STATE OF MICHIGAN

COURT OF APPEALS

SCOTT KROEGER and CANDY KROEGER,

Plaintiffs-Appellants,

v

AEC ENTERPRISES CONSTRUCTION, INC., AUBREY E. CROSBY, and LANDAMERICA TITLE,

Defendants,

and

REPUBLIC BANK,

Defendant-Appellee.

UNPUBLISHED
December 22, 2009

No. 286333
Monroe Circuit Court
LC No. 06-022559-CK

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the circuit court's orders granting summary disposition for Republic Bank under MCR 2.116(C)(10), and awarding frivolous claim sanctions to Republic Bank under MCR 2.114(F). Because the trial court did not err by granting summary disposition for Republic Bank on plaintiffs' breach of contract, breach of fiduciary duty, and negligence claims, and because the trial court did not clearly err by awarding Republic Bank sanctions, we affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although Republic Bank moved for summary disposition under both MCR 2.116(C)(8) and (10), it is apparent that the trial court granted the motion under subrule (C)(10) because it relied on documentary evidence, in particular the construction loan agreement ("CLA"). A motion for summary disposition under subrule (C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31. This Court also reviews de novo issues

involving contract interpretation as questions of law. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

Plaintiffs argue that Republic Bank breached the CLA by disbursing loan funds in March and April 2006, when sworn statements submitted for those advances contradicted the bank inspector's reports regarding the work completed and when lien waivers did not accompany the requests for those advances. This issue requires this Court to interpret the CLA.

This Court interprets contractual language according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). The judiciary lacks authority to "modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).

The CLA provides, in relevant part:

> 2.3 **Conditions to Loan Advances.** For all Loan advances, the Lender's obligation is subject to the following conditions:
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> 2.3.1 **Disbursements.** All disbursements shall be made by delivering the amount of the advance to the title insurance company and/or lender which shall disburse to the Builder or the subcontractors as necessary to assure continued lien-free title to the Building Site.
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> 2.3.2 **Supporting Documents.** The Lender shall have received Borrower's disbursement authorization form signed by any one of the Borrower(s), and such other supporting documentation as the Lender may require, including, without limit, contractors' sworn statements, waivers of lien, and/or affidavits and acceptable assurances of payment by the general contractor, subcontractors, suppliers and/or laborers, which shall cover all work, labor and materials performed or furnished for the Home, and W-9 forms for any third-party payees of any part of the advance.
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> 2.3.3 **Foundation Survey.** A survey certified to the Lender showing the boundaries of the Building Site and the location of the foundations and footings of the Home, when installed.
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> 2.3.4 **Title Policy Endorsement.** The Lender shall have received an endorsement to the title insurance policy, indicating no adverse change in the state of title, and increasing the coverage of the title policy to an amount equal to the then outstanding balance of the Loan, including the pending advance.
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> 2.3.5 **Inspection; Property Condition.** The Lender shall have received a satisfactory report from the Lender's inspector that all completed work and improvements to the Home have been properly constructed, no portion of the Home shall have been damaged by fire or other casualty, and construction shall be

progressing without interruption. **EACH INSPECTION IS SOLELY FOR THE BENEFIT OF THE LENDER**.

2.3.6 **Fees.** Payment of any fees or expenses then due and owing to the Lender, including inspection fees.

2.3.7 **No Default.** No Event of Default shall exist under this Agreement or any other document evidencing or securing the Loan or any advance thereof, and no condition shall exist which by notice, passage of time or otherwise would constitute such an Event of Default. Each request for an advance shall constitute Borrower's certification that no Event of Default exists or shall exist.

Plaintiffs argue that these provisions do not act as a "lender's shield," but rather operate as covenants for both parties. Relying on these provisions, plaintiffs argue that loan funds should not have been disbursed until work was completed and materials were installed. However, plaintiffs misconstrue the conditions contained in these provisions as creating a promise and a duty on behalf of the bank.

"A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999) (citation and quotation marks omitted). Unlike a promise, a condition precedent "creates no right or duty in itself, but is merely a limiting or modifying factor." *Id.*; see also *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953). "If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Knox, supra* at 118. Courts are reluctant to interpret contractual provisions as conditions precedent unless the language of the contract compels such a result. *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 584; 739 NW2d 696 (2007).

Here, the clear and unambiguous language of § 2.3 and the provisions that follow compels the conclusion that these provisions are conditions precedent to Republic Bank's obligation to make loan advances. Section § 2.3 clearly states that the bank's obligation "is subject to the following conditions" contained in the paragraphs that follow. Thus, the fulfillment of the conditions gave rise to the bank's obligation to perform under the CLA. If all conditions were satisfied and the bank refused to perform, Kroeger would have a cause of action against the bank. See *Scherer v Hellstrom*, 270 Mich App 458, 464; 716 NW2d 307 (2006). The plain and unambiguous language of the provisions make clear that §§ 2.3 through 2.3.7 are conditions precedent rather than promises, and created no right or duty on behalf of the bank in and of themselves. Thus, plaintiffs' reliance on the provisions in support of their breach of contract claim is misplaced.

Plaintiffs' reliance on *Rucker v Wyandotte Savings Bank*, 6 Mich App 195; 148 NW2d 532 (1967), is also misplaced. Plaintiffs cite *Rucker* for the proposition that a bank assumes a duty to disburse construction advances only after work is completed and documented by sworn statements and lien waivers. *Rucker*, however, involved an oral agreement and the issue whether the bank assumed a duty to supervise construction and ensure that all work was completed before advances were made was a question of fact for the jury. *Id.* at 199-200. This Court held that the evidence was sufficient for the jury to conclude that the bank breached the construction fee agreement with Rucker. *Id.* at 200-201. Contrary to plaintiffs' argument, *Rucker* does not stand

for the blanket proposition that a lender must disburse loan funds only after work is completed and will be liable for funds disbursed for work not documented in sworn statements and lien waivers.

Plaintiffs also argue that Republic Bank was subject to an implied covenant of good faith and fair dealing in performing the CLA and that it breached this covenant. "[T]he covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992) (quotation marks and citation omitted). Plaintiffs' attempt to base their breach of contract claim on the bank's alleged breach of this covenant necessarily fails because "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). Because the trial court properly dismissed plaintiffs' breach of contract claim based on the plain language of the CLA, we need not address plaintiffs' argument that the trial court erroneously determined that MCL 487.14203 also barred their claim.

Plaintiffs next argue that the trial court erred in dismissing their breach of fiduciary duty claim because Republic Bank's written and oral assurances created a relationship whereby plaintiffs placed their trust and confidence in the bank. "A fiduciary relationship arises from the reposing of faith, confidence, and trust, and the reliance of one upon the judgment and advice of another." *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). A fiduciary is obligated to act for the benefit of the other person regarding matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). Generally, a fiduciary relationship does not exist in a lender-borrower context. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998).

Plaintiffs liken this case to *Smith v Saginaw S & L Ass'n*, 94 Mich App 263, 266; 288 NW2d 613 (1979), which also involved a construction loan agreement. In that case, the plaintiffs dealt only with Eugene Sauer, the defendant lender's branch manager. *Id.* This Court determined that a fiduciary relationship existed between the plaintiffs and the lender, through Sauer. *Id.* at 275. This Court reasoned:

> Plaintiffs Smith placed their trust in Eugene Sauer. Joseph Smith, at the time, was in and out of the hospital and quite sick. He and his wife were 250 miles away when construction was in progress and, necessarily, were unable to oversee day-to-day activities. Sauer additionally gave repeated assurances to the Smiths that funds were on hand to complete construction and the project would be finished without cost overruns. Aside from their striking an agreement with Russell Docter [the builder], Sauer was their sole contact in the area and the only emissary of Saginaw with whom they dealt. Sauer further assured them that no funds would be released without the work therefor actually being done. Sauer approved of the builder, the building agreement and the building specifications. Sauer knew of Docter Building's financial straits and protected his own interests without in any way doing the same for the Smiths. He also permitted Docter Building Co. to fall behind in construction and allowed the release of funds for

> work not fully completed. These facts plainly established the existence of a fiduciary obligation and the breach thereof. [*Id.*]

The instant case is distinguishable from *Smith* in that there is no indication that plaintiffs were unable to inspect the progress of the construction and oversee the project on a day-to-day basis. In addition, § 7.1 of the CLA specifically states that the bank is not liable "for any assurance of any performance by the Builder or any other person or that the Loan Amount is or will be sufficient to pay all costs of construction." The CLA further provides:

> 7.10 **Lender's Responsibilities.** ANY ACTION TAKEN BY THE LENDER UNDER THIS AGREEMENT, INCLUDING THE INSPECTION OF THE BUILDING SITE AND ANY CONSTRUCTION, SHALL BE SOLELY FOR THE BENEFIT OF THE LENDER. Borrower agrees that it is not relying on the Lender with respect to any matter related to the selection of the Building Site, the Builder, or the Plans, or the process of constructing the Home, the inspections thereof, or its compliance with the Plans or any law, ordinance or regulation, or the quality of workmanship by Builder or any other person.

Thus, the CLA explicitly advised against relying on the bank regarding its actions with respect to the agreement and the construction project. Moreover, contrary to plaintiffs' argument and as previously discussed, the CLA contained no provision stating that the bank would not disburse funds for work not completed. Further, although plaintiffs assert that they are not familiar with the construction loan process or educated regarding banking or contractual terms, "[p]laintiffs' allegations of their inexperience and reliance on [the bank] are insufficient to claim a fiduciary relationship." *Ulrich, supra* at 196. Accordingly, the trial court did not err by determining that Republic Bank did not owe plaintiffs a fiduciary duty and granting summary disposition for the bank on plaintiffs' breach of fiduciary duty claim.

Although plaintiffs do not challenge the dismissal of their negligence claim against Republic Bank, we note that dismissal of that claim was proper. Pursuant to *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997), plaintiffs were required to show a duty "separate and distinct" from that imposed by contract to give rise to tort liability. Here, the only relationship between Kroeger and the bank existed by virtue of the CLA and any duty on behalf of the bank arose pursuant to the CLA. Plaintiffs have identified no duty that existed independent of the agreement. Thus, the trial court's dismissal of their negligence claim was proper.

Plaintiffs next argue that the trial court clearly erred by awarding Republic Bank sanctions for having to defend against frivolous claims. This Court reviews for clear error a trial court's determination whether an action is frivolous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous when, although there may exist evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id.* at 661-662.

Under MCR 2.114(F), "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)[,]" which states that sanctions "*shall* be awarded as provided by MCL 600.2591." (Emphasis added.) MCL 600.2591(3) provides, in pertinent part:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
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> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
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> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

"Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case." *Kitchen, supra* at 662.

In awarding Republic Bank sanctions under MCR 2.114(F), the trial court determined that there existed no factual or legal support for plaintiffs' claims. We conclude that the trial court did not clearly err in awarding Republic Bank sanctions because plaintiffs' claims were devoid of arguable legal merit. As previously discussed, the plain language of the CLA contravened plaintiffs' theory of relief on their breach of contract claim.

In addition, plaintiff Scott Kroeger specifically approved the March and April 2006 advances that plaintiffs challenge. The construction disbursement authorization forms for these advances included the following language:

> *The advance request is for work and improvements at the Building Site through the date of last inspection report. I (We) have reviewed the Builder's request for a draw for the materials and labor. I (We) have approved all of the work and improvements and I (we) request an advance and authorize payment of $_____ to the Builder.
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> I (We) certify that there is no default under the Note or the Construction Loan Agreement, there have been no changes in the contract price that Republic Bank has not approved, and all conditions to this Construction Disbursement Authorization have been satisfied.

Kroeger signed both authorizations. Although he later claimed in his affidavit that he was never informed of the inconsistencies between the inspector's reports and the sworn statements and was not advised of the lack of lien waivers, the authorizations specifically indicated that he approved all of the work and improvements and that all conditions necessary for the disbursement were satisfied. Further, in his affidavit Kroeger stated, "The only thing I was told was to sign the authorization." To the extent that Kroeger asserts that he should not be held responsible for signing the authorizations because the bank directed him to do so, his claim lacks merit. "Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents." *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000). Thus, because Kroeger specifically approved and authorized the complained of advances and the language of the CLA fails to support plaintiffs' breach of contract claim, the claim was devoid of arguable legal merit. Similarly, plaintiffs' negligence and breach of fiduciary duty claims were devoid of arguable legal merit, as previously discussed.

Accordingly, the trial court did not clearly err by awarding sanctions under MCR 2.114(F).

Affirmed. Costs to defendant-appellee.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens