

STATE OF MICHIGAN
COURT OF APPEALS

BASIM NAIMOU,

Plaintiff-Appellant,

v

PHILIP F. GRECO TITLE COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 21, 2006

No. 264503
Macomb Circuit Court
LC No. 03-004629-CK

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals a trial court order that denied his motion for summary disposition and dismissed defendant from this action. We affirm.

Plaintiff contends that the trial court erred because defendant, escrow agent Philip F. Greco Title Company (PGTC), breached its duty to plaintiff when it unilaterally released plaintiff's \$30,000 earnest money deposit to defendant, William R. Allred.

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).¹ We also review de novo issues of contract interpretation, including whether contract language is ambiguous. *Klapp v United Insurance Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Further, the legal question whether to recognize a cause of action for breach of fiduciary duty in a particular context is subject to de novo review on appeal. *The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer*

¹ Our review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

Institute, 266 Mich App 39, 43; 698 NW2d 900 (2005). Moreover, as this Court explained in *Meagher v Wayne State University*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997):

Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. Parol evidence is not admissible to vary a contract that is clear and unambiguous, but may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract. [Citations omitted.]

An escrow agent may be held liable in tort for the negligent performance of its duties or breach of its fiduciary duties. *Smith v First Nat'l Bank & Trust Co*, 177 Mich App 264, 270-271; 440 NW2d 915 (1989). The duties and liabilities imposed on an escrow agent are those set forth in the escrow agreement, and our courts will look to the precise language of the escrow agreement to effectuate the intent of the parties. *Hills of Lone Pine Association v Texel Land Co, Inc*, 226 Mich App 120; 572 NW2d 256 (1997). An escrow agent is bound by the terms and conditions of the escrow agreement and charged with a strict execution of the duties voluntarily assumed. *Smith, supra* at 271.

Here, the parties did not execute a separate escrow agreement and, therefore, PGTC was required to follow the terms of the purchase agreement and its addenda. Addendum B states that PGTC shall hold the \$30,000 deposit in escrow and release it to Allred upon PGTC's receipt of a warranty deed "conveying marketable title to Unit 57." PGTC received a warranty deed to Unit 57 and a PGTC agent confirmed that the deed conveyed marketable title. Accordingly, PGTC released the \$30,000 deposit to Allred on December 20, 2002.

With regard to the warranty deed, Addendum B provides that PGTC agreed to hold the deed "in escrow subject to the balance of the terms and conditions of the Purchase Agreement." In relevant part, "the balance of the terms and conditions of the Purchase Agreement" state that the closing would take place no later than January 15, 2003, the purchase agreement itself was contingent upon plaintiff securing a commitment for a conventional mortgage, and plaintiff was to timely apply for a commitment for a mortgage and "promptly comply with lender's request for necessary information required to process the loan application."² The purchase agreement also provides that, if plaintiff could not obtain a mortgage, Allred could declare the agreement null and void and return any deposit to plaintiff. Further, the agreement states that if plaintiff defaulted on the agreement, *Allred could enforce or terminate the agreement and keep plaintiff's deposit.*

² The addendum further states that Allred and plaintiff both agreed that time was of the essence and each party would diligently pursue their duties under the requirements of the purchase agreement.

The record reflects that plaintiff requested extensions of the closing deadline and Allred agreed. However, plaintiff never responded and never closed on the sale. Plaintiff maintains that he believed the agreement was null and void because he was unable to obtain a conventional mortgage, on which the purchase agreement was contingent. Evidence established that plaintiff applied for a conventional mortgage, but he claims that the lender denied his request. However, plaintiff admitted that he failed to provide the lender with his tax returns as requested.

On February 28, 2003, Dan McCarthy contacted plaintiff and told him that Allred was terminating the purchase agreement and would retain the \$30,000 deposit as liquidated damages pursuant to the terms of the purchase agreement because plaintiff was in default. PGTC learned that Allred declared plaintiff to be in default and, pursuant to the terms of the purchase agreement, PGTC returned the warranty deed to Allred. Much later, on May 14, 2003, plaintiff asked PGTC not to release the \$30,000 earnest money deposit to Allred which, as discussed, PGTC had already properly released to Allred on December 20, 2002, pursuant to the express terms of the purchase agreement.

We conclude that the trial court correctly granted summary disposition to PGTC because plaintiff defaulted on the purchase agreement. Specifically, plaintiff failed to supply his potential lender with his tax returns and, under the purchase agreement, he was required to comply with a potential lender's request "for necessary information required to process the loan application." As discussed, plaintiff's default gave Allred the option to declare a forfeiture and keep the \$30,000 deposit. McCarthy informed plaintiff and PGTC that Allred opted to declare plaintiff in default and PGTC, having no notice from plaintiff that he disputed Allred's declaration, properly released the warranty deed back to Allred pursuant to the express terms of the purchase agreement. Therefore, we conclude that PGTC also properly performed its duties as escrow agent. *Meagher, supra* at 721-722; *Hills of Lone Pine, supra* at 120. Therefore, the trial court did not err when it found that PGTC discharged its escrow duties in conformance with the controlling documents and, thus, denied plaintiff's motion for summary disposition. *Smith, supra*, pp 270-271.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Henry William Saad