

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

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REPUBLIC BANK,

Plaintiff-Appellee,

v

JAMES L. ELSMAN and JANICE ELSMAN,

Defendants-Appellants.

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UNPUBLISHED

September 21, 1999

No. 207556

Oakland Circuit Court

LC No. 96-530439 CH

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

In 1989, defendants obtained a mortgage from plaintiff to purchase a six-acre piece of vacant property in Oakland County. On May 17, 1994, plaintiff foreclosed on the mortgage through advertisement because of defendants' late payments on the mortgage. Plaintiff was the high bidder and purchaser at the foreclosure sale, after which a deficiency remained. Plaintiff sued defendants for the deficiency, and defendants filed a counterclaim, denying liability and questioning the validity of the sale. The parties entered into a settlement agreement, under which defendants agreed to withdraw all objections to the foreclosure sale and plaintiff agreed to extend the existing redemption period by one year, to May 17, 1996. Upon termination of the extended redemption period, defendants were to "have no further right, title or interest" in the property. Any amendment to or modification of the agreement was required to be in a writing signed by plaintiff and defendants.

Shortly before the expiration of the extended redemption period, defendants inquired whether plaintiff would grant them a further extension. In response, plaintiff offered to extend the period for up to four months, in exchange for \$10,000 for each month of the extension. Defendants faxed a letter to plaintiff purporting to accept the offer; however, the letter stated that the \$10,000 payment would "pay down [p]rincipal on the \$142,600 [r]edemption [p]rice." Plaintiff responded that the \$10,000 was not to be applied against the redemption price. On May 14, 1996, defendants delivered to plaintiff a check in the amount of \$10,000. The following day, plaintiff advised defendants that it would not cash the check unless defendants agreed in writing to the terms of the offer. Defendants refused and plaintiff

returned their check. Plaintiff then filed this suit on September 18, 1996, seeking a declaration that it owned the subject property and was entitled to all proceeds from its sale.

In October 1996, the parties entered into an escrow agreement under which they agreed to close the sale of the property to a third party for \$375,000. Plaintiff was to receive \$148,577.86, representing the redemption price and interest. The remaining amount was to be placed in escrow and not to be disbursed until the escrow agent had received either a release agreement signed by the parties or a final, nonappealable judgment from a court upon exhaustion of all appeal rights. On February 27, 1997, plaintiff and the third party entered into an agreement of sale for \$375,000. Plaintiff then moved for summary disposition arguing that there was no agreement to extend the redemption period beyond May 17, 1996, that defendants had failed to redeem the property by that date, and that defendants no longer had any interest in the property. Plaintiff also moved for the entry of a default judgment under MCR 2.313(D)(1), which permits a court to enter a default judgment against a party who fails to appear for his or her deposition.

The trial court granted the motion for summary disposition. It ruled that the settlement agreement was clear and unambiguous and was required to be enforced as written. The trial court found that the time to redeem was May 17, 1996, that defendants had failed to redeem as of that date, and that under the agreement defendants had lost all further rights, title, and interest in the property. The trial court further ruled that the doctrine of “clogging the equities” was not applicable, and that defendants’ submission of the check for \$10,000 did not create a binding contract to extend the redemption period because plaintiff did not cash the check, signaling that it did not accept a modification to the contract. The trial court granted plaintiff’s motion for summary disposition under MCR 2.116(C)(10), and found the request for a default judgment under MCR 2.313(D)(1) to be moot.

This Court reviews de novo a trial court’s decision on a motion for summary disposition *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, depositions, affidavits, admissions, and any other documentary evidence submitted to it to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek, supra*, p 337.

Defendants first argue that the trial court erred in ruling that they had failed to comply with the terms of the settlement agreement and that no contract to further extend the redemption period existed, and in thereby granting plaintiff’s motion for summary disposition. A written contract is construed according to the intentions expressed in it, when those intentions are clear from the face of the instrument. *Zurich Ins Co v CCR and Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). The unambiguous terms of a contract must be enforced as written, interpreting the language in its plain and easily understood sense. *Gelman Sciences, Inc v Fidelity & Casualty Co*, 456 Mich 305, 318; 572 NW2d 617 (1998). The trial court correctly held that the terms of the settlement agreement are “clear and not ambiguous and should be enforced as written,” and that, because defendants did not pay the redemption price on or before May 17, 1996, they had lost all interest in the property.

Defendants contend that a binding agreement to extend the redemption period was created when they accepted plaintiff's offer to allow a thirty-day extension in exchange for a cash payment of \$10,000. However, a valid contract requires mutual assent on all essential terms, and acceptance must be unambiguous and in strict conformance with the offer. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). Plaintiff presented voluminous documentary evidence supporting its argument that the parties had never agreed that the \$10,000 extension fee would be applied against the redemption price, as stated in defendants' "acceptance." Defendants offered no evidence to support their contention that there was a genuine issue of fact in this regard. "[A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). The trial court did not err in determining that no contract to extend the redemption period had been created.

Defendants next argue, for the first time on appeal, that there was substantial performance where the property was sold and plaintiff received \$142,600 from the sale proceeds. Issues raised for the first time on appeal ordinarily are not subject to review. See *Blackwell v Citizens Ins Co of America*, 457 Mich 662, 673-674; 579 NW2d 889 (1998); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, the doctrine of substantial performance is inapplicable to the facts of this case. A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted have been performed with such approximation that a party obtains substantially what is called for by the contract. *Gibson v Group Ins Co*, 142 Mich App 271, 275; 369 NW2d 484 (1985). The very essence of the parties' settlement agreement was that defendants were given a one-year extension of the redemption period. Because they failed to redeem before the deadline, it cannot be said that all the essentials of the contract had been performed. *Id.*

Defendants additionally contend that Michigan's policy against the "clogging of the equity" supports their argument that they substantially complied with the settlement agreement. However, the doctrine against clogging the equity of redemption applies to contracts between the mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off. *Russo v Wolbers*, 116 Mich App 327, 336; 323 NW2d 385 (1982). Defendants' equity of redemption was in no way impinged upon; therefore, this doctrine has no application. See *Blackwell Ford, Inc v Calhoun*, 219 Mich App 203, 215; 555 NW2d 856 (1996). Because defendants failed to provide any evidence of a genuine issue of material fact regarding whether they had complied with the terms of the settlement agreement, the trial court did not err in determining that they had no interest in the property following the expiration of the redemption period, and summary disposition was appropriately granted.

Defendants make numerous factual arguments in their brief relating to the unfairness of plaintiff's conduct, defendants' responsibility for the profitable sale of the property, and the windfall enjoyed by plaintiff. However, defendants offer no legal support for the implied argument that the facts alleged entitle them to relief. A mere statement without authority is insufficient to bring an issue before this Court. A party may not announce a position and then leave it to this Court to discover and rationalize

the basis for the claim, or elaborate the party's arguments, and then search for authority to either sustain or defeat that position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Next, defendants argue that the trial court abused its discretion in denying their motion for relief from judgment. Following the summary disposition hearing, plaintiff submitted a proposed judgment under the seven-day rule, MCR 2.602(B)(3). Defendants failed to file written objections to the proposed judgment within seven days, as required by MCR 2.602(B)(3)(a). Accordingly, the trial court entered the judgment, which included a provision that "all funds held in escrow shall be paid immediately" to plaintiff. Defendants moved for relief from the judgment, arguing that this provision conflicted with an earlier agreement of the parties, which provided that the escrow funds were not to be released until there was a "final, non-appealable judgment."

This Court reviews the trial court's denial of a motion for relief from judgment for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1995). Defendants did not argue that plaintiff failed to comply with the requirements of MCR 2.602(B)(3) or that the judgment did not conform to the trial court's decision, nor did they provide any explanation for their failure to object in a timely manner to the entry of the proposed judgment. It cannot be said that the trial court's finding that defendants had failed to establish that they were entitled to relief from the judgment was so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). Moreover, any error in denying the motion for relief from judgment was harmless. Defendants did not redeem the property by May 17, 1996; therefore, they had lost all interest in the property as of that date. Plaintiff was entitled to the proceeds from its sale of the property.

Affirmed.

/s/ Michael J. Kelly  
/s/ Kathleen Jansen  
/s/ Helene N. White