STATE OF MICHIGAN

COURT OF APPEALS

CHAD M. REUST,

Plaintiff/Counter-Defendant-Appellant,

v

DONALD L. CHENOWETH,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee,

and

UNION FEDERAL BANK OF INDIANAPOLIS,

Defendant,

and

WASHINGTON MUTUAL BANK, FA,

Third-Party Defendant-Appellant.

UNPUBLISHED
October 21, 2008

No. 277700
Ingham Circuit Court
LC No. 05-000568-CH

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

PER CURIAM.

In this action to quiet title, appellants, plaintiff Chad Reust and third-party defendant Washington Mutual Bank, appeal as of right the trial court's grant of summary disposition in favor of defendant Donald Chenoweth. Because defendant's mortgage is valid, we affirm the order granting summary disposition to defendant. However, because the mortgage only secured $15,000 and because defendant's attorney fees could not be assessed against appellants, we vacate the portion of the judgment stating that the mortgage secured the sum of $103,405.24 and remand for a new calculation of the amount secured by the mortgage.

I. Standards of Review

We review de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary

disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

We also review de novo the proper interpretation of a contract. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). "In interpreting a contract, this Court's obligation is to determine the intent of the parties." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008). If the language of the contract is unambiguous, we must enforce the contract as written. *Id*. An unambiguous contract reflects the parties' intent as a matter of law. *Id*.

II. Analysis

Appellants claim that defendant's mortgage was void as against public policy because it was obtained from Richard and Kollette Reust (the Reusts), plaintiff's brother and sister-in-law, on the promise that defendant would not seek embezzlement charges against Kollette, his former employee. They cite *Groening v Nowlen*, 369 Mich 28, 33; 118 NW2d 998 (1963), and *Koons v Vauconsant*, 129 Mich 260, 263; 88 NW 630 (1902), cases in which the Supreme Court recognized that an obligation based on a promise not to prosecute a felony is void, to support their argument. However, *Groening* and *Koons* are factually distinguishable from the present case.

In *Groening*, the plaintiff embezzled funds from the defendant, his employer. The plaintiff, at the insistence of two police officers, accompanied the officers to the municipal jail, where the parties engaged in a five-hour discussion about the alleged embezzlement. During these five hours, the plaintiff was informed that a warrant had been issued for his arrest and that unless he signed an agreement for restitution and granted as security for the agreement a deed to real estate he owned to the defendant, he would be prosecuted. After the plaintiff signed the agreement and executed the deed, he was released from the custody of the police officers, and one of the officers telephoned the prosecutor to let him know that further prosecution on the warrant was not desired. Thereafter, the prosecutor directed the dismissal of the warrant. In affirming the trial court's decision to set aside the agreement and the deed, the Supreme Court approved the trial court's conclusion that the plaintiff executed the documents on the implied promise that the criminal prosecution would be dismissed. *Groening*, *supra* at 35.

However, in the present case, at the time defendant requested the Reusts to sign the promissory note and execute the mortgage, defendant had not pressed charges against Kollette, nor had the prosecutor's office filed embezzlement charges against Kollette. Therefore, unlike the plaintiff's execution of the real estate deed in *Groening*, the execution of the promissory note and mortgage by Richard and Kollette did not halt an impending criminal prosecution. For this reason, we do not find *Groening* to be determinative of the present case.

In *Koons*, *supra*, the complainants were approached by the defendant's agents and told that unless they gave the defendant a mortgage on their farm their son would be prosecuted for forgery. The Supreme Court stated, "As a consideration for an undertaking, a promise not to prosecute a felony is illegal and void. No other consideration appears here." *Koons*, *supra* at 263. In the present case, however, the mortgage was not granted by the Reusts just to avoid

prosecution of Kollette's embezzlement; rather, it was granted to secure Kollette's repayment of the money she had embezzled from defendant. For this reason, we conclude that *Koons* does not mandate a holding that the mortgage granted by the Reusts to defendant was invalid.

Considering the facts of this case in the light most favorable to appellants, the promissory note between defendant and the Reusts was simply a payment plan for repayment of the debt arising from Kollette's embezzlement from defendant. The mortgage secured repayment of the note. Appellants have failed to establish that defendant's mortgage was invalid.[1]

Appellants next claim the trial court erred in granting summary disposition to defendant because defendant had not proven the amount of debt secured by the mortgage. We disagree.

To have a valid mortgage, there must be an underlying debt or liability for which the mortgage is security. See *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717-718; 2 NW2d 892 (1942). The mortgage provided that it secured the repayment of $52,500 in accordance with the terms of the January 31, 2003 promissory note. Pursuant to the promissory note, the Reusts had agreed to pay defendant $52,500. Defendant presented the mortgage and the promissory note to the trial court. To the extent that appellants are arguing that the mortgage *may* have secured an amount less than $52,500, they have presented no evidence to support such a claim. Accordingly, appellants' argument that defendant failed to establish the amount of the debt secured by the mortgage is without merit.

Appellants also argue that the trial court, in granting summary disposition to defendant, erred in failing to consider the affirmative defenses of unclean hands and failure to mitigate damages. Again, we disagree.

The unclean hands defense bars a party from obtaining equitable relief with regard to a matter in which it has engaged in conduct tainted by inequitableness or bad faith. *Rose v Nat'l Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002). Here, defendant created an agreement with Kollette for the repayment of funds she had embezzled from him. We have rejected appellants' claim that defendant's conduct in obtaining the promissory note and mortgage from the Reusts violated public policy. Accordingly, appellants' argument that defendant acted with unclean hands fails. Appellants' argument that defendant had a duty to mitigate his damages also fails. Neither the promissory note nor the mortgage imposed any obligation on defendant to pursue a claim for fraud or conversation against Kollette or to foreclose on the other properties before foreclosing on the property at issue.

Appellants further claim that because the Lafayette property was sold before April 1, 2003, the trial court erred in holding the mortgage secured the entire amount of the promissory note, $52,500, rather than just $15,000. We agree.

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[1] Because we conclude that the mortgage granted to defendant by the Reusts was valid, we need not address whether appellants had standing to assert the affirmative defense of illegal consideration and, if so, whether appellants waived the defense by failing to assert it in their first responsive pleading.

The mortgage signed by the Reusts contained the following clause:

> Together with all tenements, hereditament, fixtures, improvements and appurtenances now or hereafter thereunto belonging, to secure the repayment of the sum of Fifty-Two Thousand Five Hundred Dollars ($52,500) in accordance with the terms of a certain Promissory Note dated January 31, 2003, between Richard A. Reust and Kollette R. Reust, husband and wife, and Donald L. Chenoweth. Mortgagor shall pay Mortgagee the sum of Fifteen Thousand Dollars ($15,000) at the time of sale of the subject property which shall be the maximum amount of security provided under this Mortgage, unless the sale of this property does not take place by April 1, 2003. If the sale does not take place by said date, the unpaid balance of said Promissory Note shall be secured by this Mortgage.

Similarly, the promissory note provided in pertinent part:

> This note is secured by a land contract mortgage or second mortgage given by the undersigned, as Mortgagor, to DONALD L. CHENOWETH, as Mortgagee, of even date hereof, covering each of the following described real properties of the undersigned located at:
>
> - 3401 Lafayette, Lansing, Michigan 48906 [Maximum security of $15,000 up to April 1, 2003, per terms of mortgage]

The language of the mortgage is unambiguous. The mortgage plainly states that "Fifteen Thousand Dollars . . . shall be the maximum amount of security provided under this Mortgage, unless the sale of this property does not take place by April 1, 2003." Accordingly, the mortgage must be enforced as written. *In re Egbert R Smith Trust, supra*. All parties agree that plaintiff purchased the property from the Reusts on February 27, 2003. Thus, because the property was sold before April 1, 2003, the mortgage only secured $15,000. Consequently, the trial court erred in holding that the mortgage secured the entire amount payable by the Reusts under the promissory note. We therefore vacate the portion of the judgment stating that the mortgage secured the sum of $103,405.24, and remand for a new calculation of the amount secured by the mortgage.

Appellants claim the trial court erred in denying their motion for reconsideration. We disagree. We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Woods v SLB Property Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

Generally, a motion for reconsideration that merely presents the same issues ruled on by the trial court will not be granted. MCR 2.119(F)(3). Rather, "[t]he 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." *Id.* In their motion for reconsideration, appellants did not identify a palpable error by which the trial court was misled, nor have they identified such an error in their brief on appeal. The trial court did not abuse its discretion in denying appellants' motion for reconsideration.

Finally, appellants claim the trial court erred in awarding the attorney fees requested by defendant without first examining the invoices submitted by him. A trial court's decision to

award attorney fees is reviewed for an abuse of discretion. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003). We need not consider the precise issue raised by appellants because we conclude attorney fees could not be assessed against them.

Defendant's request for attorney fees was based on the following sentence from the promissory note: "If payment of any portion of this note shall not be paid when due, *maker* agrees to pay to holder, in addition to all sums herein, all costs and all actual, reasonable attorneys' fees incurred to enforce payment thereof" (emphasis added). This sentence is unambiguous: the makers of the note, the Reusts, promised to pay defendant the actual, reasonable attorney fees incurred to enforce payment of the note. The promissory note contained no promise by appellants to pay the fees incurred by defendant. In addition, defendant has made no argument claiming that pursuant to a statute, court rule, or common-law exception to the rule that a party is responsible for his own attorney fees he is entitled to recover his fees from appellants. See *In re Adams Estate*, 257 Mich App 230, 236-237; 667 NW2d 904 (2003). Accordingly, the trial court abused its discretion in awarding attorney fees to defendant.[2] Thus, on remand, in recalculating the amount secured by the mortgage, the trial court shall not include within that amount any attorney fees incurred by defendant.

Affirmed in part, vacated in part, and remanded for entry of a corrected judgment. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

[2] We recognize that appellants have never raised the issue whether defendant's attorney fees could be assessed against them. However, this Court possesses the discretion to review a legal issue not raised by the parties, *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004), and we have chosen to exercise that discretion in addressing the present issue.