for $55,972 in favor of an entity called the Mass Development Corporation. This sum corresponded closely to Atlanta Bread's five months in outstanding rent.[3] Defendant John Oosterbaan, one of SEC's owners, is also a principal member of Mass Development. Thus, one of Oosterbaan's companies (Mass Development) bankrolled another (SEC) by loaning Bennett $55,972. With the $55,972, Atlanta Bread eliminated its rent indebtedness. This loan first came to light only after Atlanta Bread closed its doors.

Despite the advanced funds by Mass Development, Bennett continued to seek concessions concerning his personal guaranty. Smith initially demurred, advising Bennett that SEC was refinancing the shopping center and "the bank would not accept anything less than a year personal guaranty." But Bennett and SEC then struck yet another deal. They agreed to "write a year guaranty" with Bennett funding the first six months and a company called Golden Horseshoe paying the last six months. Like Mass Development, Golden Horseshoe is owned by Oosterbaan. Golden Horseshoe agreed to supply the funds necessary to satisfy the last six months of any indebtedness due pursuant to the guaranty. When Atlanta Bread defaulted, Golden Horseshoe lived up to its part of the bargain by electronically transferring the monthly rent payments to Atlanta Bread's bank account through the law office of Damien Fraser, the attorney who represented SEC throughout the purchase and sale venture.

Notably, Oosterbaan signed Bennett's new personal guaranty agreement on January 23, 2007 – 12 days *after* Kishmish and Yatooma signed the purchase and sale contract. The funding agreement for the guaranty also remained secret until after Atlanta Bread folded.

On April 5, 2007, Bennett signed a tenant estoppel certificate stating that there had been no amendments or modifications of Atlanta Bread's lease, and there existed "no other promises, agreements, understandings, or commitments" between himself and SEC. Tenant estoppel certificates set forth the date of the tenant's lease, the square footage of the leased property, and the amount of rent due each month. They provide assurance that the tenants' leases are in full force and effect, contain the terms represented by the seller, and have not been amended or modified. In its letter, Atlanta Bread warranted that its lease was "in full force and effect" and that:

> there are no amendments or modifications of any kind to the Lease except as referenced above (if any); there are no other promises, agreements, understandings, or commitments between Landlord and Tenant relating to the premises leased under the Lease; and Tenant has not given Landlord any notice of termination thereunder;
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> * * *
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> (g) Tenant is obligated to pay rent to Landlord at the rate set forth in the Lease, Tenant is current with respect to, and is paying the full rent and other

[3] According to its lease, Atlanta Bread paid $10,417 monthly rent.

> charges stipulated in the Lease (including, without limitation, common area maintenance charges) with no offsets, deductions, defenses or claims; and Tenant has not prepaid any rent or other amounts to Landlord other than rent and other charges due and payable in the calendar month of this certification[.]

According to Bennett, Oosterbaan and Smith instructed him that he "shouldn't talk about" the January 2007 agreement and he made no reference to it in the tenant estoppel certificate. Bennett claimed that he signed the tenant estoppel certificate after "[w]e received phone calls from Damion [sic] Frasier adamantly to sign it. When I say, 'we', I mean me and my attorney." Another tenant, Orville Elema, signed an estoppel letter certifying that his business, Paris Studios, was current on its rent obligations. Elema later confessed that Paris Studios' rent was delinquent, and claimed he signed the letter "under duress" applied by an SEC representative.

Similarly, the certified rent roll provided to plaintiffs by SEC on January 31, 2007, represented that none of the tenant's leases had been modified or amended. The rent roll, signed by Smith, further asserted that none of the tenants was "in material default."

Meanwhile, the loan made to Bennett failed to resolve Atlanta Bread's financial woes. On April 24, 2007, Bennett travelled to Atlanta to gather information about a restaurant remodel mandated by the franchisor. Bennett advised Smith that he would need a "tenant allowance" to make the necessary modifications, as well as a restructured lease. On April 27, 2007, shortly before the May 4 closing date, Bennett met with Oosterbaan. Oosterbaan informed Bennett that a sale of the shopping center was pending and declined to restructure the lease. Bennett then notified Oosterbaan that he would close the restaurant after Memorial Day.

Oosterbaan instructed Bennett to send an email detailing his rent requirements, and Bennett agreed to do so. As Bennett was typing the email, Oosterbaan called and told him that the email was unnecessary. According to Bennett, Oosterbaan stated that "we're not going to disclose anything" to the proposed buyer.

Only hours after Oosterbaan's meeting with Bennett, Frasier sent an email to John Hindo, the attorney representing plaintiffs, as follows:

> [T]he owner of the Atlanta Bread franchise told SEC Grand Pointe that the Atlanta Bread franchisor is making changes to its format and requiring franchisees to make changes to their stores. Although not required of the purchase agreement, we feel that morally and ethically it's the right thing to do by letting you know of the conversation with the tenant today. At this point we have no specifics, but we understand that the tenant will be requesting a tenant improvement allowance to cover the cost of the franchisor mandated improvements and possibly a reduction in rent.

Frasier did not reveal Bennett's unambiguously expressed intent to close the store after Memorial Day.

Hindo replied by email, demanding to "know immediately if the Tenant has indicated that they would terminate the lease if concessions were not given" and requesting that SEC guaranty Atlanta Bread's lease. Frasier replied:

> As for Atlanta Bread, it was their meeting with their franchise last week that led to their demands. Moreover, during your lender's due diligence[,] Atlanta Bread told the lender and the broker that they had less revenues than they felt they should have and that they were exploring with the franchisor ways to alleviate the problem.

Atlanta Bread was not the only Grand Pointe tenant in financial hot water. Goldsmith Jewelers' tenant estoppel letter stated that it owed $24,583.78 in back rent that accrued before December 2005. Kishmish received this information shortly before Bennett's meeting with Oosterbaan. Based on his new concerns about Goldsmith Jewelers' stability, Kishmish instructed Hindo to terminate the deal. Hindo then discussed the Goldsmith situation with Damien Frasier, SEC's attorney. Frasier provided the buyers with a replacement estoppel certificate for Goldsmith that disclaimed any rent problems.

Nevertheless, plaintiffs' concerns about the Atlanta Bread and Goldsmith Jewelers' leases threatened to unravel the deal. On May 1, 2007, SEC, Kishmish and Yatooma signed a document entitled "Agreement for Goldsmith Jeweler and SKM Bread [sic], LLC d/b/a Atlanta Bread Leases." SEC contended throughout the subsequent litigation that this document, which SEC characterizes as a "release," barred plaintiffs' fraud claim. The contract provided in relevant part:

> RECITALS
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> Whereas, Seller and Purchaser entered into a certain Purchase and Sale Agreement ("Purchase Agreement") which became effective on January 17, 2007, for the sale of certain real property more specifically described in the Purchase Agreement (the "Premises");
>
> Whereas, all conditions to close under the Purchase Agreement have been met and Purchaser has requested a price reduction from that set forth in the Purchase Agreement, which Seller refused to grant; and
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> Whereas, in an effort to compromise the Parties have agreed that Seller will provide a guaranty of the Goldsmith Jewelers original lease term and a credit for the SKM Bread [sic], LLC d/b/a Atlanta Bread lease/guarantee and Purchaser confirms, acknowledges and agrees that it has no rights against Seller for the payment or non-payment of rent by any other tenant than as set forth herein.
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> NOW THEREFORE, the Parties agree to the following:
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> 1. Seller hereby agrees to guaranty the collection of monthly rent owed under the . . . Goldsmith Jeweler's [sic] lease with Seller of 2,387.03 per month from the date of the closing on the Purchase Agreement through the lease termination date of July 31, 2009.

> 2. In settlement of the disagreement concerning the SKM Bread [sic], LLC d/b/a Atlanta Bread lease/guarantee Seller and Purchaser have agreed that at closing Seller shall give purchaser a credit from the closing proceeds of $75,000.00 which Purchaser shall be required by its lender to hold in a reserve fund with the lender[.]
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> 3. Purchaser confirms, acknowledges and agrees that Purchaser has conducted due diligence of the Premises, inclusive of due diligence of the tenants' business operations, and that Purchaser is relying solely on its due diligence, the leases provided by Seller, the Seller's rent roll and the tenant estoppels provided by the tenants as part of the Purchaser's due diligence, in proceeding to close on the Purchase Agreement and that Seller is not and shall not be responsible for any post-closing breach of any lease, inclusive of non-payment of rent, or losses caused thereby or resulting therefrom, of any tenant (and/or guarantor thereof) of the Premises after the closing on the Purchase Agreement other than as set forth in Sections 1 through 4 [sic] above; notwithstanding the foregoing, Purchaser hereby acknowledges and agrees that it waives any and all of its present and/or future claims, known or unknown, against Seller with respect to either the Goldsmith Jewelers lease and/or the SKM Bread [sic], LLC d/b/a Atlanta Bread lease/guarantee.
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> 4. The Parties acknowledge and agree that the closing date set forth in the Purchase Agreement shall be extended until May 4, 2007[,] and that all conditions to close have either been met and/or waived.
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> 5. Unless amended herein the Purchase Agreement and all of the applicable terms thereof shall remain unmodified and shall continue in full force and effect.

The deal closed three days after the parties signed this agreement, on May 4, 2007. On May 17, 2007, Bennett shuttered Atlanta Bread. After Atlanta Bread closed, several other tenants defaulted and left the shopping center. The buyers then defaulted on their $5 million mortgage.

In December 2008, plaintiffs sued SEC, SMK Breads, Robert and Mary Bennett, and Mark Eddy, SEC's real estate broker. The complaint asserted claims for breach of contract, fraudulent inducement and fraudulent misrepresentations, negligent misrepresentations, innocent misrepresentations, conspiracy, conversion, breach of fiduciary duties, exemplary damages, and accounting. By the time of trial, only SEC remained as a party defendant.

SEC moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10) asserting that plaintiffs' claims were barred by the May 1, 2007 agreement and the purchase and

sale agreement's merger clause. The trial court denied summary disposition, and the case proceeded to trial.[4]

D. Plaintiff's Fraud Evidence at Trial

The trial evidence supported that SEC never revealed to Grand Pointe's prospective purchasers that Atlanta Bread had been behind in its rent obligation, that Bennett's guaranty had been modified, or that Bennett had received a substantial loan to bring Atlanta Bread's rent obligation up to date. The certified rent roll provided on January 31, 2007 instead averred that the leases of the listed tenants had not been modified, and that no tenant was in material default.

Hindo testified that the Mass Development loan to Atlanta Bread should have been disclosed because "essentially this is part of the lease." Hindo also expressed that the modified guaranty qualified as a lease amendment. Had he received the modified guaranty, Hindo asserted, it would have served as an "immediate red flag." Charles W. Peterson, an expert witness called on plaintiffs' behalf, similarly opined that both the promissory note and the modified guaranty should have been disclosed.

After plaintiffs rested, defendant moved for a directed verdict and a dismissal of the complaint. The trial court denied defendant's motion for directed verdict on plaintiffs' claims for breach of contract and fraudulent inducement, which it interpreted as a claim for fraud based on false misrepresentation, because plaintiffs had presented "sufficient proofs." The trial court directed a verdict for SEC on plaintiffs' claims for conspiracy, exemplary damages, breach of fiduciary duty, negligent misrepresentation, and accounting. The jury returned a verdict in plaintiffs' favor on the claim for fraud based on false representation, and assessed damages in the amount of $630,000.

II. ANALYSIS

A. The Integration Clause

SEC initially contends that the purchase and sale agreement's integration clause barred plaintiffs' fraud action. "Absent any proof of fraud regarding the integration clause itself," SEC argues, "the court should have granted summary judgment [sic] and/or dismissed the allegation following Plaintiffs' proofs." We find no merit in this argument, which essentially (and incorrectly) portrays a merger clause as conferring immunity from suit for fraud.

Generally speaking, a merger clause prevents a court from considering evidence outside the four corners of a contract. Because SEC has not identified with any particularity the evidence it claims to have been incorrectly admitted, SEC's merger clause argument is difficult

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[4] As discussed in greater detail, *infra,* the trial court suggested that plaintiffs amend their complaint to "more specifically address" the May 1, 2007 agreement. Plaintiffs then filed an amended complaint. Before trial commenced, the court granted summary disposition to defendant on plaintiffs' claim for conversion.

to decipher. SEC insists that "[t]he only proof offered at trial regarding any statements or misrepresentations were statements by Mark Eddy," and that Eddy's subsequent dismissal as a party-defendant eliminated SEC's respondeat superior liability for Eddy's statements. But the transcript pages identified by SEC as containing these alleged misrepresentations relate to plaintiffs' admissions that *before* the closing, no SEC representative had made any verbal representations pertinent to the sale. SEC has not addressed the representations made *pursuant* to the purchase and sale agreement, which form the vast bulk of plaintiffs' fraud claim. Nor has SEC specified that any of evidence it now challenges related to statements or understandings not merged into the purchase and sale contract.

SEC first raised its merger-clause argument in a motion for summary disposition. This Court reviews de novo a trial court's summary disposition ruling, and considers all evidence submitted in support or opposition to the motion in the light most favorable to the nonmoving party. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). SEC renewed its merger clause claim in its motion for a directed verdict. We also review de novo a trial court's ruling on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A motion for directed verdict or JNOV should be granted only if the evidence viewed in th[e] light [most favorable to the nonmoving party] fails to establish a claim as a matter of law." *Id*.

The purpose of an integration or merger clause is to prevent either party to a contract from introducing parol evidence to prove an agreement other than the one the parties actually signed. See *Coal Resources, Inc v Gulf & Western Indus, Inc*, 756 F2d 443, 447 (CA 6, 1985) ("The purpose of an integration clause stating that there are no agreements or understandings between the parties other than those reflected in the written contract is, of course, to prevent either party from relying upon statements or representations made during negotiations that were not included in the final agreement."). "[T]he parties to a contract can agree to an integration clause that will effectively preclude courts from looking outside the contract to interpret the contract." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 507 n 14; 579 NW2d 411 (1998). An integration clause "nullifie[s] all *prior and contemporaneous* agreements, understandings, representations, and warranties[.]" *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006) (emphasis added). As this Court explained in *KSL*, "The raison d'etre of an integration clause is to prohibit consideration of parol evidence by nullifying agreements not included in the written agreement." *Id.*

We agree with SEC that as a general principle, the purchase and sale agreement's merger clause barred the introduction of parol evidence concerning pre-contractual understandings or intentions. Had plaintiffs structured their fraud case around pre-contractual statements or representations, SEC might well have a valid merger-clause claim. But SEC has failed to bring to our attention any objectionable pre-contractual statements. Furthermore, the record simply fails to substantiate that plaintiffs sought to vary or escape from the terms of the purchase and sale contract. None of the evidence found at the meager transcript references supplied by SEC as objectionable contradicted the contract. Rather, plaintiffs asserted throughout the case that SEC's material misrepresentations *made pursuant to the contract* both breached the agreement and constituted fraud.

Plaintiffs premised their fraud claims on representations made pursuant to the contractual requirements that SEC produce a truthful rent roll and that the tenants certify the accuracy of their tenant estoppel certificates. Plaintiffs contended the information supplied by SEC was either false or deliberately misleading. The purchase and sale agreement specifically integrated the tenant estoppel letters and the rent roll: "This written Agreement, *including all exhibits attached hereto and documents to be delivered pursuant hereto*, shall constitute the entire agreement and understanding of the parties[.]" (Emphasis added). Thus, the merger clause simply did not apply to these post-contractual statements, which by the contract's own terms were not extrinsic but merged into the contract itself. Thus, we find utterly meritless SEC's merger clause claims.[5]

B. The May 2007 Agreement

SEC next advances two related arguments concerning the May 1, 2007 contract titled, "Agreement for Goldsmith Jeweler and SKM Bread [sic], LLC d/b/a Atlanta Bread Leases." SEC first contends that the agreement contained a release voidable only by fraud in the execution, and that no evidence supports a finding of such fraud. Second, SEC insists that plaintiffs were required to tender back the consideration provided for in the release before challenging it on the grounds of fraud.

SEC first raised these arguments in a motion for summary disposition brought pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). SEC's motion included an affidavit signed by Oosterbaan, averring in relevant part: "SEC Grand Pointe, LLC paid Plaintiffs, Jason Kishmish and Talal Yatooma ("Plaintiffs") $75,000 at the closing of real property commonly known as 4747 – 4763 Wilson Avenue SW, Grandville, Michigan as consideration for the release executed by the Plaintiffs." Kishmish's affidavit countered that no money had been received: "Neither Grand Pointe Property, LLC, Tom Yatooma, nor any of the Members received any cash, check or property when the May 1, 2007 (Exhibit 7) was executed. Rather, we received merely what SEC had already promised to perform and conform to agreements it had previously executed." Regarding this obvious factual dispute, the trial court ruled as follows:

> This Court finds that beneath the surface of this case lie some very troubling allegations of intentional non-disclosures of material facts, in order to induce the Plaintiffs into purchasing the Property. The Plaintiffs' response and

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[5] As the misrepresentations cited by plaintiffs arose from the rent rolls, tenant estoppel letters and statements of SEC's attorney rather than Mark Eddy, the admission of alleged misrepresentations by that dismissed party unlikely affected the outcome of the trial. Accordingly, we need not consider SEC's claim that the trial court erroneously admitted that evidence.

We also reject SEC's contention that the trial court was required to dismiss the entire action after Eddy was released from liability. SEC asserts that "[t]he only proof offered at trial regarding any statements or misrepresentations were statements by Mark Eddy" and the claims against SEC were based solely on vicarious liability. This is simply untrue as noted above.

> the included documentary evidence sufficiently support these allegations, such that this Court must deny [defendant's] motion as to MCR 2.116(C)(7) and (10).
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> * * *
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> As for [defendant's] "tender back" argument, the Plaintiffs respond that the rule does not apply because no consideration has been exchanged. The Release states that the $75,000 is to be held "in a reserve fund with the lender." Therefore, the Plaintiffs claim they did not receive any money that they now need to return to [defendant] before filing their suit. This raises a genuine issue of material fact.
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> However, this Court should note some applicable authority for when this issue is resolved. A release may be challenged on the basis of fraud in the inducement, such as the claims the Plaintiffs have made, but only after "tender back" of the consideration. Fraud in the execution, where the nature of the release is misrepresented, is the type of fraud that is an exception to the "tender back" rule. As [defendant] correctly points out, the Plaintiffs have not claimed this type of fraud in their complaint. In other words, the Plaintiffs do not allege that they did not know that the instrument they were entering into was a release.

SEC never filed in the trial court any evidence supporting Oosterbaan's averment. Nor does the trial record include any evidence that SEC actually paid $75,000 to plaintiffs. Nevertheless, SEC reiterated its arguments concerning the May 2007 contract in its motion for directed verdict. In a bench ruling concerning the tender-back argument and others, the trial court did not address the May 2007 contract. It instructed the jury regarding the "release" as follows:

> Next is with regards to the release. If the Plaintiffs knowingly and understoodly [sic], executed a release, the Plaintiffs cannot recover in this action. If so, your verdict should be for the Defendant. However, if you believe the release or the contract was obtained by fraud, then the release does not apply.

SEC has not challenged this instruction on appeal.

We review de novo SEC's directed verdict argument concerning the May 2007 agreement, *Sniecinski*, 469 Mich at 131, and also apply de novo review to the denial of SEC's summary disposition motion premised on the same ground. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). We begin with SEC's contention that the tender-back doctrine bars plaintiffs' lawsuit.

A party seeking to repudiate a compromise settlement or a release must place the other party *in statu quo* by tendering the return of what he received. *Stefanac v Cranbrook Ed Comm (After Remand)*, 435 Mich 155, 164-165; 458 NW2d 56 (1990). Although a plaintiff may challenge a release on the basis of fraud, a plaintiff must first tender back the consideration received in exchange for the release. *Collucci v Eklund*, 240 Mich App 654, 659; 613 NW2d 402 (2000).

The tender-back rule is inapplicable in this case. Plaintiffs did not receive the $75,000 from SEC. Rather, the $75,000 was deducted from the $5 million loan advanced to plaintiffs by their lender, Column Financial, and was placed in an escrow account held by Column as a credit. The credit was to be applied according to certain contingencies set forth in the mortgage. Because the parties have not supplied this Court with a complete copy of the mortgage or an accounting of the credit, we lack information concerning the fate of the credit. But in any case, the record simply does not support that SEC advanced $75,000 in exchange for the purported release.

Nor does the record substantiate that SEC agreed to accept $75,000 less for its shopping center than the originally-agreed sale price. The May 2007 contract specifically disclaims any reduction in the sale price: "Purchaser has requested a price reduction from that set forth in the Purchase Agreement, which Seller refused to grant[.]" Rather, the $75,000 escrow agreement amended the purchase and sale contract by affording a partial guaranty of potential further rent indebtedness incurred by Atlanta Bread and Goldsmith.

The evidence surrounding this non-integrated agreement sheds further light on its purposes. On the same day the parties signed the May 2007 agreement, an attorney for Column Financial sent the following email to Frasier, SEC's counsel:

> We received a draft of the new agreement terms relating to the Atlanta Bread Co. lease. Unfortunately, the proposed agreement poses a number of problems for Borrower's loan from Column and John Hindo requested that we directly address these concerns with you. First, Borrower cannot assign its collection rights against SKM Bread [sic] to Seller because *Borrower is assigning all rents to Column under the loan documents*. Second, any funds escrowed to cover a tenant default under the Atlanta Bread lease must be held and distributed by Column.
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> If the parties intend to pursue an agreement along the terms proposed in your draft, we suggest the following:
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> (1) Column Financial shall place the funds in a reserve at closing and maintain such reserve;
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> (2) Funds from such reserve will be disbursed to Borrower to cover any shortfalls in rent from SKM Bread [sic] until either a replacement tenant is in place and paying rent or the entirety of the reserve is depleted;
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> (3) If an acceptable replacement tenant is in place and paying rent, then Column will release the entirety of the fund to Borrower. Your purchase contract can control how Borrower distributes this disbursement once received. [Emphasis added].

The trial court record contains the following pertinent excerpt from plaintiffs' mortgage addressing the $75,000 credit:

> Contemporaneously with execution of this Mortgage, Borrower has established with the Lender a reserve (the "Atlanta Bread Company Reserve") in an amount equal to **$75,000**, by depositing such amount with Lender. The Atlanta Bread Company Reserve shall be held by Lender as additional security for the Loan. Funds held in the Atlanta Bread Company Reserve shall be released to Borrower in accordance with subparagraph (a) or (d) herein. . . . Interest or other earnings on the funds contained in the Atlanta Bread Company Reserve shall be credited to Borrower as provided in Section 4.28 hereof.
>
> (a) Disbursements from the Atlanta Bread Company Reserve. So long as no default hereunder or under the other Loan Documents has occurred and is continuing, Lender shall, within ten (10) days after receipt of a written request from Borrower (the "Disbursement Request"), release to Borrower the appropriate portion of the balance of the Atlanta Bread Company Reserve as described below . . . .

These facts conclusively demonstrate that the $75,000 flowed from plaintiffs' lender, not from SEC. Plaintiffs obtained nothing from SEC other than the property that they had already agreed to buy. In one sense, the $75,000 was akin to a liquidated damage provision. If Atlanta Bread honored its lease provisions and no dispute arose, the parties apparently agreed that plaintiffs' lender would release the escrowed $75,000 to SEC. If Atlanta Bread defaulted, the lender would keep the $75,000 as an offset to plaintiffs' indebtedness. Accordingly, there was nothing for plaintiffs to tender back. Because SEC had not advanced anything to plaintiffs, it remained in *statu quo.*

Moreover, nothing in the language of the May 2007 agreement released SEC from liability for plaintiff's subsequent tort claim for fraud. The parties drafted the agreement after plaintiffs lost confidence in the financial viability of Atlanta Bread and Goldsmith Jewelers and threatened to back out of the deal unless SEC reduced the transaction price. SEC refused to reduce the price. As a compromise intended to salvage the entire shopping center deal, SEC agreed to: (1) guaranty the Goldsmith lease through July 31, 2009, and (2) permit plaintiffs' lender to hold back $75,000 pending Atlanta Bread's performance under its lease. In consideration for the lender holding $75,000 in escrow, SEC declined to "be responsible for any post-closing breach of any lease." Plaintiffs agreed to waive any claims "with respect to either the Goldsmith Jewelers lease and/or the SKM Bread [sic], d/b/a Atlanta Bread lease/guarantee."

The plain language of this provision contemplates that plaintiffs would refrain from charging SEC with Atlanta Bread's unpaid lease payments. If Atlanta Bread failed to honor its lease obligation or neglected to make good on its guaranty, the parties agreed that plaintiffs would allow the lender to apply to the loan the money held in escrow. But by consenting to escrow $75,000 of the $6.25 million purchase price SEC did not agree to assume liability for fraud arising from representations made pursuant to the purchase and sale contract. Similarly, nothing in the contract supports that plaintiffs waived their right to sue SEC for fraud. Nor did the May 2007 agreement serve to absolve SEC from liability for supplying misleading or patently inaccurate information. Although SEC's manipulations relative to the Atlanta Bread lease formed part of the fraud, the agreement covered unpaid rent obligations. Consequently, the

trial court correctly denied SEC summary disposition and a directed verdict based on the tender-back doctrine.

SEC's contention that plaintiffs could avoid the May 2007 contract only upon proof of fraud in the execution is similarly meritless. Plaintiffs contended and the jury implicitly found that SEC fraudulently induced plaintiffs to complete the purchase and sale agreement. "Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995). Accordingly, plaintiffs were entitled to rescind the May 2007 agreement based on fraud, and the trial court correctly denied summary disposition and a directed verdict on this ground.[6]

C. "Silent Fraud"

SEC next asserts that the trial court erred by denying its motion to exclude evidence of silent fraud. According to SEC, plaintiffs presented to the jury "a plethora of evidence based on [s]ilent [f]raud," but failed to include a silent fraud claim in their complaint. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In its brief on appeal, SEC cites seven pages of the trial transcript as representative of the "plethora" of silent fraud evidence introduced. The cited testimony consists primarily of Kishmish's assertions that SEC failed to disclose the promissory note or the amended personal guaranty. This evidence supported that SEC's representations made pursuant to the purchase and sale agreement were deliberately false or misleading. Moreover, plaintiffs' complaint asserts claims for both fraudulent misrepresentation and silent fraud.

Michigan's contract law recognizes three interrelated fraud doctrines: (1) fraudulent misrepresentation (also known as actionable fraud or traditional common-law fraud); (2) innocent misrepresentation; and (3) silent fraud (also known as fraudulent concealment), and each theory contains separate elements. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012).

Regarding actionable fraud,

> "[t]he general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it

[6] We note that because the record contains no information concerning the fate of the $75,000 it is unclear whether the money was actually applied by the lender as an offset to any indebtedness due to Atlanta Bread's breach of its lease. Thus, it remains uncertain whether plaintiffs actually rescinded the May 2007 agreement.

> should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury . . . ." [*Id.*, quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919), overruled in part on other grounds *United States Fidelity & Guaranty Co v Black*, 412 Mich 99; 13 NW2d 77 (1981).]

Silent fraud is committed "when there is a legal or equitable duty of disclosure" and the truth is suppressed with the intent to defraud. *Titan Ins*, 491 Mich at 557.

Plaintiffs' amended complaint, which spans some 62 pages, recites in paragraph 32 that SEC made the following representations:

> D. Neither SMK BREADS nor its guarantors, ROBERT BENNETT or MARY B. BENNETT, would request or had requested a significant modification, novation, or cancellation from the terms and conditions of the Shopping Center Property Lease;
>
> E. SMK BREADS was solvent and timely paying in full its monthly rent of $10,417.67;
>
> F. SMK BREADS would occupy its 5,000 sq. ft area and continue to do business at the same location until the expiration of tis lease on March 31, 2014;
>
> G. Defendant SEC had not discounted, renegotiated or otherwise modified any tenant's lease, including SMK BREADS;
>
> H. No different payment terms, conditions or provisions, whether written or oral, had been agreed upon with any tenant, including specifically the April 1, 2004 lease of SMK BREADS, that would vary, modify, revoke or cancel any provision to any tenant's lease or to any estoppel certificate; and
>
> I. There existed no unpublished, nondisclosed or "side," or "backroom," or "secret" agreements between the Defendant SEC with any of the tenants to provide for less than the monthly lease payments required in each tenant's lease.

The amended complaint sets forth in Count II claims for "fraudulent inducement and fraudulent misrepresentations." This section of the amended complaint reiterates SEC's representations concerning Atlanta Bread's financial stability, and avers that the statements were "false when they were made" and were intended to induce plaintiffs' reliance. Count III is labeled "Negligent Misrepresentations." In this section of the amended complaint, plaintiffs assert that SEC bore an obligation to make "full financial disclosure of all significant facts, forecasts and communications" affecting Atlanta Bread's ability to comply with its lease, and that SEC should have revealed Bennett's intention to terminate the lease and the "adverse financial data" in its possession.

Fairly read, the amended complaint includes allegations that SEC suppressed the truth despite legal and equitable duties of disclosure. These allegations are consistent with a claim for silent fraud. Because the amended complaint adequately pleaded silent fraud, the trial court did not err by denying SEC's motion to exclude silent fraud evidence.

D. Expert Testimony Regarding Fraud

Next, SEC contends that the trial court erred by allowing Peterson to testify as an expert witness. According to SEC, Peterson's testimony was "merely . . . subjective," unsupported by scientific literature, and "not peculiar to an expert." SEC further contends that Peterson should not have been permitted to testify concerning the ultimate issue of fraud. "We review a trial court's admission of evidence for an abuse of discretion. However, we review de novo preliminary questions of law pertinent to the admission of evidence." *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009) (citations omitted).

Peterson is an attorney and has worked in the field of "corporate finance and investment banking" for more than three decades. He testified that as general counsel for Great Lakes Business Credit he regularly rendered opinions concerning due diligence and documentation, and had been intimately involved in countless commercial transactions. Peterson reviewed the evidence surrounding the sale of Grand Pointe and rendered opinions including that (1) plaintiffs performed due diligence in purchasing the shopping center; (2) the purchase and sale agreement contained provisions common to many such agreements; (3) the loan from Mass Development to Bennett should have been disclosed; (4) Atlanta Bread's tenant estoppel certificate was inaccurate; (4) SEC failed to notify plaintiffs that Atlanta Bread planned to terminate its lease; and (5) SEC's failure to disclose material information in its possession concerning Atlanta Bread constituted "if not fraud, a material misrepresentation."

MRE 702 governs the admission of expert witness testimony. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). It provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"The admission of expert testimony requires that (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). The critical inquiry is whether the expert witness testimony will aid the jury "in making the ultimate decision in the case". *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990) (citation omitted).

We first reject SEC's claim that Peterson was precluded from testifying to an ultimate fact. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704. Accordingly, unless Peterson's expert witness testimony was otherwise inadmissible, there was no plain error in Peterson testifying to an ultimate issue to be decided by the jury.

Nor are we persuaded by SEC's contention that Peterson's knowledge was merely that of a layperson, or that the absence of scientific support should have precluded his testimony. Peterson's extensive experience in commercial lending and in putting together complex commercial transactions amply qualified him as an expert in that realm. Furthermore, Peterson's testimony likely assisted the jury in understanding the evidence. This case involved a complex commercial transaction, and Peterson's explanations of basic principles and concepts served to clarify and simplify the facts. But even if Peterson's testimony was incorrectly admitted, we find no reversible error. "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment . . . unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). Peterson's evidence was largely cumulative and summary. Its admission was highly unlikely to have affected the outcome of the trial.

E. The Great Weight of the Evidence

Lastly, SEC argues that the verdict contravened the great weight of the evidence. Because SEC failed to move for a new trial on this basis in the circuit court, this issue is unpreserved. Our failure to evaluate this issue will not result in a miscarriage of justice, and we decline to consider it further. *Sherman-Nadiv v Farm Bureau Gen Ins Co of Mich*, 282 Mich App 75, 80; 761 NW2d 872 (2008).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Christopher M. Murray