[Cite as *Waffen v. Summers*, 2009-Ohio-2940.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Wayne William Waffen	Court of Appeals No. OT-08-034
Appellant	Trial Court Nos. 06CV185C 06CV543H
v.	
Daniel Summers, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 19, 2009

* * * * *

Thomas J. Lipka, for appellant.

Laurence Powers and James J. Costello, for appellee Anchors Away, LLC; Matthew D. Harper and Tiffany E. Courtney, for appellees Midland Title Agency of Northwest Ohio, Inc. and First American Title Insurance Company.

* * * * *

SINGER, J.

{¶ 1} Appellant, Wayne William Waffen ("Waffen"), appeals the judgment of the Ottawa County Court of Common Pleas, which granted summary judgment to appellees, Midland Title Agency ("Midland") and First American Title Insurance ("First

American"),[1] and Anchors Away Properties, LLC ("Anchors Away"). This is an accelerated appeal.

{¶ 2} The pleadings, depositions, interrogatories, and evidence submitted on motions for summary judgment reveal the following facts. This matter stems from the sale of a hotel and restaurant business, known as the Beachfront Motel. Waffen and his former spouse, Suzanne Waffen, decided to sell the Beachfront Motel during divorce proceedings.[2] They entered into a purchase agreement with Daniel Summers. The purchase price under the purchase agreement between the Waffens and Summers was $1,100,000.

{¶ 3} Summers and another party, Gary Milkovich, formed Anchors Away for the purpose of purchasing the Beachfront Motel. Summers assigned his rights under the Waffen-Summers purchase agreement to Anchors Away. Anchors Away was funded, in part, through Summers' assignment of rights in the Waffen-Summers purchase agreement. Summers had a 19.5 percent ownership interest in Anchors Away. Anchors Away has denied that Summers acted as its agent and it further denies that Anchors Away received any disbursements from Summers' assignment and this purchase.

{¶ 4} Midland acted as the closing agent and the closing occurred at Midland's offices. Waffen, Suzanne Waffen, Summers, and Milkovich were all present. Sandra

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[1]First American owns Midland, and Midland operates under the name First American/Midland Title. They are considered one party for purposes of this appeal.

[2]Suzanne Waffen is not a party to this appeal.

Hylant, title counsel and vice-president for Midland, supervised the closing. Hylant acknowledged in her deposition that, in addition to closing services, Midland also provided title insurance services and escrow services for the sale.

{¶ 5} In Midland's discovery responses, it stated that "certain funds were deposited in escrow with Midland for disbursement as required by the transaction documents and settlement statement." Hylant acknowledged in her deposition that the "transaction documents" included the Waffen-Summers purchase agreement and the settlement statement. Midland admitted in discovery responses that, at closing, "all parties were present and signed the settlement statement confirming, and agreeing to, the manner in which the funds from the closing would be disbursed." Midland also admitted that all funds were disbursed in accordance with its disbursement worksheet.

{¶ 6} The settlement statement lists Midland as the "settlement agent" and Cammie Abraham signed the document as "settlement agent." The settlement statement lists fees which Midland collected for its services at closing; the fees include a payment for wire transfers. The settlement statement at closing listed both Waffen and Summers as sellers, with a purchase price of $1,300,000 instead of the $1,100,000 listed in the Waffen-Summers purchase agreement. The $1,300,000 reflected the original $1,100,000 sale price plus $200,000 due to Summers from his assignment to Anchors Away.

{¶ 7} In the disbursement worksheet, which Midland prepared and used at closing, Midland is listed as the "escrow agent," and its employee, Cammie R. Abraham, is listed as the "escrow officer." Along with other payouts to various creditors, for title

insurance, for the Waffens' divorce escrow, it lists the remainder of the money due to Waffen as payable to "Wayne William Waffen a.k.a. Wayne Wm. Waffen."

{¶ 8} The settlement statements, purchase agreement, and disbursement worksheet prepared by Midland show that, from the sale price to the Waffens of $1,100,000, Suzanne Waffen was to receive $176,400.51 and Waffen was to receive $176,400.50. An additional $100,000 to the Waffens was to be paid into an escrow account for the Waffens pursuant to the terms of the Waffens' divorce decree.

{¶ 9} The Waffen-Summers purchase agreement provided that Waffen's half of the proceeds was "to be paid to Wayne Waffen and/or a qualified intermediary * * * comprised of a cash payment in the amount of $25,000 with the balance of said proceeds payable to Wayne Waffen and/or a qualified intermediary pursuant to the terms of a promissory note made by Daniel S. Summers payable to _____, a qualified intermediary."

{¶ 10} In her deposition, Hylant acknowledged that she did not ask Waffen or anyone else at closing why the above space in the Waffen-Summers purchase agreement was blank. In his deposition, Waffen explained that the purchase agreement clause was to give him the option of setting up a 1031 account, using a qualified intermediary to handle the funds due Waffen, or alternatively, the option of accepting a promissory note from Summers to help finance the transaction. Waffen testified that he abandoned the promissory note option prior to closing and that he never accepted a promissory note from Summers.

{¶ 11} The day prior to closing, Hylant received a telephone call instructing her to deposit the remaining funds due to Waffen into an account at the National Bank of Oak Harbor ("NBOH"). The caller gave her an account number. The account was in the name of "Waffen Enterprises, L.L.C." Hylant submitted a copy of her handwritten notes of the telephone call. She had not noted the name of the caller who gave the instructions. Hylant testified that she did not know who telephoned her with the instructions, but stated that her "best guess [is] that it came from somebody who I thought was giving me correct information."

{¶ 12} At closing, of the money due to Waffen, Midland disbursed $14,701.09 in a check directly to Waffen. Midland paid Waffen's legal counsel directly an additional amount of $10,298.91 on Waffen's behalf. Three days after the closing, Midland, following the instructions Hylant received from the unknown caller prior to closing, wired $151,400.50, the amount due Waffen, to the NBOH bank account in the name of "Waffen Enterprises, L.L.C."

{¶ 13} Hylant did not remember showing Waffen, at closing or ever, the bank account information for Waffen Enterprises, L.L.C. Although it is Midland's usual and customary practice of verifying deposit information with the beneficiary when information is received from another source, Hylant admitted that she could not remember whether she contacted Waffen to verify the deposit information. When asked whether she had personal knowledge of whether Waffen was aware of the Waffen Enterprises, L.L.C. account, Hylant stated, "I would think that walking out of the closing

without a check for the full amount that he thought he was going to get I would assume that he knew part of the proceeds were being wired." She further admitted that she assumed Waffen knew about the account because Waffen, at closing, did not ask her how he was to receive the balance of the money due to him.

{¶ 14} Waffen also testified that he did not speak to Hylant the day of closing. With respect to what he knew about the money due to him at closing, he stated that he knew he would receive a small payment at the closing and another payment would go directly to his attorneys. With respect to the balance of $151,400.50, he denied calling Hylant to instruct her to wire the money into the "Waffen Enterprises, L.L.C." account. He testified that he spoke to no one at Midland before the day of closing.

{¶ 15} In an affidavit, Waffen averred that he did not open the Waffen Enterprises account, did not give anyone the authority to open the account on his behalf, and had no knowledge of the account's existence at the time of closing. In his affidavit, Waffen also stated that he became aware of the Waffen Enterprises account when he went to collect $5,149.45 from Summers several weeks after the closing. Waffen averred, and testified at his deposition, that Summers had promised to pay Waffen this amount for legal fees in connection with the closing. Summers issued a check to Waffen which was drawn on the Waffen Enterprises, L.L.C. account.

{¶ 16} In his deposition, Waffen explained that he had hired another attorney to set up a "1031 account" and the sale proceeds were to be deposited into that account. When asked whether Waffen knew whether his attorney had set up the account, Waffen stated,

"To the best of my knowledge, he was in the process of doing that. I assumed that that's what was being done." Waffen explained that he thought he had up to six months to arrange the account.

{¶ 17} Soon after Waffen received the Waffen Enterprises, L.L.C. check from Summers, he contacted the police. An investigation, together with discovery responses from NBOH, revealed that Summers had opened the Waffen Enterprises, L.L.C. bank account and that Summers was the sole signatory to the account. Waffen told the police, in several written statements, that Summers had given Waffen a bank account number prior to closing in order to have Waffen's proceeds wired into it. Waffen testified in his deposition to the contrary, stating that, in fact, Summers had not ever given him bank account numbers. He explained that the discrepancy in his statements was due to the promissory note option, later abandoned, that he and Summers had discussed whereby Summers would have given Waffen a note in exchange for Waffen's proceeds.

{¶ 18} Waffen filed a complaint against Summers, Midland and First American, NBOH, and Anchors Away. As against Anchors Away, Waffen raised claims of fraud and conversion, alleging that Summers acted as agent for Anchors Away in opening the Waffen Enterprises account and tortiously taking Waffen's proceeds of $151,400.50. As against Midland, Waffen raised claims of breach of contract, breach of fiduciary duty, and negligence.

{¶ 19} The trial court granted Anchors Away's motion for summary judgment, finding that Summers was not acting as an agent of Anchors Away when he allegedly took the proceeds due to Waffen.

{¶ 20} The trial court also granted Midland's motion for summary judgment. With respect to the breach of contract claim, it found that no actual or implied contract existed between Midland and Waffen. With respect to the negligence claims, it dismissed both as it found no fiduciary relationship between Waffen and Midland. In dismissing both negligence claims, it did find that "whether Wayne Waffen's negligence was greater than Midland's is a question of fact for the jury. Nevertheless, this is actually a moot point because there is no implied contract or fiduciary duty between Wayne Waffen and Midland."

{¶ 21} From the two grants of summary judgment, Waffen raises two assignments of error for review:

{¶ 22} "The trial court erred in granting Midland Title Agency's motion for summary judgment.

{¶ 23} "The trial court erred by granting defendant Anchors Away's motion for summary judgment."

{¶ 24} The appellate court reviews a grant of summary judgment de novo, standing in the shoes of the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment may only be granted when there remains no genuine issue of material fact and, when construing the evidence in favor of the nonmoving party,

reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. In a motion for summary judgment, the moving party bears the initial burden of demonstrating that there are no genuine issues of material facts regarding an essential element of the nonmoving party's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

{¶ 25} As this is an accelerated appeal, we briefly address Waffen's second assignment of error first. Our de novo review of the record demonstrates no error in the trial court's judgment as to Anchors Away. Waffen has not raised a genuine issue of material fact as to any actual or apparent authority of Summers to act as an agent for Anchors Away. Waffen points to no grant of express authority conferred on Summers by Anchors Away. Also, Waffen has not suggested that Anchors Away held Summers out to the public as possessing authority to open the NBOH checking account in the name of Waffen Enterprises. Waffen has also not pointed to any evidence or inferences therefrom that Anchors Away had knowledge of Summers' actions. Waffen's second assignment of error is not well-taken.

{¶ 26} We do find error, however, in the grant of summary judgment to Midland on Waffen's breach of contract claims and his negligence claims.

{¶ 27} The Ohio Supreme Court has described an escrow by stating,

{¶ 28} "An escrow in Ohio, as between grantor and grantee of real estate, is witnessed by a written instrument known as an escrow agreement, delivered by mutual

consent of both parties to a third party denominated the depositary or escrow agent, in which instrument certain conditions are imposed by both grantor and grantee, which conditions the depositary or escrow agent, by the acceptance and retention of the escrow agreement, agrees to observe and obey." *Squire v. Branciforti* (1936), 131 Ohio St. 344, paragraph one of the syllabus.

{¶ 29} "Although *Squire* defined an escrow as a writing, other courts have since stated that an escrow is '*usually* evidenced by a writing.' (Emphasis added.) *Janca v. First Fed. S. & L. Assn. of Cleveland* (1985), 21 Ohio App.3d 211, 213. The 'grantee [in a real estate transaction] * * * may [also] impose conditions in the escrow instrument or agreement that have the same binding effect upon the escrow agent as those of the grantor * * *.' *Squire*, 131 Ohio St. at 354, citing *Cincinnati, Wilmington & Zanesville R. Co. v. Iliff* (1862), 13 Ohio St. 235." *Bell v. Turner*, 172 Ohio App.3d 238, 2007-Ohio-3054, ¶ 18.

{¶ 30} "No precise form of words is necessary to constitute an escrow. The term 'escrow' need not be used. Merely labeling a delivery of property an escrow does not make it such, nor will the misuse of the term in designating an instrument make it an escrow. The use of the term is a circumstance which is considered by a court in determining the intent of the parties. Thus, whether an escrow exists in any case depends not so much upon the terms the parties may use as upon the intent with which the deed or paper is deposited in the hands of a third party." 41 Ohio Jurisprudence 3d (2008) 3, Escrows, Section 4.

{¶ 31} Waffen argues that the circumstances of the closing show that Waffen and Midland had an implied contract for escrow, whereby Midland agreed to act as escrow agent for Waffen. "There are three classes of simple contracts; express, implied in fact, and implied in law. * * * In express contracts the assent to its terms is actually expressed in offer and acceptance. In contracts implied in fact the meeting of the minds, manifested in express contracts by offer and acceptance, is shown by the surrounding circumstances which make it inferable that the contract exists as a matter of tacit understanding." *Hummel v. Hummel* (1938), 133 Ohio St. 520, 525; see, also, *Legros v. Tarr* (1989), 44 Ohio St.3d 1, 6-7. "The conduct and declarations of the party must be examined to determine the existence of an intent to be bound." *Reali, Giampetro & Scott v. Soc. Nat'l Bank* (1999), 133 Ohio App.3d 844, 850, citing *Columbus Hocking Valley & Toledo Ry. Co. v. Gaffney* (1901), 65 Ohio St. 104. The existence of a contract is determined as a matter of law. Id.

{¶ 32} "The main function of an escrow agent is to hold documents and funds until the conditions of the purchase agreement are met whereupon the escrow agent releases the documents and funds. See *Squire v. Branciforti*, supra; *Pippin v. Kern-Ward Bldg. Co.* (1982), 8 Ohio App.3d 196; *Gove v. Jablonski* (Feb. 7, 1985), Cuyahoga App. No. 48411, unreported. Thus, *the escrow is a fiduciary agent for both parties* to a purchase agreement." *Saad v. Rodriguez* (1986), 30 Ohio App.3d 156, 158 (emphasis sic).

{¶ 33} "The depositary under an escrow agreement is an agent of both parties, as well as a paid trustee with respect to the purchase money funds placed in his hands."

Pippin v. Kern-Ward Bldg. Co. (1982), 8 Ohio App.3d 196, 198. "'*The depositary may not perform any acts with reference to the handling of the deposit, or its disposal, which are not authorized by the contract of deposit.* Thus, a depositary holding a deed conveying land and a sum of money to pay therefor, the transaction to be consummated at a definite, fixed time which is made the essence of the contract, may not, in the absence of express authority from the vendee, surrender to the vendor any part of the money held, to enable him to remove encumbrances and perfect his title. *Likewise, if an escrow agent neglects to carry out the instructions of a party to the escrow agreement, liability will result for the damages induced thereby*.' 20 Ohio Jurisprudence 2d 215, Escrows, Section 8. (Emphasis added.)" Id.

{¶ 34} An escrow agent, despite fiduciary status, will not be liable when he or she acts in accordance with the escrow agreement or instructions. *Janca v. First Federal Sav. and Loan Ass'n of Cleveland* (1985), 21 Ohio App.3d 211, paragraph two of the syllabus. Where, however, an escrow agent disburses funds held in escrow contrary to the escrow agreement or instructions, the escrow agent will be liable for the wrongful disbursement. *Spaulding v. Coulson* (1995), 104 Ohio App.3d 62; *Pippin v. Kern-Ward Bldg. Co.*, supra; *Calhoun v. McCullough* (Apr. 25, 1991), 8th Dist. No. 60271, citing *Union Trust v. Broadway House Wrecking Co.* (1931), 9 Ohio Law Abs. 318.

{¶ 35} Here, Midland acted as escrow agent, and knew the terms by which it was bound to perform. Hylant acknowledged that Midland provided escrow services for Waffen. Midland's discovery responses stated that "funds were deposited with Midland

in escrow for disbursement *as required by the transaction documents and settlement statement*." (Emphasis added.) Midland admitted that the "transaction documents" included the Waffen-Summers purchase agreement. Midland's discovery responses also stated that, by signing the settlement agreement at closing, "the parties agreed to the manner in which the escrowed funds would be disbursed." Midland's disbursement worksheet lists Midland as escrow agent. Midland collected fees for escrow services as listed in the settlement worksheet.

{¶ 36} Thus, sufficient documentation and evidence exists to show that an implied contract for escrow exists. The trial court relied on the rule from *Applegate v. Northwest Title Co.*, 10th Dist. No. 03AP-855, 2004-Ohio-1465, which the trial court construed as stating that an "alleged promise that funds would be escrowed, without more, did not create a contract between appellant and the title companies, whether or not appellant relied on the promise to his detriment." The trial court, however, misconstrued *Applegate*. In *Applegate*, the plaintiff-appellant could only point to an oral promise by an agent that funds from the sale of the plaintiff's wife's house would be escrowed on the plaintiff's behalf. Because the *Applegate* plaintiff was not a party to his wife's transaction, the agent did not actually escrow funds for him and the agent owed him no duty to escrow funds.

{¶ 37} Here, to the contrary, Midland acknowledged that it acted as escrow agent and Waffen's funds were actually escrowed with Midland. The trial court wrongly found that "the promise that funds would be distributed, without more, does not create a

contract between Wayne Waffen and Midland * * *." Midland, in fact, took the proceeds, acknowledged that it acted as escrow agent, admitted that the funds were to be disbursed according to the settlement statement and purchase agreement, and was paid consideration for its service. Thus, all the elements of a contract – offer, acceptance, contractual capacity, consideration, manifestation of mutual assent – exist. While not expressly articulated, the contract exists as a matter of mutual tacit understanding. *Legros v. Tarr* (1989), 44 Ohio St.3d 1, 6-7. The contract exists because Waffen has demonstrated "[conditions which] the depositary or escrow agent * * * agrees to observe and obey." *Squire v. Branciforti*, 131 Ohio St. 344, paragraph one of the syllabus. The deposit of Waffen's funds with Midland was absolute and the funds were beyond the reach of the depositor. As in *Squire*, Midland "alone was the disburser of this money." *Squire*, 131 Ohio St. at 356. Therefore, a contract for escrow services existed between Midland and Waffen. The trial court erred when it granted summary judgment to Midland on this claim.

{¶ 38} The trial court dismissed Waffen's two separate claims for breach of fiduciary duty and negligence. "The elements for a breach of fiduciary duty claim are: '(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom.'" *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc.*, 176 Ohio App.3d 54, 2008-Ohio-1490, ¶ 19, quoting *Thomas v. Fletcher*, 3d Dist. No. 17-05-31, 2006-Ohio-6685, at ¶ 13, quoting *Werthmann v. DONet*, 2d Dist. No. 20814, 2005-Ohio-3185, at ¶ 42. "A

claim of breach of fiduciary duty is basically a claim for negligence that involves a higher standard of care." Id, quoting *All Star Land Title Agency, Inc. v. Surewin Invest., Inc*., 8th Dist. No. 87569, 2006-Ohio-5729, at ¶ 36.

{¶ 39} In finding that no fiduciary relationship between Midland and Waffen existed, the trial court relied on Waffen's signature on a Disclosure and Acknowledgement statement at closing, which stated: "Midland Title Agency of Northwest Ohio, Inc. is not acting as my/our agent, attorney, representative or fiduciary at this real estate closing." The trial court also found Waffen's negligence claim moot, since it found no fiduciary relationship.

{¶ 40} "A 'fiduciary' has been defined as "'a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking."'" *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, quoting *Haluka v. Baker* (1941), 66 Ohio App. 308, 312. No formal escrow agreement is necessary for an escrow agent to have a fiduciary relationship. "A fiduciary relationship may be created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been reposed." *Ed Schory & Sons, Inc. v. Soc. Nat'l Bank* (1996), 75 Ohio St.3d 433, 442, quoting *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St.2d 282, paragraph one of the syllabus.

{¶ 41} While, ordinarily, escrow agents are fiduciaries, here, Waffen signed an acknowledgement form, indicating that no fiduciary relationship existed. While an implied contract for escrow services exists between Midland and Waffen, it is not the

case that *both* parties understood that a fiduciary relationship existed between them. Waffen cites no authority for a rule that fiduciary duties may not be waived by the party benefiting from the duty. "A fiduciary duty is a common-law duty. As with any such duty, the obligor may be relieved of it by the obligee who would benefit from its performance." *Cruz v. South Dayton Urological Associates, Inc.* (1997), 121 Ohio App.3d 655, 663. A claim for breach of fiduciary duty necessarily fails when no fiduciary duty exists. Thus, the trial court did not err in dismissing Waffen's claim for breach of fiduciary duty.

{¶ 42} A finding of no fiduciary duty on Midland's part, however, does not render Waffen's ordinary negligence claim moot. Absent a fiduciary relationship, Midland cannot be held to a higher standard of care. Midland can, however, be held to a standard of ordinary care in its duty to disburse Waffen's funds according to the "transaction documents" – the Waffen-Summers purchase agreement and the settlement statement. All documents show that Midland was to disburse Waffen's funds to "Wayne William Waffen" or "Wayne Wm. Waffen" – not to "Waffen Enterprises, L.L.C." A genuine issue of material fact exists, therefore, as to whether Midland was negligent in disbursing funds due to Waffen in its capacity as escrow agent pursuant to the terms of the implied escrow contract. The trial court erred in dismissing this claim.

{¶ 43} On motions for summary judgment, and again on appeal, Midland argues that if it was negligent in accepting instructions from the unknown caller regarding Waffen's disbursement, its negligence was no greater than Waffen's negligence, since

Waffen failed to provide Midland with instructions for the disbursement at closing. Waffen admitted that he did not call Midland before closing to give disbursement instructions or give disbursement instructions to Midland at closing. He also admitted that he did not follow up with his attorney to prepare the alleged 1031 transaction.

{¶ 44} The trial court correctly held that the question of comparative negligence was not properly determined at the summary judgment stage. The trial court also correctly held that reasonable minds could differ as to whether Waffen or Midland was more negligent. It should not, therefore, have dismissed Waffen's negligence claim on the grounds that Midland had no duty to Waffen as escrow agent. See *Lashua v. Lakeside Title & Escrow Agency, et al.*, 5th Dist. No. 2004-CA-00237, 2005-Ohio-1728 (applying comparative negligence to claims that a title agency wrongfully disbursed funds). The issue of comparative negligence is for the fact finder to resolve, since the evidence is not so compelling that reasonable minds can reach but one conclusion. *Simmers v. Bentley Const. Co.* (1992), 64 Ohio St.3d 642, 646.

{¶ 45} Waffen's first assignment of error is well-taken to the extent that the trial court erred in dismissing his claims for breach of contract and negligence. The first assignment of error is not well-taken with respect to Waffen's claim for breach of fiduciary duty. Waffen's second assignment of error is not well-taken. The grant of summary judgment to Anchors Away is affirmed. The grant of summary judgment to Midland is reversed in part and affirmed in part. This matter is remanded to the Ottawa County Court of Common Pleas for further proceedings in accordance with this decision.

Midland and Waffen are each responsible for one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE