STATE OF MICHIGAN

COURT OF APPEALS

SANDRA VANDENBROECK, ABEL SOTO and DENISE SOTO,

Plaintiffs,

and

EUGENE NICHOSON and CAROL NICHOSON,

Plaintiffs-Appellants/Cross-Appellees,

v

COMMONPOINT MORTGAGE COMPANY, f/k/a AAA MORTGAGE & FINANCE, f/k/a ALLSTATE MORTGAGE & FINANCIAL CORPORATION, f/k/a ANDERSON REALTY, INC., and CONTIMORTGAGE CORPORATION,

Defendants,

and

GREEN TREE FINANCIAL CORPORATION,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
August 10, 2004

No. 236642
Kent Circuit Court
LC No. 98-010759-CP

Before: Gage, P.J. and O'Connell and Zahra, JJ.

PER CURIAM.

In its cross-appeal, defendant Green Tree Financial Corporation (Green Tree) appeals the trial court's order granting summary disposition in favor of plaintiffs, Eugene and Carol Nichoson (the Nichosons) and members of the certified class on their breach of contract claims. We affirm.

Plaintiffs Sandra VandenBroeck, the Nichosons, and Abel and Denise Soto (the Sotos) brought this action on behalf of themselves and a class of similarly situated plaintiffs against defendant CommonPoint Mortgage Company (CommonPoint), which provided mortgage loans to plaintiffs, and against defendants ContiMortgage Corporation (ContiMortgage) and Green Tree, which purchased plaintiffs' mortgage notes from CommonPoint. Plaintiffs alleged violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, breach of fiduciary duty, and unjust enrichment. CommonPoint filed for bankruptcy early in the proceedings, leaving ContiMortgage and Green Tree to answer for its conduct with respect to the mortgage loan transactions. Plaintiffs later amended their complaint to add a breach of contract claim based on CommonPoint's practice of charging "loan discount" fees to borrowers without providing any discount in the interest rate charged. ContiMortgage, which purchased the VandenBroeck and Soto mortgage loans, subsequently filed for bankruptcy. A settlement was apparently reached through the bankruptcy court with VandenBroeck, the Sotos, and class members whose loans were purchased by ContiMortgage. The trial court eventually granted summary disposition to the Nichosons and class members, whose loans were purchased by Green Tree, on their breach of contract claim. The other pleaded claims were previously or contemporaneously dismissed by various orders of the trial court. The Nichosons appealed from the summary disposition order as of right. Green Tree filed a cross-appeal. The Nichosons' appeal was later dismissed by order of this Court on stipulation of the parties. The issues raised in Green Tree's cross-appeal remain for our determination.

I

Green Tree first argues that the Nichosons and other class members were not entitled to summary disposition on their breach of contract claim. We review a grant of summary disposition de novo "examining the entire record to determine whether the moving party was entitled to judgment as a matter of law." *Stopczynski v Woodcox*, 258 Mich App 226, 229; 671 NW2d 119 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* Summary disposition is proper if, after a review of the evidence in a light most favorable to the nonmoving party, a genuine issue of material fact is not established. *Id.*

The breach of contract claim was based on allegations that CommonPoint charged the Nichosons and each of the class members a fee for a "loan discount," that this contract term required a discounted interest rate in exchange for the fee, that CommonPoint did not discount the interest rate, that CommonPoint actually inflated the interest rate, and that CommonPoint's conduct breached the contract, resulting in damages. The aforementioned allegations set forth a prima facie claim for breach of contract. Green Tree argues, however, that the claim was not proven as a matter of law because the terms of the contract did not provide for a reduction in the offered interest rate in exchange for the payment of the loan discount fee. Green Tree argues that there was no breach of the contract terms as written.

The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). If contract language is clear and unambiguous, its meaning presents a question of law for the court. *UAW-GM Human Resource Ctr v KSL Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998), citing *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). If language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Id.* The initial inquiry whether an

ambiguity exists in the language of a contract is a question of law. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). An ambiguity is not established simply because the parties to a contract dispute its meaning. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 14; 614 NW2d 169 (2000). Generally, contract language is to be construed according to its ordinary and plain meaning, and technical and constrained constructions are to be avoided. *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit (After Remand)*, 210 Mich App 449, 452; 534 NW2d 160 (1995). Parol evidence to define and explain the meaning of technical or trade terms is permissible. *Id.* Summary disposition may be granted on a contract claim if the terms of the contract are not subject to more than one reasonable interpretation. *BPS Clinical Laboratories v Blue Cross & Blue Shield of MI (On Remand)*, 217 Mich App 687, 700; 552 NW2d 919 (1996).

We hold that the contract term "loan discount fee" is subject to only one reasonable interpretation. It cannot be construed as anything other than a fee paid to reduce the interest rate on the loan. The testimony and evidence presented to the trial court supports our conclusion. In a glossary of terms provided to borrowers as part of the loan application process, the term "loan discount fee" was not defined. A "discount point" was defined as the "amount payable to the lending institution by the borrower or seller to increase the lender's effective yield. One point is equal to one percent of the loan amount." A "discount loan" was defined as follows: "When the note rate on a loan is less than the market rate, the lender requires additional points to raise the yield on the loan to the market rate." According to Michael Anderson, CommonPoint's president, the term "market rate" can be construed to mean the rate the investor determines for the loan. Construing the glossary definitions together, it is undeniable that a loan discount fee or point is the amount paid to increase the lender's yield on loans where the charged interest rate is below the rate at which the loan could be made.

This definition comports with the common mortgage trade or industry meaning of loan discount point or fee. Edward Lawrence, the Nichosons' expert, agreed that discount points and fees are paid in exchange for a more favorable interest rate. The fee is a premium paid for obtaining a lower mortgage rate. Ronald Lemmon, CommonPoint's general manager, also acknowledged that discount points are generally paid to buy down the interest rate. Laura Borelli, Green Tree's expert, previously testified that the industry standard deems a discount point to be "bona fide" if it results in an interest rate reduction of at least twenty-five basis points. Clearly, she recognized the correlation between paying a discount point and receiving a reduction in the interest rate.

We are mindful that some CommonPoint employees defined or attempted to define "loan discounts" or "loan discount fees" as something other than fees paid to reduce the interest rate. There was testimony that the term should be defined as a fee paid simply to increase the lender's yield. We avoid strained constructions of contractual language, *Fitch v State Far Fire & Cas Co*, 211 Mich App 468, 471; 536 NW2d 273 (1995), and we decline to accept an uncommon, strained definition of the terms "loan discount fee." If the fee were meant to strictly increase the lender's yield, it would be aptly identified as a "yield increase fee." In reaching our conclusion, we acknowledge Green Tree's argument that neither the Nichosons nor any class members were entitled to conventional loan pricing methods or conventional reductions in interest rates according to conventional loan pricing methods. The Nichosons, however, never alleged or tried to prove that they were entitled to conventional loan pricing. They were borrowing in the

subprime market. Their theory of the case was that CommonPoint should not have charged and collected loan discount fees when it did not provide loan discounts. Green Tree offered no evidence to support that the meaning of "loan discount fee" changes depending on the financial status of the borrower. The Nichosons and members of the class offered clear evidence to support the existence of contracts requiring payment of a loan discount fee, which term was not ambiguous and is a fee paid to increase the lender's yield when a lower interest rate is provided.

The Nichosons also offered unequivocal evidence to support that their contract and those of other class members were breached. The discount fees were charged and collected, but no discounts were given to borrowers. Anderson admitted that CommonPoint's loan originators were told to charge discount fees to increase profits and to consider the time and work on the file when deciding what to charge. He testified that CommonPoint did not charge discount fees in order to lower the rates on the loans. Jolene Walkington, a loan originator, averred that the discount fees were arbitrarily set, that they were charged to increase profits, and that interest rates were not lowered based on payment of discount fees. Jay Faunce, a CommonPoint manager, testified that, if asked about the discount fee, loan originators were instructed to tell borrowers that the fee was the amount that CommonPoint had to spend in order to buy the rate down to the rate the borrowers were getting. He admitted, however, that CommonPoint was not buying down the rate. The discount fee was used to make the origination fee look smaller, i.e., the amount the originator wanted to charge would be split between the loan origination fee and the loan discount fee so borrowers would not question the fees. T. Patrick LaPorte, another CommonPoint loan originator, testified that his job was to upsell the loan from the "buy rate" amount set by investors in the secondary market. There was no guideline with respect to how much the loan discount fee should be, except it could not be higher than state law or lender maximums. It was a cost of doing business. Inez Walker, a CommonPoint officer, testified that CommonPoint's practice was to charge discount fees, but no reduction in the rate of interest was given. Other employees of CommonPoint offered similar testimony and supported that the setting of discount fees was discretionary with loan originators. The loan discount fee was not tied to the setting of the interest rate for borrowers. It was charged to recover costs and increase profits. Because loan discount fees were paid per the contract, but no corresponding interest rate reductions were given, the breach was proven as a matter of law.

We disagree that there was any evidence to support a contrary conclusion or to create an issue of material fact. Specifically, the affidavit of John Watson, a CommonPoint manager, does not establish that the loan discount fees were related to the interest rates. Watson averred that fees were charged in an effort to cover the costs of making loans. He further averred that, if the borrowers had not paid these fees upfront, CommonPoint would have needed to charge higher interest rates to achieve necessary revenue. He averred that, "[i]n effect, for payment of these fees, CommonPoint's borrowers received lower interest rates." We agree with the trial court that Watson's affidavit does not support the existence of a correlation between the charged loan discount fees and the interest rates offered. While CommonPoint may well have priced its base rates higher if the collection of potential fees was not generically considered, the affidavit does not demonstrate or factually support that any corresponding discount in the interest rate was provided for payment of the loan discount fee. Watson did not rebut evidence that the determination of a borrower's interest rate and fees was discretionary with the loan originators and was not calculated based on any formula. The rate sheets promulgated by CommonPoint set forth maximum and minimum rates only. They did not outline any calculation with respect to

setting the interest rate and fees. We find compelling the fact that an originator could have charged the maximum loan discount fee and the maximum interest rate on any given loan. This fact belies that loan discounts were given in exchange for the payment of loan discount fees or that interest rates were set in consideration of the discount fee.

We have reviewed the other testimony upon which Green Tree relies to support that there was a material question of fact with respect to whether the loan discount fee correlated with the interest rate. We find that the testimony is either misconstrued or taken out of context. The evidence does not demonstrate that the Nichosons or any class members received a discount in the charged interest rate in exchange for the loan discount fee paid. Because there were no questions of material fact with respect to breach, summary disposition in favor of the Nichosons was appropriate.

In reaching our conclusion, we disagree that the trial court improperly weighed evidence and made findings of fact when ruling on the motion for summary disposition. The trial court reviewed the language of the contract as a matter of law, determined there was no ambiguity in the term "loan discount fee," considered the submitted evidence, and determined that there was no question of material fact with respect to the breach of contract claim. The trial court did not overstep its bounds in deciding the MCR 2.116(C)(10) motion. We further note that the trial court did not improperly shift the burden of proof to Green Tree. The Nichosons offered proof to support their motion for summary disposition on the contract claim. Green Tree was thereafter called upon to rebut the Nichosons' evidence. In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position with evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the opposing party to establish a genuine issue of material fact. *Id.*; MCR 2.116(G)(4). Summary disposition is properly granted where the opposing party does not present evidence to establish a genuine issue of material fact. *Smith, supra*, 460 Mich 455. When the trial court challenged Green Tree to rebut plaintiffs' evidence, it did not improperly shift the burden of proof.

II

Green Tree additionally argues that the trial court erred by certifying the class in this case. We review for clear error the trial court's decision to certify the class. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 588; 654 NW2d 572 (2002). "Generally speaking, factual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

MCR 3.501(A)(1) provides that one or more members of a class may sue as representative parties if the class is so numerous that joinder of all members is impracticable (numerosity), if there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members (commonality), if the claims of the representative parties are typical of the claims of the class (typicality), if the representative parties will fairly and adequately assert and protect the interests of the class (adequacy), and if the maintenance of the action as a class action will be superior to other available methods of adjudication (superiority). Green Tree argues that the elements of typicality, commonality, adequacy, and superiority were not present and thus, class certification should have been denied. We disagree.

"Commonality" was established in this case. The commonality factor addresses whether there is a common issue, resolution of which will advance the litigation. *A & M Supply, supra,* 252 Mich App 599. The common issues in a class action should be subject to generalized proof and be applicable to the class as a whole. *Id.* While the common issues must predominate over issues that are subject only to individualized proof, there is no requirement that all questions necessary for ultimate resolution be common to all members of the class. *Id.* In this case, the relevant common facts included that class members were charged discount fees and that they did not receive discounted interest rates in exchange for payment of those fees. The common issue of law resolved on summary disposition was based on those factual allegations, was subject to generalized proof, and was common to all class members. Resolution of the contract claims did not require individualized considerations or an examination of individual loan negotiations. While there were individual considerations with respect to damages, specifically the amount of the improper discount fee paid, the individual considerations were not predominant.

Additionally, typicality was established. The elements of typicality and commonality are similar and tend to merge. *Gen Tel Co of the Southwest v Falcon,* 457 US 147, 157 n 13; 102 S Ct 2364; 72 L Ed 2d 740 (1982); *Neal v James,* 252 Mich App 12, 21; 651 NW2d 181 (2002). In *Neal, supra,* quoting *Allen v Chicago,* 828 F Supp 543, 553 (ND Ill, 1993), this Court noted that the focus is on whether the named representative's claims have the same essential characteristics as the class at large. *Neal, supra,* 252 Mich App 21. Factual differences between the claims do not alone preclude certification. *Id.* The representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members" and be based on the same legal theory. *Id.* The Nichosons' contract claim had the same essential characteristics as the class at large and was based on the same legal theory. Specifically, the Nichosons and all class members claimed that CommonPoint had a practice of charging loan discount fees without providing loan discounts.

We decline to review whether the class certification elements of adequacy and superiority were met in this case because Green Tree fails to argue, explain, or rationalize its position that the elements were not established. Where a party fails to properly address the merits of its claim of error, the issue is abandoned. *Houghton v Keller,* 256 Mich App 336, 339-340; 662 NW2d 854 (2003). We affirm the class certification order.

III

Green Tree next challenges the trial court's refusal to decertify the class or revoke its certification. Certification decisions are reviewed under the clearly erroneous standard. *Zine v Chrysler Corp,* 236 Mich App 261, 270; 600 NW2d 384 (1999).

In ruling that it would certify the class, the trial court articulated the allegations common to all class members, including that they paid discount fees and did not receive discounted interest rates. It noted that, in each case, the issues involved whether CommonPoint's conduct violated the MCPA, violated unauthorized practice of law statutes, or created an unjust enrichment or "otherwise set forth a colorable cause of action." Before the class certification order was entered, the trial court allowed amendment of the complaint to add a breach of contract claim as an alternative to the unjust enrichment claim based on the payment of discount fees.

Subsequently, after most of the pleaded claims were dismissed by the trial court, Green Tree moved to revoke or decertify the class with respect to the contract claim. It insisted that individual factors predominated over group factors with respect to that claim. The trial court disagreed that individual issues were predominant with respect to the contract claim, and it determined that the contract issue was simple. Either the class members received discounted interest rates in exchange for payment of the fee, or they did not. The trial court denied Green Tree's motion, but it indicated that it would revisit the motion if it became necessary, i.e., if it was later determined that individual issues were predominant.

On appeal, Green Tree argues that litigation of the contract claim by class action was not a superior litigation method. It maintains that adjudication of each class member's contract claim required review of individual contract negotiations and terms. We disagree. We are not persuaded, on the record before us, that individual considerations needed to be investigated and decided with respect to the pleaded breach of contract claim. We are also not persuaded that contract actions cannot be subject to class adjudication. Form contracts, such as the contracts herein, may be subject to class litigation. See *Smilow v Southwestern Bell Mobile Sys*, 323 F3d 32, 35 (CA 1, 2003). In *Smilow*, all class members signed standard form contracts for cellular telephone services, but their rate plans and fee arrangements differed. *Id.* The common issues were found to predominate because the claims were based on the standard form contract, and there was a common question of law about whether the terms of the contract precluded the defendant from charging for incoming cellular calls. *Id.* at 39, 42. Similarly, in the instant case, the breach of contract claims are based on a fee routinely charged by CommonPoint in contracting with borrowers. The breach of contract claims are based on CommonPoint's common course of conduct in charging the discount fee without providing any discounts. While damages may vary for each class member, this fact does not negate the propriety of class certification. *Id.* at 40. The determination of damages in this case was simple because the amount of the discount fee paid by each class member was easily ascertainable. We note that, even if this were not the case, liability can be tried as a class with damages being reserved for individualized attention. See *Sterling v Velsicol Chem Corp*, 855 F 2d 1188, 1196-1197 (CA 6, 1988). The trial court did not err in refusing to revoke the class certification.

IV

Finally, Green Tree argues that the trial court abused its discretion in denying its request to take discovery depositions of class members to learn about individual loan negotiations and terms. This issue is abandoned on appeal because Green Tree offers only a brief, conclusory argument and fails to explain or rationalize its position. *Houghton, supra*, 256 Mich 339-340.

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra