STATE OF MICHIGAN

COURT OF APPEALS

STERLING BANK & TRUST, F.S.B.,

Plaintiff-Appellant,

v

FIRST CITY FINANCIAL CORP., BANK OF NEW YORK, and CHASE-TEXAS BANK,

Defendants-Appellees.

UNPUBLISHED
July 23, 2002

No. 228222
Oakland Circuit Court
LC No. 99-016345-CZ

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

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying plaintiff's motion for summary disposition and granting summary disposition in favor of defendants First City Financial Corp.[1] and Bank of New York. We affirm.

Plaintiff, which is in the business of issuing temporary financing for mortgage loans to mortgage originators, issued temporary financing to MCA Mortgage Corp. (MCA) for a refinancing mortgage loan to Bessie D. Milner-Benson. Defendant FC Capital had a Master Purchase and Sale Agreement (Sale Agreement) with MCA, which sets forth terms by which FC Capital would purchase mortgage loans from MCA. FC Capital also entered into a Custodial Agreement with Lehman Commercial Paper, Inc. and defendant Bank of New York, whereby Lehman agreed to loan funds to FC Capital to purchase mortgage loans, and Bank of New York was designated as the custodian of the mortgage loans.

On January 14, 1999, plaintiff sent a letter to FC Capital, c/o defendant Bank of New York, at a New York City address, wherein plaintiff stated that "[i]n accordance with your takeout commitment with MCA Mortgage" plaintiff was sending "original collateral packages for mortgage loans identified on the attached Shipping Schedule . . . for purchase by you." The Milner-Benson loan was not identified in the letter, and the "attached Shipping Schedule" was not submitted to the trial court or to this Court on appeal. On January 15, 1999, defendant FC Capital sent a letter to MCA vice president William Banfield, noting MCA's commitment to sell

[1] Defendant First City Financial Corp. is referred to as FC Capital Corp. throughout the parties' briefs and the lower court record. For purposes of consistency, we shall refer to First City Financial Corp. as FC Capital in this opinion.

certain mortgage loans that were listed on an attached FC Capital Funding Report (which included the Milner-Benson loan), asking for more complete information regarding the loans, noting that the terms of the commitment were governed by the Sale Agreement, and asking for Banfield's signature on a copy of the letter reflecting his acceptance. Banfield returned the letter with his signature and indicated payment instructions in accordance with the Sale Agreement. It is not disputed that defendant FC Capital paid MCA for the Milner-Benson loan through a wire transfer to MCA's account at Chase-Texas Bank.

Plaintiff argues that it formed an express contract with defendants FC Capital and Bank of New York because, in the January 14, 1999, letter to these defendants, it communicated an offer to take possession of the Milner-Benson mortgage loan on the condition that defendants pay plaintiff the stated amount. Plaintiff asserts that defendants accepted this offer by retaining possession of the loan. Alternatively, plaintiff argues that customs in the mortgage banking industry demonstrate the existence of an implied contract. Both defendants argue that they had no contract with plaintiff and that the Sale Agreement governs the transaction at issue.

An enforceable contract is not created unless there is an offer, an acceptance, and mutual assent on all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997); *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *Eerdmans*, *supra*, quoting Restatement Contracts, 2d, § 24. The acceptance must be unambiguous and in strict conformance with the offer, otherwise no contract is formed. *Eerdmans*, *supra*. Acceptance may be implied by the offeree's conduct, if an offer does not require a specific form of acceptance. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 106; 577 NW2d 188 (1998).

Courts will also recognize an implied contract "where parties assume obligations by their conduct." *Williams v Litton Systems, Inc*, 433 Mich 755, 758; 449 NW2d 669 (1989). A contract "implied in law" is "'an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended.'" *In re McKim Estate*, 238 Mich App 453, 457; 606 NW2d 30 (1999), quoting *In re Lewis Estate*, 168 Mich App 70, 74-75; 423 NW2d 600 (1988). "'A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation.'" *Id*. A contract "implied in fact" arises "'when services are performed by one who at the time expects compensation from another who expects at the time to pay therefore.' The issue is a question of fact to be resolved through the consideration of all the circumstances . . . ." *In re McKim Estate*, *supra* at 458, quoting *In re Lewis Estate*, *supra* at 75.

The trial court did not err in finding that no express contract had been formed between these parties. The January 14, 1999, letter sent by plaintiff to defendants states that plaintiff is sending collateral packages "[i]n accordance with your takeout commitment to MCA Mortgage." Thus, plaintiff acknowledged that any relationship between itself and defendants must be evaluated in accordance with defendants' relationship with MCA Mortgage. That relationship was defined by the Sale Agreement, which provided for the sale by MCA to FC Capital of certain mortgage loans in aggregate amounts and prices as the parties agreed, which would be evidenced by a confirmation issued by FC Capital. Moreover, MCA warranted that the loans would be solely owned by MCA, free of any liens or security interests. All notices were required

to be sent to FC Capital in Valhalla, NY, but all mortgage loan documents were to be sent to Bank of New York in New York City. All loans would be funded in accordance with the most recent wire transfer instructions received by FC Capital on a form containing MCA's letterhead and the signature of an MCA officer.

The January 14, 1999, letter did not meet these qualifications and, therefore, was not "in accordance" with any written commitment undertaken by defendants. The "collateral packages" that were the subject of the letter were, contrary to the Sale Agreement, allegedly subject to a perfected security interest in favor of plaintiff. The letter also attempts to establish payment instructions without any indication of MCA's approval as required by the Sale Agreement. The letter, which purports to provide notice to FC Capital of a shipment of collateral packages, was not sent to FC Capital at its Valhalla, NY address.

Moreover, the Milner-Benson loan that is the subject of this litigation was included on a schedule of loans sent to MCA by FC Capital on January 15, 1999, with an accompanying letter noting that the terms of the commitment were governed by the Sale Agreement. MCA vice-president William Banfield signed the letter and returned it to FC Capital, with instructions to wire payment to an MCA bank account. This loan is not identified in the January 14, 1999, letter from plaintiff to defendants, upon which plaintiff's claim for breach of contract is predicated. That letter references "original collateral packages for mortgage loans identified on the attached Shipping Schedule." However, in none of plaintiff's pleadings below did plaintiff provide a copy of the "attached Shipping Schedule" evidencing shipment of the subject mortgage loan to defendants, nor does plaintiff do so on appeal. Defendant Bank of New York submitted an affidavit from its vice-president, Richard Costantino, in which Costantino stated that he had reviewed all of the documentation relating to the Bank of New York's receipt of the loan documents for the Milner-Benson loan, the records reflected that the Bank of New York received the loan by federal express on January 15, 1999, and no letter was sent with the loan documents. The Bank of New York received the January 14, 1999, letter, which was not sent by federal express or overnight delivery, some time after receiving the loan documents.

There is also no evidence that defendants accepted any offer that plaintiff communicated in the January 14, 1999, letter. The "offer" was conditional, and the only method of acceptance was payment by defendants of the negotiated principal price. Because it is undisputed that defendants did not pay plaintiff, there was no acceptance of plaintiff's "offer." Although plaintiff maintains that the "offer" was accepted by retention of the collateral, this is not the manner of acceptance outlined in plaintiff's letter of January 14, 1999. Plaintiff also has not demonstrated that the collateral was included with the letter or that plaintiff sent the loan to defendants. Therefore, no actual contract was formed, and the trial court properly granted summary disposition on plaintiff's claim for breach of contract.

Plaintiff argues that the affidavit of John O'Leary, Managing Director of plaintiff's Mortgage Loan Participation Division, is evidence of "the undisputed industry custom [which] demonstrates the existence of an enforceable obligation by Defendants to pay for or return the note." In the affidavit, O'Leary states, "Pursuant to Sterling Bank & Trust's regular business practices, on January 14, 1999, Sterling Bank & Trust sent to FC Capital, c/o Bank of New York, a bailment letter and collateral for the Miler[sic]-Benson loan. Pursuant to Sterling Bank's regular business practices, the collateral (i.e., the note) was shipped together with the bailment letter." O'Leary maintains that bailment letters are "commonly used" in the warehouse banking

business to "transmit collateral from a temporary, warehouse lender such as Sterling Bank & Trust in this case to an end-investor such as FC Capital." This affidavit is not evidence of an undertaking of an enforceable obligation by defendants. Although it is not disputed that the Milner-Benson loan passed to defendants, O'Leary's affidavit establishes only that it was plaintiff's practice to ship mortgage notes with bailment letters. There is no evidence that plaintiff shipped the Milner-Benson loan. Therefore, there is no basis to imply a contract in law because there is no evidence that defendants received a benefit from plaintiff, the retention of which would be inequitable. See *In re McKim Estate, supra* at 457.

Plaintiff also argues that it was not a party to the contract between MCA and FC Capital and should not be bound by its terms. In his affidavit, O'Leary contends that "a takeout commitment is generally an agreement signed by the end investor listing specific loans which the end investor has agreed to purchase, or, at a minimum, a total dollar amount committing the end investor to purchase"; therefore, the Sale Agreement between MCA and FC Capital is not a "takeout commitment" because it does not identify particular loans. However, plaintiff did not submit to the trial court or this Court a copy of the actual "takeout commitment" referenced in the January 14, 1999, letter, and, therefore, has provided no evidence of the terms of any purported contract with defendants beyond those in the letter.

Plaintiff also has not established that FC Capital had any notice of the alleged loan transfer, and plaintiff therefore could not hold FC Capital liable. Plaintiff argues that Bank of New York was an agent of FC Capital, which can therefore be held liable as the principal. However, because we have found no actual or implied contract between plaintiff and Bank of New York, there is no basis to hold FC Capital liable as principal for breach of contract.

Although plaintiff did not plead breach of bailment in its complaint, plaintiff also argues that defendants committed a breach of bailment. The trial court did not address this issue therefore it is not properly before this Court. *Miller v Inglis*, 223 Mich App 159, 169; 567 NW2d 253 (1997). Moreover, plaintiff's bailment theory fails because the evidence does not establish either an actual or implied contract, or an actual delivery. See *National Ben Franklin Ins Co v Bakhaus Contractors, Inc*, 124 Mich App 510, 512, n 2; 335 NW2d 70 (1983), citing 8 Am Jur 2d, Bailments, § 2, p 738.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder