

STATE OF MICHIGAN
COURT OF APPEALS

CITIZENS BANK, f/k/a REPUBLIC BANK,

Plaintiff/Counter-Defendant-
Appellee,

v

DAVID CRIS PELHAM,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
February 2, 2012

No. 302241
Jackson Circuit Court
LC No. 10-001523-CZ

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

Plaintiff Citizens Bank brought an action against defendant David Cris Pelham, claiming breach of a mortgage contract. Pelham originally had two mortgages with Citizens Bank. The first, serviced by PHH Mortgage Services (PHH), was discharged following the short sale of his home. For the first mortgage, PHH received proceeds from the short sale and \$15,000 from a promissory note authorized by Pelham. The second mortgage is the subject of the current litigation. In order to accomplish the short sale of the home, Pelham hired a negotiator to obtain Citizens Bank's agreement to release the second lien on the property in exchange for \$3,000. Following the sale, Pelham sent Citizens Bank a check for \$3,000 and a letter stating that the check represented "full payment" of the second mortgage. Citizens Bank cashed the check. When no further payments on the second mortgage were forthcoming, Citizens Bank filed this lawsuit. Pelham responded by asserting accord and satisfaction as a defense. The trial court granted Citizens Bank's motion for summary disposition under MCL 2.116(C)(10) and entered judgment for Citizens Bank in the amount of \$129,045. Pelham's motion to reconsider was denied. Pelham now appeals as of right. We affirm.

We review de novo a trial court's grant of summary disposition. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim and should be granted when no genuine issue of any material fact exists to warrant a trial. *Spiek*, 456 Mich at 337. In considering a motion under MCL 2.116(C)(10), the Court considers the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "The existence of an accord and satisfaction may be decided as a question of law if the facts of the

case are undisputed and not open to opposing inferences.” *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 70; 711 NW2d 340 (2006).

Accord and satisfaction is an affirmative defense. *Id.* MCL 440.3311 governs the use of negotiable instruments in accord and satisfaction and provides, in relevant part:

(1) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3)^[1] applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

To satisfy MCL 440.3311(1) there must be either an unliquidated claim or a bona fide dispute *at the time of the accord*. MCL 440.3311(1)(ii); *Hoerstman*, 474 Mich at 76, 77 n 10.

Turning to the present case, the potential “accord” under MCL 440.3311(1) occurred when Pelham tendered, and Citizens Bank accepted, the \$3000 check accompanied by a letter. To begin, we conclude that Pelham has not presented a genuine issue of material fact regarding whether the second mortgage was an unliquidated claim at the time of the accord. “A liquidated claim is one which can be determined with exactness from the agreement between the parties, or by arithmetical process, or by the application of definite rules of law.” *Faith Reformed Church of Traverse City v Thompson*, 248 Mich App 487, 493; 639 NW2d 831 (2001) (internal citation and quotation marks omitted). This case involves the second mortgage, which was subject to

¹ Subsection (3) states:

Subject to subsection (4), a claim is not discharged under subsection (2) if either of the following applies:

(a) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(b) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This subdivision does not apply if the claimant is an organization that sent a statement complying with subdivision (a)(i).

specified interest and repayment terms such that the amount could be determined mathematically. Because the debt could be determined with exactness, Pelham's second mortgage was a liquidated claim at the time of the accord.

We also find that Pelham has failed to present a genuine issue of material fact regarding whether there was a bona fide dispute at the time of the accord. "[P]ayment of an existing, undisputed claim does not, without more, work an accord and satisfaction as to all claims." *Gitre v Kessler Prod Co*, 387 Mich 619, 624; 198 NW2d 405 (1972). The record shows that Pelham's payment of \$3,000 was a payment that both sides agreed was due from the short sale for the release of the lien. Accordingly, without more, it does not constitute accord and satisfaction in relation to the outstanding mortgage debt. The only feasible dispute Pelham suggests is his assertion that the \$3,000 was not only for the release of the lien on the property, but for the release of the mortgage as well. However, this dispute did not exist at the time of the accord. *Hoerstman*, 474 Mich at 77 n 10. It was only after Citizens Bank sought payment of the balance that a dispute began over whether \$3,000 was tendered in payment of the mortgage or only for the release of the lien. Even supposing that Pelham subjectively believed he only owed \$3,000 at the time he tendered the \$3,000 payment, his individual belief, unexpressed to Citizens Bank, did not create a bona fide dispute. The term "dispute" denotes "[a] conflict or controversy." Black's Law Dictionary (9th ed). Pelham does not suggest, and no evidence was presented to support, that he disputed the matter with Citizens Bank before he sent the check and that a conflict then existed. At best, Pelham asserts a one-sided belief never voiced to Citizens Bank; he has not managed to demonstrate the existence of any question of material fact regarding a bona fide dispute at the time of the accord.

Contrary to Pelham's assertions, the fact that the proceeds from the sale were divided between two mortgages does not make the debt unliquidated or in dispute. The proceeds from the short sale were distributed as agreed to by Pelham, PPH, and Citizens Bank; this distribution did not alter the mathematical certainty with which the mortgage amounts could be calculated. With regard to the \$15,000 payment, it is clear (from the affidavit of Pelham's own negotiator) that it was only intended for the first mortgage. Pelham himself authorized the distribution of the \$15,000 to PPH, the servicer of the first mortgage. Although Citizens Bank ultimately owned both mortgages, we conclude that that fact alone does not turn the second mortgage into an unliquidated debt or place the second mortgage in dispute.

We also find that no question of material fact exists regarding whether the letter accompanying the check was a "conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." MCL 440.3311(2). To be conspicuous, a statement must clearly express the writer's intention to condition acceptance of the check on an agreement to accept the payment as an accord and satisfaction. *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 650; 482 NW2d 474 (1992).

The tender of a sum less than the contract price, in settlement of a disputed claim, must be accompanied with a statement, not which *may* be understood by the creditor as intended to be in full settlement and satisfaction of the claim, but which *must* be so understood by him. That is, the statement must be so clear, full and explicit that it is not susceptible of any other interpretation. [*Id.* at 649 (internal citations and quotation marks omitted; emphasis added by *Nationwide.*)]

Pelham's letter accompanying the check stated: "Enclosed is a check in the amount of \$3,000.00, representing full payment of the referenced loan." Following the reasoning of the court in *Nationwide*, we conclude that the language could have been read to indicate Pelham's belief that he only owed \$3,000, rather than his intent to condition acceptance of the check on Citizens Bank's agreement that the check fully satisfied his obligation on the second mortgage. *Id.* at 650. Accordingly, as a matter of law, Pelham has not presented a genuine issue of material fact warranting a trial.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter