

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

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GHAITH M. IBRAHIM and SALAM YANEK,  
Plaintiffs-Appellants,

UNPUBLISHED  
June 19, 2012

v

JOSEPH PHILIP CRAIG & SONS INC., JOSEPH  
PHILIP CRAIG DEVELOPMENT, and JOSEPH  
P. CRACCHIOLO,

No. 303207  
Oakland Circuit Court  
LC No. 2009-104479-CK

Defendants,

and

PNC MORTGAGE,

Defendant-Appellee.

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Before: GLEICHER, P.J., and M.J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition to defendant, PNC Mortgage ("PNC"). We affirm.

Plaintiffs argue that the trial court erred in granting summary disposition to PNC because plaintiffs presented evidence creating a genuine issue of material fact regarding whether PNC had breached its loan contract with plaintiffs. Additionally, plaintiffs claim the trial court incorrectly held that the statute of frauds, MCL 566.132(2), bars plaintiffs' extra-contractual claims. We disagree.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

This case presents a dispute over the financing of a residential building project. Plaintiffs, Ghaith M. Ibrahim and Salam Yanek, husband and wife physicians, purchased property in Troy Michigan, and entered into a building contract with Joseph Philip Craig & Sons ("the builder") to build their home. The contract provided, in relevant part, that progress payments would be made by the lender to the builder upon presentation of appropriate "draw requests" by the builder.

On April 25, 2006, plaintiffs entered into a number of agreements with National City Bank, now PNC. These included, without limitation, a Construction/Permanent Loan Agreement (“Agreement”), a mortgage, an adjustable rate note in the amount of \$1,312,500, and an interest-only addendum to that note, which provided for a period of 60-months of interest-only payments, at a 7.75 percent interest rate, and which further provided that if construction was not complete before the stated completion date, plaintiffs would pay a fixed interest rate of 11.75 percent for the remainder of the construction period. The fixed interest rate could also be imposed in the event of a default.

The Agreement provided, in part, that PNC would “advance proceeds of the Loan periodically, as construction of the Improvements progresses,” and that plaintiffs would provide PNC with such documents as PNC required in connection with those advances. The Agreement further authorized PNC to “disburse any portion of any advance at any time, and from time to time, to persons other than [plaintiffs] for the purposes specified herein irrespective of any other provisions of this Agreement.” Further, the Agreement provided as follows:

- e. Payment directly to Contractor. At its option, the Lender may provide for any or all disbursements to go directly to any general contractor or to any other contractors or subcontractors. The Borrower’s execution of this Construction/Permanent Loan Agreement constitutes an irrevocable authorization to make these direct payments.

Notably, Ibrahim signed the Agreement and various contemporaneously signed documents both on his own behalf, and as “attorney in fact” for Yanek, and it is undisputed that Ibrahim possessed a valid power of attorney to sign for Yanek.

Another document apparently signed and initialed by Ibrahim was an undated document entitled “Disbursement Instructions,” which expressly further provided for PNC to effect disbursements without plaintiffs’ further authorization. This document does not reflect Yanek’s signature, and Ibrahim did not sign it on Yanek’s behalf, although, as noted, Ibrahim did possess a valid power of attorney to sign for Yanek.

In addition to the above authorizations, plaintiffs acknowledge that, during the course of the construction period, they signed invoices and draw requests that authorized installment payments to the builder. Plaintiffs therefore do not dispute the appropriateness of the payments that were made (including any made pursuant to the Disbursement Instructions document that reflected only Ibrahim’s signature), other than the final disbursement which, as discussed herein, was the subject of a separate draw request form. With respect to that final draw, made in February 2007. Ibrahim stated in his deposition that he did not authorize PNC to make the final disbursement, stating, “[t]he last bill – the last invoice they submitted I never authorized.”

The record reflects that Ibrahim became frustrated that he lacked control over the payments that PNC made to the builder. He stated that “[i]n the beginning the house is what [sic] under his control, the money is what in [sic] the bank, blank check right and left, I have no control of it.” When asked if he “signed authorizations for the disbursement of funds during the construction of the house,” Ibrahim responded that, although he signed the authorizations, “it was not explained to me that he will run [sic] the show.”

However, with respect to the final disbursement that is the subject of this appeal, the record reflects a final draw request form, signed by both Ibrahim and Yanek, authorizing PNC to make the final payment to the builder. This document reflects a date of February 9, 2007, days prior to the final draw to the builder, although it also reflects that Ibrahim inserted a hand-written signature date of February 9, 2006, a year prior. While it is unclear whether this document was signed roughly contemporaneously with the final draw (and misdated by Ibrahim), or whether it was signed a year in advance, perhaps “in blank,” the document specifically states that the lender did not encourage plaintiffs to sign the document “without an amount filled in or prior to actual work being completed.” (Underlined in original.)

Due to ongoing issues between plaintiffs and the builder, plaintiffs were faced with a loss of their preferred loan terms with PNC. According to plaintiffs, the effect was that in February 2007, plaintiffs’ original 7.5 percent interest-only payments were converted into principal and interest payments at a rate of 8.5 percent. This continued until July 1, 2007, the effective date of a loan modification agreement between plaintiffs and PNC, under which plaintiffs’ payments again became interest-only, at a rate of 5.875 percent.

Plaintiffs brought suit, alleging that PNC had improperly distributed payments to the builder without plaintiffs’ written consent, as required under the loan agreement.<sup>1</sup> Plaintiffs also claimed that PNC had breached its implied covenant of good faith and fair dealing, had breached fiduciary duties it owed to plaintiffs, and that PNC’s conduct constituted conversion and negligence. Plaintiff’s estimated their damages as a result of this alleged breach as over \$150,000, including almost \$100,000 in additional work to be done on the house and over \$50,000 in additional interest incurred as a result of losing their interest rate under the original contract.

PNC moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that the unambiguous language of the loan contract and disbursement instruction allowed PNC to pay the builder directly without plaintiffs’ approval, that plaintiffs had authorized PNC to make the final disbursement, and that the statute of frauds barred plaintiff’s extra-contractual claims.

The trial court held that plaintiffs had failed to present a genuine issue of material fact regarding whether PNC had breached the loan contract. The court found that plaintiffs merely presented unsupported claims of extra-contractual, oral promises as well as a lack of understanding of the content of the contracts they signed. The trial court noted that plaintiffs, at the last minute, challenged the validity of the final disbursement, but failed to present any evidence to suggest that PNC did not fully comply with the terms of the contracts. Further, the court held that “[t]he terms of the contracts are clear and any claims of oral agreements made in contravention thereof, are barred by the Michigan Statute of Frauds . . . .” Finally, the trial court held that, because plaintiffs’ contractual claim must be dismissed, their remaining claims must

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<sup>1</sup> Plaintiffs also sued the builder (and related parties), as part of this case, for not properly finishing the construction of their home, but apparently settled those claims and agreed to a January 31, 2011 order of dismissal as to those defendants.

also be dismissed. The trial court, therefore, granted PNC summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10).

## II. STANDARD OF REVIEW

This Court reviews a trial court's grant of summary disposition de novo. *Blue Harvest, Inc v DOT*, 288 Mich App 267, 271; 792 NW2d 798 (2010). When the parties bring a motion for summary disposition under the wrong subrule, the trial court may proceed under the correct subrule so long as neither party is misled. *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). Under MCR 2.116(C)(7), the trial court may grant summary disposition on a contract claim if the statute of frauds renders the contract unenforceable as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with "affidavits, depositions, admissions, or other documentary evidence," provided that the evidence would be admissible at trial. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quoting *Maiden*, 461 Mich at 119). This Court accepts the contents of the complaint as true unless contradicted by documentary evidence. *Id.*

The trial court should grant summary disposition under MCR 2.116(C)(8) when a party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW3d 684 (2005). Such a motion tests the legal sufficiency of the complaint, and the court may not consider documentary evidence outside of the pleadings in ruling on the motion. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The court must accept the factual allegations as true, and draw any reasonable inferences from those facts. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Detroit Internat'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008). The court should grant the motion when the claim is so clearly unenforceable as a matter of law that no factual development could justify recovery. *Adair*, 470 Mich at 119.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *BC Tile & Marble Co v Multi Building Co*, 288 Mich App 576; 794 NW2d 76 (2010). In reviewing the motion, this Court must consider "the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *BC Tile & Marble Co*, 288 Mich App at 583. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This Court also reviews issues of statutory interpretation de novo. *Chandler v Co of Muskegon*, 467 Mich 315, 319; 652 NW2d 224 (2002). "When interpreting statutory language, [this Court's] obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Id.* Finally, this Court reviews questions of law regarding the construction of a contract de novo. *Shay v Aldrich*, 487 Mich 648; 790 NW2d 629 (2010).

### III. INTERPRETATION OF THE CONSTRUCTION LOAN AGREEMENT AND DISBURSEMENT INSTRUCTION

When the language of a contract is clear and unambiguous, this Court must construe the contract according to its plain meaning. *Zahn v Kroger Co*, 483 Mich 34, 40; 764 NW2d 207 (2009). In construing a contract, the Court must ascertain and give effect to the intent of the parties, and must give reasonable meaning to all of the contract's terms. *Id.* at 40-41. Any duty imposed by a contract must arise from the language of the contract itself. *Id.* at 40. This rule attempts to ensure that courts do not "substitut[e] their own judgment for the intent of the parties . . .[.] thus making a contract for the parties that [they] never intended." *City of Grosse Pointe Park v Mich Mun Liab & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005).

Plaintiffs argue that the contractual language at issue required PNC to obtain plaintiffs' approval before making disbursements to the builder. We disagree. The Agreement explicitly authorized PNC to disburse funds to persons other than plaintiffs, and provided plaintiffs' "irrevocable authorization" for PNC, at its option, to make payments directly the builder. The Agreement did not require PNC to obtain plaintiffs' further approval for the disbursements.

We give effect to the ordinary and plain meaning of contractual language. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). As noted, Ibrahim signed the Agreement both on his own behalf and on behalf of Yanek, as her "attorney in fact."

Ibrahim's and Yanek's intent to so authorize PNC also is reflected in their signatures on the Building Contract that they signed with the builder, which stated in part:

Purchaser has secured a construction loan contract and progress payments to Builder shall be made by Purchaser's lender at such intervals and in such a amounts [sic] as determined by said lender upon presentation of appropriate draw requests by Builder.

In addition, Ibrahim signed the initial Disbursement Instructions form, expressly authorizing PNC to disburse payments to the builder without prior authorization. That form names both Ibrahim and Yanek as borrowers, and states that "[b]y signing below we are agreeing to the method of disbursement described above." While only Ibrahim signed this document, he possessed a valid power of attorney for Yanek, and routinely exercised it. Ibrahim and Yanek do not contest the installment payments made to the builder pursuant to this disbursement authorization, except for the final draw. We find, under the totality of these circumstances, coupled with the language of the documents, that Ibrahim and Yanek provided sufficient authorization for disbursements made by PNC to the builder.

Notwithstanding the foregoing, and the authorizations reflected in the Agreement, plaintiffs argue that the final draw request was not validly executed by them, and is not binding. We disagree. Plaintiffs do not deny that they signed the final draw request. Rather, they claim that they executed the form, without all of the terms filled in, a year before the final disbursement, and that they therefore did not actually authorize the final disbursement. Regardless, however, the document was signed by Ibrahim and Yanek, and clearly states that they were agreeing to allow PNC to make the final disbursement. The document further

expressly warns borrowers against signing the document in advance, stating that PNC “does not recommend, encourage or in any way promote the borrower signing this ‘Request for Disbursement’ without an amount filled in or prior to actual work completed.” (Underlined in original).

Absent fraud or deception, plaintiffs are presumed to have read the document they signed. *Otto Baedeker & Assoc v Hamtramck State Bank*, 257 Mich 435, 438; 241 NW 249 (1932). A fair reading of the document indicates that the parties intended it to be effective and binding regardless of whether its terms were complete or when it was executed, and that plaintiffs were aware of the risk of signing an incomplete authorization. To hold otherwise would improperly render the warning language surplusage. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 468; 663 NW2d 447 (2003). We decline to adopt plaintiff’s construction of the final draw request, and find that PNC was authorized to make the final disbursement to the builder.

#### IV. STATUTE OF FRAUDS

Plaintiffs also claim that PNC modified or waived the loan terms that allowed PNC to make disbursements without plaintiffs’ authorization. Specifically, plaintiffs argue that PNC’s oral representations to plaintiffs, and that PNC’s course of performance in sending invoices to plaintiffs for approval before dispersing funds to the builder, modified the contract. However, as the trial court noted, the statute of frauds bars any such claims. MCL 566.132 modifies the general rules of contractual construction and interpretation. When a financial institution enters into a loan contract with a borrower, any claimed agreement to modify the contract or waive any of its terms is void unless it is in writing and contains the authorized signature of the party to be charged. MCL 566.132(2); *Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000). This rule applies to bar the claim regardless of whether the party claiming the modification or waiver pleads the claim in contract, tort, or promissory estoppel. *Crown Tech Park*, 242 Mich App at 550. Thus, a trial court should summarily dismiss any claim based on an oral loan modification or waiver based on the parties’ course of conduct because the law does not provide relief for these claims. *Id.* at 553.

Because the express terms of the Agreement and related documents authorized PNC to make these disbursements, plaintiffs were barred from proving any oral agreements or understanding contradicting these terms, and their extra-contractual claims were barred as a matter of law. MCL 566.132(2); *Crown Tech Park, FSB*, 242 Mich App at 550. Plaintiffs have failed to point to any other theory establishing that PNC breached its contractual obligations. The trial court, therefore, properly enforced the unambiguous terms of the loan agreement and properly granted PNC summary disposition.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ Michael J. Kelly  
/s/ Mark T. Boonstra