STATE OF MICHIGAN

COURT OF APPEALS

STANDARD FEDERAL BANK,

Plaintiff-Appellant,

v

FIRSTBANK,

Defendant-Appellee.

UNPUBLISHED
July 23, 1999

No. 208301
Isabella Circuit Court
LC No. 97-010197 CK

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this breach of contract action. We affirm.

On January 30, 1995, the parties entered an agreement for defendant's purchase of plaintiff's branch office in Mount Pleasant. Closing occurred on June 17, 1995. On September 30, 1996, the Deposit Insurance Funds Act of 1996 (DIFA)[1] was enacted. The DIFA levied a special, one-time assessment on all deposits held on March 31, 1995, that were insured by the Savings Association Insurance Fund. Plaintiff paid the assessment for the deposits held in its Mount Pleasant branch on March 31, 1995, but sought reimbursement from defendant. When defendant refused, plaintiff filed the instant lawsuit.

Plaintiff first argues that the trial court erred in denying its motion for summary disposition and granting defendant's motion for summary disposition. On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

Plaintiff relies on paragraph 8.4.2 of the parties' contract, which provides in relevant part:

> *Indemnity of Seller*. Purchaser shall indemnify, defend, and hold Seller and its directors, officers, employees, and agents harmless from and against *all* demands, damages, liabilities, costs, and expenses (including, without limitation, interest, penalties, and attorney fees) asserted against, imposed on, or incurred by such indemnified party by reason of or resulting from (i) any breach of the representations, warranties, or covenants of Purchaser in this Agreement; (ii) *any other liability or obligation of or claim against Seller arising out of any occurrence, event, or state of facts relating to any of the Acquired Assets or Assumed Liabilities having come into existence or having taken place after the Closing*; and (iii) those liabilities, obligations, and claims specifically assumed by Purchaser under this Agreement. Seller will promptly give Purchaser notice of any such claims. [Plaintiff's emphasis.]

Under ordinary contract principles, if the language of a contract is clear and unambiguous, its construction is a question of law for the court. *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). The primary goal in the interpretation of contracts is to honor the intention of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). When determining what the parties' agreement is, the court should read the contract as a whole and give meaning to all its terms. See *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided. *UAW-GM Human Resource Ctr*, *supra* at 491-492.

Plaintiff asserts that the DIFA assessment is included within the purview of paragraph 8.4.1. However, paragraph 8.4.1 provides that defendant would indemnify plaintiff against liabilities "arising out of any occurrence, event, or state of facts relating to any of the Acquired Assets or Assumed Liabilities." Here, the liability did not arise out of or relate to the acquired assets, since the DIFA assessment applied only to those deposits held on March 31, 1995. Defendant did not assume any liability for deposits held by plaintiff before June 17, 1995. Indeed, the deposits held by a financial institution do not remain static from day to day, and the deposits held on March 31, 1995, would not be expected to be identical to those held on June 17, 1995.

With regard to the liabilities assumed by defendant, paragraph 1.2 provides in pertinent part:

> As of the Closing, Purchaser shall also assume and thereafter duly perform, satisfy, and discharge the following liabilities and obligations of Seller (collectively, the "Assumed Liabilities"), *but no other liabilities whatsoever whether arising before, at, or after the Closing*. [Emphasis added.]

In addition, paragraph 8.4.1 provides:

> After the Closing, Seller shall indemnify, defend, and hold Purchaser and its directors, officer, employees, and agents harmless from and against all demands, damages, liabilities, costs, and expenses (including, without limitation, interest, penalties, and attorney fees) asserted against, imposed on, or incurred by such indemnified party by reason of or resulting from . . . any other liability or obligation of or claim against Purchaser arising out of any occurrence, event, or state of facts relating to any of the Acquired Assets or Assumed Liabilities existing or having taken place prior to the Closing *other than those liabilities, obligations, and claims specifically assumed by Purchaser under this Agreement*. [Emphasis added.]

Thus, under the purchase agreement, defendant did not assume any liability that was not specifically set forth in the agreement, regardless of when the liability arose. The agreement nowhere allocates to defendant the responsibility for any federal assessment on assets held by plaintiff before June 17, 1995. Accordingly, defendant is not contractually obligated to indemnify plaintiff for the DIFA assessment.

Plaintiff argues that although March 31, 1995, is the valuation date of the DIFA assessment, defendant should be liable because the assessment was made after the closing. However, the plain language of the DIFA indicates that Congress intended that the institution which held specific deposits on March 31, 1995, should pay the assessment for those deposits. Accordingly, responsibility for the assessment imposed by the DIFA rests solely with plaintiff, and the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff next argues that the trial court erred in dismissing its claim for unjust enrichment. The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). In such cases, the law operates to imply a contract in order to prevent unjust enrichment. *Id*.

However, an implied contract will not be found where there is an express contract covering the same subject matter. See *id*. While the purchase agreement did not specifically address the DIFA assessment, it did delineate the liabilities assumed by defendant and explicitly limited defendant's liabilities to those listed in the agreement. Because, under the terms of the parties' contract, defendant was not required to indemnify plaintiff for the DIFA assessment, we will not imply a contract imposing such a requirement.

In any case, we are not persuaded that plaintiff conferred a benefit upon defendant. When plaintiff paid the assessment on the deposits it held on March 31, 1995, plaintiff implicitly acknowledged that it had the obligation to do so under the DIFA. While, from plaintiff's point of

view, the date chosen by Congress for valuation of the DIFA assessment was certainly unfortunate, we discern no inherent injustice in allowing the burden of the assessment to remain where Congress chose to place it. The trial court did not err in granting defendant's motion for summary disposition on plaintiff's claim of unjust enrichment.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

[1] PL 104-208, § 2701 *et seq*., 110 Stat 3009-479 *et seq*.