

STATE OF MICHIGAN
COURT OF APPEALS

GARY E. HOSEY and DEBRA A. HOSEY,

Plaintiffs/Counter-Defendants-
Appellants,

v

JE HEMPHILL, INC., JERRY E. HEMPHILL,
and PREFERRED APPRAISALS, INC.,

Defendants/Cross Defendants,

and

PHILIP R. SEAVER TITLE COMPANY, INC.,

Defendant/Cross-Defendant/Cross-
Plaintiff-Appellee,

and

OL BOLYARD LUMBER COMPANY,

Plaintiff/Counter-Defendant-
Appellee,

and

FIFTH THIRD MORTGAGE MI, LLC,

Defendant/Counter-Plaintiff/Cross-
Plaintiff.

UNPUBLISHED
February 14, 2013

No. 306177
Macomb Circuit Court
LC No. 2009-001193-CK

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Plaintiffs appeal by right a Macomb County Circuit Court order granting defendant's motion for summary disposition under MCR 2.116(C)(10) in this civil dispute involving the performance of an agency agreement. We affirm.

Plaintiffs bought vacant land and entered into two separate agreements: one with J.E. Hemphill, Inc. (Hemphill), for the construction of their personal residence and one with Fifth Third Mortgage MI, LLC (Fifth Third), to finance the construction. Fifth Third then obtained a title insurance policy from Philip R. Seaver Title Company, Inc. (defendant), who agreed to obtain the necessary sworn statements and lien waivers before making the construction-loan disbursements for Fifth Third. Plaintiffs then signed a document which indemnified defendant against all loss resulting from construction liens. Other than the release, plaintiffs did not enter into any other agreements with defendant.

Ultimately, Hemphill failed to pay its subcontractors and suppliers even after it received funds from plaintiffs' loan. As a result, those parties filed construction liens against plaintiffs' property. Plaintiffs consequently terminated their agreements with Hemphill and filed suit against Hemphill, Fifth Third, defendant, and others. Defendant subsequently filed a motion for summary disposition under MCR 2.116(C)(10), which was granted by the Macomb County Circuit Court. This appeal followed.

The issue on appeal is whether plaintiffs are entitled to recover as beneficiaries to the agreement between Fifth Third and defendant where defendant failed to obtain the necessary sworn statements and lien waivers before disbursing loan funds to Hemphill. Plaintiffs first argue that they are entitled to recover as third-party beneficiaries to the contract. Plaintiffs further argue that, in the absence of a contract, defendant breached its common-law duty to protect them against construction liens on their property.

This Court reviews de novo decisions regarding summary disposition. *Kaupp v Mourer-Foster, Inc.*, 485 Mich 1033, 1035; 776 NW2d 893 (2010). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party has the initial burden to specify which factual issues are undisputed and to support these specifications by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The non-moving party then has the burden of showing, by offering evidentiary proof, that a genuine issue of material fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. The moving party is entitled to judgment as a matter of law under MCR 2.116(C)(10) if the non-moving party fails to establish that a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when, viewed in the light most favorable to the non-moving party, reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Plaintiffs first argue that they are entitled to recover, as third-party beneficiaries, as a result of defendant's breach of its promise to Fifth Third to obtain the necessary sworn statements and lien waivers. We disagree. Defendant's agreement with Fifth Third was one of agency and principal, making the third-party beneficiary argument largely irrelevant.

In *Uniprop, Inc v Morganroth*, 260 Mich App 442; 678 NW2d 638 (2004), this Court adopted the reasoning of a Sixth Circuit Court of Appeals case applying Michigan law to facts nearly identical to the facts we have here. See *Koppers Co, Inc v Garling & Langlois*, 594 F2d 1094 (CA 6, 1979). The *Uniprop* Court found that the nature of the relationship between the lender and the title company “under the disbursing agreement was one of principal and agent.” *Uniprop*, 260 Mich App at 447. In that case, the Court held that “agency agreements do not create rights in third parties.” *Id.* at 443. Consequently, the third-party beneficiary analysis is inapplicable to the facts of this case. Defendant’s agency agreement with Fifth Third created no rights in plaintiffs to enforce.

In light of our finding that the subject of this case is an agency agreement, it is unnecessary to further address plaintiffs’ arguments regarding third-party beneficiary rights to a contract.

Plaintiffs next argue that, even in the absence of a contract, defendant owed them a common-law duty to protect them against the attachment of construction liens. In making this argument, plaintiffs rely on *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 159; 809 NW2d 553 (2011), which held that “a contracting party’s assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to non-contracting third parties in the performance of a contract.” Plaintiffs’ reliance on *Loweke*, however, is misplaced.

Defendant owed no independent tort duty to plaintiffs outside of its obligations to secure sworn statements and lien waivers pursuant to its agency agreement with Fifth Third. So the rule in *Loweke* does not apply to the facts of this case. Moreover, even if there had been a duty, plaintiffs waived any right to make a claim against defendant when they signed the release of liability. Because plaintiffs offer no evidence in the record to indicate that they did not fairly and knowingly sign the release, it is enforceable. *Hoffner v Lanctoe*, 290 Mich App 449, 456; 802 NW2d 648 (2010).

We conclude that defendant’s agency agreement with Fifth Third created no rights in plaintiffs to enforce the agreement or claim damages against defendant. Further, defendant owed no duty, common-law or otherwise, to plaintiffs to protect them from the attachment of construction liens on their property. The trial court’s decision to grant summary disposition in favor of defendant was proper.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood