IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LARRY YOUNG and SYLVIA YOUNG **PLAINTIFF**

V. **4:07-CV-00668-WRW**

BANK OF AMERICA, NA, et al. **DEFENDANTS**

ORDER

Pending is Defendant Bank of America's Motion for Summary Judgment (Doc. No. 65). Plaintiffs have responded, and Bank of America has replied.[1] For the reasons set out below, the motion is DENIED.

I. BACKGROUND[2]

On November 14, 2003, Plaintiffs acquired homeowner's insurance from Foremost to cover property located at 19 Sheraton Oaks Dr, Sherwood, Arkansas, 72120 (the "Property"). Premium Payment Notices were mailed to Bank of America, and the insurance premiums were paid through an escrow account maintained by Bank of America. The policy automatically renewed each year, and Bank of America paid the policy premiums in 2003, 2004, and 2005.

On July 31, 2006, a bankruptcy trustee issued Bank of America a check for $7,382.08,[3] as a "principal payment" and "interest payment" to pay off the mortgage on the Property.[4] In an

[1]Doc. Nos. 76, 81.

[2]Unless otherwise noted, the background comes from the parties' Statements of Undisputed Facts (Doc. Nos. 67, 78).

[3]According to the bankruptcy documents, $6,893.77 was for principal and $488.31 was for interest.

[4]Doc. No. 65-3, Ex. 3.

August 22, 2006, letter, Plaintiffs' bankruptcy lawyer pointed out that Bank of America had "been paid in full" and requested "a Mortgage Release."[5]

On September 19, 2006, Foremost mailed a Premium Payment Notice to Bank of America for coverage from November 18, 2006, to November 18, 2007. After the notice was mailed, Plaintiffs increased their personal property coverage under the policy, and Foremost mailed a second Premium Payment Notice to Bank of America on November 10, 2006, which required payment by December 12, 2006. Neither Plaintiffs nor Bank of America paid the premium.

On November 14, 2006, Bank of America sent a mortgage release to Plaintiffs. The mortgage release "certifie[d]" that Plaintiffs had paid off their loan as of November 14, 2006, and informed Plaintiffs that if "insurance had previously been paid through your escrow account, you now assume responsibility for payment of your . . . annual homeowner's insurance premium."[6]

In mid December, Plaintiffs received a $2,030.89 check "For Payment of Escrow to Mortgagor" from Bank of America, which Plaintiffs deposited on December 18, 2006.[7]

On December 19, 2006, Foremost mailed a letter to Bank of America informing it that Plaintiffs' insurance policy would be cancelled on January 3, 2007, because of nonpayment.

On February 3, 2007, a fire destroyed the Property, and Foremost refused to pay on the policy, claiming the policy lapsed because of non-payment.

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[5]Doc. No. 65-2, Ex. 1.

[6]Doc. No. 65-2, Ex. 2.

[7]Doc. No. 65-4, Ex. 11.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds.[8] The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.[9]

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should only be granted when the movant has established a right to the judgment beyond controversy.[10] Nevertheless, summary judgment promotes judicial economy by preventing trial when no genuine issue of fact remains.[11] This court must view the facts in the light most favorable to the party opposing the motion.[12] The Eighth Circuit has also set out the burden of the parties in connection with a summary judgment motion:

> [T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*,"[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.[13]

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[8] *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed R. Civ. P. 56.

[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

[10] *Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

[11] *Id.* at 728.

[12] *Id.* at 727-28.

[13] *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted)).

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.[14]

III. DISCUSSION

Bank of America asserts that Plaintiffs' breach of fiduciary duty claim is without merit because, a mortgagor-mortgagee relationship existed between the parties, and therefore no fiduciary duty existed. This argument overlooks the fact that Bank of America was Plaintiffs' escrow agent, which apparently established a fiduciary relationship.[15]

Material facts remain in dispute as to whether Bank of America breached their fiduciary duty as Plaintiff's escrow agent.

CONCLUSION

Based on the findings of fact and conclusions of law above, Bank of America's Motion for Summary Judgment (Doc. No. 65) is DENIED.

IT IS SO ORDERED this 9th day of April, 2009.

/s/ Wm. R. Wilson, Jr.
UNITED STATES DISTRICT JUDGE

[14] *Anderson*, 477 U.S. at 248.

[15] *Patel v. Gannaway*, 726 F.2d 382, 384 (8th Cir. 1984) (holding that an escrow agent "becomes agent of both buyer and seller and this agency creates a fiduciary relationship"); see also, *In the Matter of Arkansas Bar Association*, 702 S.W.2d 326, 360 (Ark. 1985) ("[A] lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.).