

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D18-3075

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CARTER DEVELOPMENT OF  
MASSACHUSETTS, LLC,

Appellant,

v.

G. ALAN HOWARD and MILAM  
HOWARD NICANDRI DEES &  
GILLAM, P.A.,

Appellees.

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On appeal from the Circuit Court for Duval County.  
Adrian G. Soud, Judge.

November 26, 2019

ROWE, J.

Carter Development of Massachusetts, LLC appeals an order granting summary judgment for G. Alan Howard and Milam Howard Nicandri Dees & Gillam, P.A. in a case involving a failed real estate investment. For the reasons that follow, we affirm.

*I. Background*

Suzanne Carter formed Carter Development of Massachusetts, LLC to invest in a real estate project developed by Sanctuary Beach, LLC. Sanctuary Beach sought investors for the

development and represented that it had a conditional letter of commitment for a loan to develop the property. To secure financing from its lender, Sanctuary Beach required \$650,000 for earnest money deposits. Carter Development entered into a Purchase Agreement with Sanctuary Beach, agreeing to pay \$650,000 for a 20% interest in the development.

The Purchase Agreement was negotiated by Carter Development's counsel, H. Glen Alberich, and Sanctuary Beach's counsel, G. Alan Howard of Milam Howard Nicandri Dees & Gillum, P.A. It provided:

(b) The purchase price for the Interest shall be \$650,000, shall be paid upon execution of this Agreement, and shall be deposited into the trust account of Milam Howard Nicandri Dees & Gillam, P.A. ("Milam Howard") in accordance with wire instructions to be furnished to Carter Development. The purchase price proceeds shall be held by Milam Howard pursuant to the terms of that certain Escrow Agreement dated of even date herewith by and between Sanctuary Beach and Milam Howard.

Several weeks after the Purchase Agreement was signed, Sanctuary Beach and Milam Howard executed the Escrow Agreement.<sup>1</sup> The agreement included the following terms:

The parties hereto agree that the Escrow Funds shall be held by Escrow Agent and delivered in accordance with the following:

(a) Escrow Funds shall be delivered to Escrow Agent by Carter Development.

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<sup>1</sup> Though the Escrow Agreement was not fully executed until weeks after the Purchase Agreement, it was backdated to reflect the same date as the Purchase Agreement.

(b) Escrow Funds shall be disbursed solely for the purpose of paying earnest money deposits under the Purchase Contracts or to fund Project related costs and expenses.

(c) Sanctuary Beach shall deliver written notice to Escrow Agent requesting disbursement of Escrow Funds. Such notice shall include the purposes for which the Escrow Funds shall be disbursed, and such purposes shall be limited to those purposes described in paragraph 4(b) above. Such notice shall also include wire transfer instructions for the requested disbursement. Upon written notice from Sanctuary Beach requesting disbursement of Escrow Funds, Escrow Agent shall disburse the Escrow Funds then in its possession pursuant to the written notice; provided, however, that Escrow Agent shall have no obligation to disburse Escrow Funds for purposes other than those indicated in paragraph 4(b).

The Escrow Agreement outlined the duties of Milam Howard:

Escrow Agent's duties and responsibilities shall be limited to those expressly set forth in this Agreement. It shall be sufficient if any document described herein is delivered to Escrow Agent and purports on its face to be correct in form and signed and otherwise executed by the party or parties required to sign or execute the same as indicated therein. Escrow Agent shall not be required in any way to determine the identity or authority of any person executing the same or the genuineness of any signature.

The Escrow Agreement also addressed liability:

Upon delivery or return of the Escrow Funds in accordance with the terms of this Agreement, Escrow Agent shall be discharged and released

from any and all liability hereunder. Escrow Agent shall not be liable for any error in judgment, any act or omission, any mistake of law or fact, or for anything that it may do or refrain from doing in connection herewith, except for its own gross negligence. Sanctuary Beach agrees to indemnify and hold Escrow Agent harmless from and against any losses, costs, damages, expenses, claims and attorneys' fees and costs suffered or incurred by Escrow Agent in connection with or arising out of this Agreement. Sanctuary Beach recognizes and acknowledges that Escrow Agent is serving as escrow agent without compensation solely as an accommodation to them and agree that Escrow Agent shall not be liable to any of them for any act or omission hereunder or any matter or thing arising out of the conduct of Escrow Agent hereunder, except for its gross negligence.

After executing the Purchase Agreement, Carter Development wired \$650,000 to Milam Howard. In the months that followed, Milam Howard disbursed escrow funds for earnest money deposits, legal fees and services, and project-related costs and expenses. But, after a downturn in the real estate market, Sanctuary Beach could not close on the loan for the development and its plan to develop the property failed.

When Carter Development realized that the real estate development would not move forward, it sought return of the funds it invested under the Purchase Agreement. It sued the escrow agent, Milam Howard, for breach of fiduciary duty, accounting, civil conspiracy and negligence. It asserted that the \$650,000 paid to Sanctuary Beach under the Purchase Agreement was to be used exclusively to fund an earnest money deposit. Instead, Milam Howard disbursed funds for other purposes authorized in the Escrow Agreement between Milam Howard and Sanctuary Beach. Specifically, Milam Howard disbursed funds for project-related costs and expenses.

Milam Howard moved for summary judgment, arguing that (1) it owed Carter Development no duty under the Purchase Agreement because it was not a party to the Purchase Agreement; (2) it performed all obligations under the Escrow Agreement and Carter Development was not a party to the Escrow Agreement; and (3) the Escrow Agreement released it from liability.

The trial court determined there was no record evidence revealing any genuine issue of material fact that Milam Howard owed any duty to Carter Development under the Purchase Agreement or that Milam Howard breached any duty under the Escrow Agreement. The court also found that the Escrow Agreement limited liability for Milam Howard to liability for its own gross negligence, and that the facts presented did not establish a claim of gross negligence. This appeal follows.

## *II. Analysis*

We review the trial court's order granting summary judgment de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Id.*<sup>2</sup>

The trial court entered summary judgment on Carter Development's claims that Milam Howard breached duties it owed to Carter Development. Carter Development challenges the

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<sup>2</sup> The Florida Supreme Court accepted jurisdiction in *Wilsonart, LLC v. Lopez*, SC19-1336, 2019 WL 5188546, at \*1 (Fla. Oct. 15, 2019) to consider whether Florida should "adopt the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)."

summary judgment ruling on two grounds.<sup>3</sup> First, it argues that genuine issues of material fact existed about whether its attorney Mr. Alberich negotiated (or had the authority to negotiate) the Escrow Agreement that authorized Milam Howard to disburse escrow funds for project-related costs and expenses. Carter Development contends if Mr. Alberich agreed to allow Milam Howard to disburse funds for those purposes, he lacked authority to do so since Carter Development disclaimed any such uses in the Purchase Agreement. But whether Mr. Alberich negotiated or had the authority to negotiate the terms of the Escrow Agreement is not material to Carter Development's claims against Milam Howard. This is because Milam Howard owed no duty to Carter Development under the Escrow Agreement.

An escrow holder owes a fiduciary duty only to the parties to the escrow transaction. *Watkins v. NCNB Nat. Bank of Florida, N.A.*, 622 So. 2d 1063, 1065 (Fla. 3d DCA 1993); *Cf. The Florida Bar v. Joy*, 679 So. 2d 1165, 1167 (Fla. 1996) (an escrow agent owes a fiduciary duty to all of the principal parties). Any limitation on the use of money placed in an escrow pursuant to an agreement is governed solely by the terms of that agreement. *Van Vorgue v. Rankin*, 41 So. 3d 849, 853 (Fla. 2010).

Carter Development was not a party to the Escrow Agreement. The sole parties to the Escrow Agreement were Sanctuary Beach and Milam Howard. The Escrow Agreement allowed Milam Howard to disburse funds for "project related costs and expenses." It is not material whether Carter Development or its attorney agreed to the language in the Escrow Agreement allowing for disbursement of escrow funds for project-related costs and expenses. Although Carter Development contends that the Purchase Agreement allowed for disbursement of escrow funds only for earnest money deposits, the Purchase Agreement also unambiguously provides that the escrow funds were to be held by Milam Howard and that those funds would be distributed according to the Escrow Agreement. The Escrow Agreement

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<sup>3</sup> Carter Development raises a third issue on appeal regarding the trial court's order striking the affidavit of an expert witness. We affirm this issue without further comment.

authorized Milam Howard to disburse funds for project-related costs and expenses. Because Milam Howard owed Carter Development no duty under the Escrow Agreement, any actions of Carter Development's attorney in negotiating the Escrow Agreement are not material. Thus, the trial court did not err by entering summary judgment for Milam Howard.

Carter Development argues next that there were genuine issues of material fact about whether Milam Howard had authority to disburse the escrow funds. Carter Development asserts that because the Escrow Agreement had not been executed when the escrow funds were wired to Milam Howard, Milam Howard was required to return the funds immediately.

This argument also fails. That the Escrow Agreement had not been fully executed when the funds were transferred did not alter Milam Howard's obligations as escrow agent. This is because Milam Howard's execution of the Escrow Agreement was not a condition precedent to implementing the terms of the Agreement. *See Armbruster v. Alvin*, 437 So. 2d 725, 727 (Fla. 3d DCA 1983) (holding that the fact that an escrow agreement was not signed by an escrow agent did not mean that as a matter of law it was not binding on him); *see also Gateway Cable T. V., Inc. v. Vikoa Const. Corp.*, 253 So. 2d 461, 463 (Fla. 1st DCA 1971) (assent may be shown by acts or conduct of the parties).

The parties to the Purchase Agreement and the parties to the Escrow Agreement understood that the Escrow Agreement would provide the terms by which Milam Howard would hold the escrow funds. Even though the Purchase Agreement required a signed Escrow Agreement, Milam Howard was not party to the Purchase Agreement. It was a party only to the Escrow Agreement. As a matter of law, Milam Howard was bound only by the terms of the Escrow Agreement. Because the Escrow Agreement authorized Milam Howard to disburse escrow funds for purposes other than those provided for in the Purchase Agreement, the trial court did not err in finding that there was no genuine issue of material fact over whether Milam Howard breached any duty under the Escrow Agreement. The order granting summary judgment is AFFIRMED.

B.L. THOMAS and OSTERHAUS, JJ., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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David P. Healy of Dudley, Sellers, Healy, Heath & Desmond, PLLC, Tallahassee, for Appellant.

Michael R. D'Lugo of Wicker, Smith, O'Hara, McCoy & Ford, P.A., Orlando, for Appellees.