STATE OF MICHIGAN

COURT OF APPEALS

DIETRICH FAMILY IRREVOCABLE TRUST, by EDGAR J. DIETRICH, Trustee,

Plaintiff-Appellant,

v

PHILIP F. GRECO TITLE COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 26, 2008

No. 274970
Wayne Circuit Court
LC No. 05-535752-CK

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff Dietrich Family Irrevocable Trust, through its trustee, Edgar Julian Dietrich, appeals as of right from an order granting summary disposition to defendant under MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), this Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

First, we conclude that plaintiff's breach of contract claim properly was dismissed because there is no genuine issue of material fact that plaintiff was not a third-party beneficiary of the contract between defendant and Michigan Heritage Bank.

MCL 600.1405 states:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2)(a) The rights of a person for whose benefit a promise has been made, as

> defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.
>
> (c) If the promisee is indebted or otherwise obligated to the person for whose benefit the promise was made and the promise in question is intended when performed to discharge that debt or obligation, then the promisor and the promisee may, by mutual agreement, divest said person of his rights, if this is done without intent to hinder, delay or defraud said person in the collection or enforcement of the said debt or other obligation which the promisee owes him and before he has taken any legal steps to enforce said promise made for his benefit.
>
> (3) Nothing herein contained shall be held to abridge, impair or destroy the rights which the promisee of a promise made for the benefit of another person would otherwise have as a result of such promise.
>
> (4) The provisions of this section shall be construed to be applicable to contracts made prior to its enactment as well as to those made subsequent thereto, unless such construction is held to be unconstitutional, in which case they shall be held to be applicable only to contracts made subsequent to its enactment.

Our Supreme Court has held that "the plain language of this statute reflects that not every person incidentally benefited by a contractual promise has a right to sue for breach of that promise, but rather only if the promisor has 'undertaken to give or to do or refrain from doing something *directly* to or for said person." *Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002) (emphasis in the original), quoting MCL 600.1405(1). "In other words, MCL 600.1405 draws a distinction between intended third-party beneficiaries who may sue for breach of a contractual promise in their favor and incidental third-party beneficiaries who may not." *Id.*; see also *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428-429; 670 NW2d 651 (2003). In determining whether someone is an intended third-party beneficiary of a contract, the form and the meaning of the "contract itself" is to be examined using an objective standard. *Id.* at 428.

In the present case, defendant undertook to act as closing agent, including paying all back taxes from escrowed funds, and issuing a policy of title insurance to the bank, for the purpose of ensuring the priority position of the bank's security interest in the property. There is no indication that defendant undertook to do or refrain from doing anything directly to or for the benefit of plaintiff. Plaintiff was no more than an incidental beneficiary of defendant's agreement with the bank. Because plaintiff was not a third-party beneficiary to the contract between defendant and the bank, defendant was entitled to summary disposition with respect to plaintiff's breach of contract claim.

Next, we conclude that plaintiff's claims for negligence, negligent misrepresentation, and breach of fiduciary duty were all properly dismissed because these claims are based on duties

arising from defendant's agreement with the bank, and plaintiff failed to establish an independent duty of care owed to plaintiff.

The existence of a duty of care is a question of law for the court. *Etter v Michigan Bell Tel Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

Plaintiff alleges that defendant negligently performed its duty to discover and pay the back taxes owed on lot 25, as part of its duties as closing agent. However, the duty to discover and pay back taxes arises from defendant's contract with the bank. Thus, plaintiff must show that defendant owed it a duty of care separate and distinct from defendant's contractual obligations to the bank. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 466-467; 683 NW2d 587 (2004).

Whether a duty exists depends on (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of the connection between the conduct and the injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006). Foreseeability of harm, by itself, is not sufficient to justify imposing a duty. *Id*. at 631. Rather, the issue of duty is one of fairness, involving a weighing of the relationship of the parties, the nature of the risk, and the public's interest in the proposed solution. *Id*.

In the present case, the only relationship between the parties was that defendant had acted as closing agent on previous transactions involving the trust, and that Dietrich, who was *not* the trustee at the time, asked defendant to act as closing agent in January 2002. It is undisputed, however, that the bank was defendant's client. Although the harm (of losing property to foreclosure) was foreseeable, the injury was not certain to occur; rather, it depended on how long the taxes had been due and on whether plaintiff eventually paid them. Further, the connection between defendant's alleged negligence and plaintiff's loss is tenuous. Ultimately, it is the property owner's responsibility to pay property taxes, and plaintiff knew that taxes were past due. Further, defendant's conduct was not morally blameworthy. The policy of preventing future harm is not particularly strong in this situation, given that the payment of taxes is the property owner's responsibility. Lastly, imposing a duty of care on a closing agent for a lender toward a property owner would be tantamount to providing the property owner with free title insurance, which the property owner could have purchased, but did not.

We find no basis for imposing a duty of care on defendant for plaintiff's benefit in this case. Because plaintiff has failed to show a source for defendant's alleged duty of care that is separate and distinct from defendant's contractual obligation to the bank, the trial court properly dismissed plaintiff's negligence and negligent misrepresentation claims.

With regard to plaintiff's breach of fiduciary duty claim, a fiduciary duty arises when the relationship between two parties is "of such character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith." *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981); see also *The Meyer & Anna Prentis Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005). When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the

relationship. *Id*. Examples of fiduciary relationships are attorneys to clients, doctors to patients, trustees to beneficiaries, and guardians to wards. *Portage*, *supra* at 294.

In the present case, although Dietrich testified that there was a long-term relationship between plaintiff and defendant, there was no evidence that plaintiff confided in defendant, or that plaintiff sought or received defendant's counsel and advice. Plaintiff can show no more than an ordinary, albeit long-term, business relationship, not a fiduciary, confidential, trust-based relationship. Accordingly, the breach of fiduciary claim was properly dismissed.

In light of our decision, it is unnecessary to address the parties' remaining arguments.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello