

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

GRAND RAPIDS HOUSING COMMISSION and  
MT. MERCY HOUSING CORPORATION,

UNPUBLISHED  
February 7, 2008

Plaintiffs-Appellees,

v

OHIO FARMERS INSURANCE COMPANY,

No. 273513  
Kent Circuit Court  
LC No. 05-007189-CK

Defendant-Appellant.

---

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant Ohio Farmers Insurance Company (OFIC) appeals as of right the circuit court's order granting summary disposition to plaintiffs Grand Rapids Housing Commission (GRHC) and Mt. Mercy Housing Corporation (MMHC). OFIC also challenges the circuit court's order denying its motion for reconsideration. We reverse.

I

In December 2003, Cycon Enterprises, Inc. (Cycon), contracted with the GRHC and Mt. Mercy Limited Partnership (MMLP) to be the general contractor for Assisted Living Mt. Mercy-Phase II (the Project). Two months later, OFIC, as surety, issued a performance bond on behalf of Cycon, the principal. The performance bond listed GRHC as the obligee and owner of the bond. OFIC also issued two obligee riders, which listed MMHC and Fifth Third Bank as obligees. In December 2004, Mt. Mercy Limited Partnership II (MMLP II) unilaterally terminated Cycon as general contractor of the project, believing that Cycon failed to perform in accordance with the contract. MMLP II then commenced this action against OFIC seeking to recover the amount that it spent above the contract price to finish the project. Thereafter, GRHC and MMHC, who were the obligees under the performance bond, were substituted as plaintiffs.

Cycon instituted arbitration proceedings against MMLP II and GRHC, claiming that its termination from the project was improper. A counterclaim was asserted based on the completion damages. While the arbitration was pending, OFIC sought summary disposition in the instant action on the limited basis that it could not be liable to GRHC or MMHC under the performance bond because the plaintiff obligees suffered no damages. Rather, OFIC asserted, assuming Cycon did, in fact, breach the contract, only MMLP II, an entity that was not an obligee under the bond, incurred the additional completion expenses.

Plaintiffs responded to the substance of OFIC's motion, addressing the issue whether plaintiffs suffered compensable losses. Plaintiffs' response included the following:

Under MCR 2.116(C)(10), a moving party is entitled to Summary Disposition only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Citation omitted]. In ruling on such a motion, the Court must consider the pleadings as well as any depositions, affidavits, admissions, or other documentary evidence submitted by the parties MCR 2.116(G)(5). **"If it appears to the Court that the opposing party, rather than the moving party, is entitled to judgment, the Court may render judgment in favor of the opposing party."** MCR 2.116(I)(2).

OFIC's Motion for Summary disposition must be denied. The attached evidence that GRHC has paid all Completion Contractors after Cycon's termination precludes the conclusion that GHRC [sic] has not been injured by Cycon's termination from the Project. Since OFIC now represents that no factual issues exist, Summary Disposition should be entered in favor of GRHC and MMHC against OFIC for \$1,061,506, plus costs, interest and attorney fees. [Emphasis in original.]

OFIC filed a reply to plaintiffs' response to OFIC's motion for summary disposition in which it argued that the affidavit attached to plaintiffs' response supported OFIC's position that MMLP II was obligated to reimburse GRHC for the additional expenditures, and so GRHC and MMHC, the plaintiff obligees suffered no compensable losses.

At argument on OFIC's motion, counsel for OFIC began by identifying the parties and their relationships. Defense counsel continued:

They [Cycon] were defaulted. This case doesn't deal with the propriety of that and who is right and who is wrong, but they were in December of '04 – I'm sorry, '05. At that point, Mt. Mercy II entered into a contract with Triangle construction  
...

Counsel asserted that MMLP II is the owner, hired the completing contractors, and owes GRHC for the amounts expended, and that therefore GRHC suffered no loss.

Counsel for plaintiffs then responded. He began:

Let me see if I can put this all into perspective, because it's undisputed, and we - - we think that the facts are undisputed at this point, that we're entitled to summary disposition.

Counsel went on to explain that GRHC is listed as an owner under the contract with Cycon, and is also an obligee under the bond. Counsel continued:

The contract called for a performance bond. They issued a performance bond. There's no debate about that. We're an obligee. No debate about that. No debate about the default. No debate about the notice of default. The bond required, the

specific terms of the bond required the bonding company to complete the project upon default. They didn't complete the project upon default, so the Grand Rapids Housing Commission, the owner under the contract, then undertook to complete that work.

We did complete the work. Grand Rapids Housing Commission hired the replacement contractors. They paid the replacement contractors. They hired the replacement subcontractors. They paid those subcontractors. All said and done, the Grand Rapids Housing Commission has paid out of its own bank account \$5.4 million for a contract it was only obligated to pay 4.2 million plus some minor change orders. So as you saw in the map in Carlos' [Sanchez] affidavit, the Grand Rapids Housing Commission is out hard dollars, 1,061,000 and change.

\* \* \*

Now, with regard to the claim that there's no compensable losses [sic], under the development contract, as a developer, the Grand Rapids Housing Commission was obligated to deliver this project to Mr. Mercy Limited Partnership II for 4.2 million. Mt. Mercy Limited Partnership II wasn't obligated to pay more money. . . . we're not asking for any money that the limited partnership has an obligation to reimburse back to the Grand Rapids Housing Commission. What we want is we want the 1,061,000 which the partnership is not obligated to reimburse the housing commission because that was the housing commission's risk, because they were the developer. . . .

\* \* \*

You can't --you can't sell a bond, list a company as an obligee, have that obligee pay money that it can't recover from anyone, and then turn and walk away and say we're not going to pay you, *because we have hard dollars we paid, we demonstrated by the affidavit, and there's nothing of record right now that disputes that.*

So we'd ask, frankly, not only that the motion be denied, but that summary disposition, *at least on the issue of liability*, be granted in our favor.

*And incidentally, the whole - - this whole case, there's a companion case, an arbitration that's supposed to be going. I want to talk to you at some point about maybe extending the deadlines because nothing that happens in this case really matters until the arbitration is done, but that's another issue for another day.* [Emphasis added.]

The court then announced that it would take the matter under advisement and issue a written opinion. Plaintiffs' counsel observed that defense counsel had filed a reply brief, and requested an opportunity to respond to the reply. The court agreed.

In its response to OFIC's reply, filed after argument on the motion, plaintiffs again argued that GRHC had suffered an actual loss of \$1,061,000. Plaintiffs then argued that they were entitled to summary disposition:

Here, the Affidavit of Carlos Sanchez establishes, without any counter evidence of any type or kind, and even with partial concession by OFIC; (1) the existence of the contract between Cycon Enterprises, Inc. and the Grand Rapids Housing Commission, (2) the existence of the Performance Bond provided by OFIC, (3) the event of default by Cycon Enterprises, Inc., and (4) the amount of money spent by one of the named obligees, the Grand Rapids Housing Commission. This satisfies all of the requirements for granting summary disposition under MCR 2.116(C)(10). The response of the Grand Rapids Housing Commission and Mt. Mercy Housing Corporation, which clearly included a request for summary disposition under MCR 2.116(1), clearly placed OFIC on notice that the Grand Rapids Housing Commission and Mt. Mercy Housing Corporation intended to ask this Court that summary disposition be entered in their favor. Even though the "Reply" filed by OFIC was not permissible under the Rules, the "Reply" nevertheless failed to address any of the arguments regarding outstanding balances owed and failed to present any additional information suggesting that any material issue of fact exists in this case. Further, no such issue of fact was pointed out or even suggested during oral argument. On that basis, this Court is fully empowered to enter summary disposition in favor of the Grand Rapids Housing Commission, and respectfully, that is precisely what should be done here.

The circuit court then issued a written opinion and order granting plaintiffs a judgment for \$1,061,506. OFIC filed a motion for reconsideration, arguing that the court erred in granting judgment for plaintiffs because the question of Cycon's liability under the contract was "hotly contested" and was yet to be decided in the arbitration proceedings, and that because OFIC's liability as the surety depends on Cycon's liability as the principal, judgment should not have been granted to plaintiffs. The circuit court denied the motion, finding that

the Motion for Reconsideration's arguments related to issues that may or may not be hotly contested in Cycon arbitration (see page 2 of OFIC's brief in support of their Motion for Reconsideration) clearly would have been known and were known by the OFIC defendants at the time of their initial motions but were not argued.

The court then rejected the argument that it had been misled, and observed that OFIC had asserted in its motion that "all of the material facts of this case are undisputed," OFIC's counsel had stated at argument "[t]hey were defaulted. This case doesn't deal with the propriety of that and who is right and who is wrong . . .", counsel for plaintiffs had mentioned the ongoing arbitration, and counsel for OFIC "at no time asserted any arbitration clause issues." The court concluded:

The matters before the Court were fully considered, full [sic] evaluated and the Court made the determination that it did . . . based upon the Court's analysis and

understanding of the uncontested facts as suggested by the parties and of the law that applied to the case.

The Court does not believe palpable error has taken place.

## II

On appeal, OFIC claims that the circuit court erred in granting summary disposition to GRHC and MMHC and ordering it to pay \$1,061,506, before Cyclon's liability was determined in the arbitration proceeding, and in denying its motion for reconsideration. We agree.

We review a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Pursuant to MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). A trial court abuses its discretion when it fails to select a principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.119(C), which governs a motion for reconsideration, provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the trial court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

"A surety is one who undertakes to pay money or take any other action if the principal fails therein." *Will H Hall & Son, Inc v Ace Masonry Constr, Inc*, 260 Mich App 222, 228-229; 677 NW2d 51 (2003). A surety may plead any defense available to the principal. *Id.* at 229. The liability of the surety is coextensive with the liability of the principal and can be extended no further. *Id.*

There is no dispute that in order to find OFIC liable under the bond, the court had to find that Cycon was liable under the contract. Plaintiffs argue that the court so found based upon their own request for summary disposition and the uncontested affidavit of Carlos Sanchez. While the court may, indeed, have been justified in assuming that summary disposition in plaintiffs favor would be proper if the court rejected OFIC's argument regarding whether plaintiffs suffered a compensable loss, given OFIC's exclusive focus on that issue, it is nonetheless apparent that the parties entered the summary disposition debate with the understanding that the issue before the court was whether plaintiffs suffered a compensable loss, not whether there was a genuine issue whether Cycon had breached the contract.

We have engaged in the extensive account of the proceedings recounted above because we think it clear that a review of those proceedings can lead to but one conclusion -- that at least until plaintiffs' response to OFIC's reply to plaintiffs' response to OFIC's motion, which was filed after argument, the only issue was whether plaintiffs had suffered a compensable loss under the bond. Under the circumstances, the court abused its discretion in refusing to grant reconsideration and modify the judgment to reflect a partial summary disposition in plaintiffs' favor on the issue whether its completion damages would be covered under the bond if Cycon is ultimately determined to have breached the underlying contract. The court should have recognized that on this record, palpable error results from declaring OFIC, the surety, liable in the sum of \$1,061,506, when it is unknown whether the arbitrators will determine that Cycon, the principal, had breached the contract when it was forced off the job.

Reversed and remanded for entry of partial summary disposition for plaintiffs consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis  
/s/ William B. Murphy  
/s/ Helene N. White