STATE OF MICHIGAN

COURT OF APPEALS

FIFTH THIRD MORTGAGE-MI, L.L.C., FIFTH THIRD MORTGAGE COMPANY, and FIFTH THIRD BANK,

Plaintiffs-Appellees,

v

ROBERT M. HANCE, STEPHANIE HANCE, and EXECUTIVE ESTATE BUILDERS, L.L.C.,

Defendants-Appellants,

and

ROCKRIDGE HOLDINGS, INC. and TYRONE A. HOGAN,

Defendants.

UNPUBLISHED
September 29, 2011

No. 294633
Oakland Circuit Court
LC No. 05-070592-CZ

FIFTH THIRD MORTGAGE-MI, L.L.C., FIFTH THIRD MORTGAGE COMPANY, and FIFTH THIRD BANK,

Plaintiffs-Appellants,

v

ROBERT M. HANCE, STEPHANIE HANCE, EXECUTIVE ESTATE BUILDERS, L.L.C., and ROCKRIDGE HOLDINGS, INC.,

Defendants,

and

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant-Appellee.

No. 294698
Oakland Circuit Court
LC No. 05-070592-CZ

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

This appeal involves a "straw man" scheme in which several individuals and companies conspired to defraud Fifth Third Mortgage-MI, L.L.C., Fifth Third Mortgage Company, and Fifth Third Bank (hereinafter "Fifth Third") by procuring residential mortgages and then defaulting on the loans. While the original lawsuit identified a large number of defendants, this appeal concerns only the grant of summary disposition involving two parties. Stephanie Hance contests the grant of summary disposition in favor of Fifth Third on its claim of statutory conversion and the imposition of treble damages. Fifth Third challenges the grant of summary disposition in favor of First American Title Insurance Company (hereinafter "First American") based on the trial court's rejection of the vicarious liability claim premised on the wrongdoing of its agent Continental Title Insurance Agency, Inc. We affirm in Docket No. 294633, and reverse in part and affirm in part in Docket No. 294298.

I. DOCKET NO. 294633

Robert Hance, the husband of Stephanie Hance was employed by Fifth Third and involved in the origination of 11 fraudulent residential mortgage loans. Executive Estate Builders, L.L.C. (hereinafter "Executive Estate") was a limited liability corporation established by Stephanie Hance. Robert and Stephanie Hance received $531,858.92 in fraudulent loan proceeds or payoffs from co-conspirators, which were deposited into their personal bank accounts or into the bank account of Executive Estate. The trial court granted summary disposition in favor of Fifth Third against Executive Estate and the Hances for $531,858.92 in actual damages on the conversion claim and rendered a judgment for treble damages of $1,595,576.76, as permitted by statute, along with costs and attorney fees.[1]

Sufficient evidence existed to support the grant of summary disposition and the imposition of the statutory damage award. Stephanie Hance does not actively contest the trial court's ruling on the conversion claim. The actual thrust of Stephanie Hance's appeal is to avoid the statutory award of treble damages for conversion.[2]

Stephanie Hance argues that the statute imposing treble damages is not applicable because Fifth Third failed to demonstrate that she actually "knew that the property was stolen, embezzled, or converted."[3] Her assertion regarding the meaning of the statutory language is consistent with our Supreme Court's interpretation, "Constructive knowledge is not sufficient to impose liability under MCL 600.2919a. The term 'knew' in the statute means knowledge that

[1] MCL 600.2919a.

[2] *Id.*

[3] MCL 600.2919a(1)(b).

the property is stolen, embezzled, or converted."[4] But, Stephanie Hance conveniently ignores the full implication and distinction in case law between "constructive knowledge" and "actual knowledge proven by circumstantial evidence."[5] While the statutory imposition of treble damages requires actual knowledge, this level of scienter can be demonstrated through circumstantial evidence. As noted by our Supreme Court:

> We hold that, under MCL 600.2919a, constructive knowledge is not sufficient; a defendant must show that the property was stolen, embezzled, or converted. . . . [A] defendant's knowledge that the property was stolen, embezzled, or converted can be established by circumstantial evidence.[6]

It is not necessary to demonstrate Stephanie Hance actually knew the intricate workings of the scam or the details of how the monies were obtained. In accordance with the statute, liability can be imposed for merely possessing, concealing or aiding in the concealment of the "stolen, embezzled or converted property" with the knowledge "that the property was stolen, embezzled, or converted."[7]

We find it impossible to believe Stephanie's Hance's assertion that despite the influx in excess of a half million dollars into the Executive Estate account and her personal bank accounts she remained blissfully ignorant of their illicit source. Stephanie Hance initiated Executive Estate and the business was based at her residential address. Stephanie Hance, her husband, and Executive Estate received exorbitant fees without a commensurate performance of actual work or services. The close relationship of Robert and Stephanie Hance, their shared access to the accounts, in conjunction with evidence that Stephanie did not render any services yet directly received monies from Rockridge Holdings, an entity involved in the fraudulent procurement of mortgage loans from Fifth Third, was sufficient to show actual knowledge regarding the illicit obtainment of the funds.

Stephanie Hance's reliance on her husband's alleged statement that she was unaware of the illegal activities or source of the funds is unavailing. The statement comprises inadmissible hearsay[8] that does not fall within a recognized exception.[9] In addition, the statement would have required the trial court to engage in a credibility determination, which was inappropriate at summary disposition.[10]

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[4] *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 202; 694 NW2d 544 (2005).

[5] *Id.*

[6] *Id.*

[7] MCL 600.2919a(1)(b).

[8] MRE 801.

[9] MRE 803.

[10] *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005).

Stephanie Hance also makes a rather convoluted argument asserting the applicability of a statutory provision pertaining to the persons authorized to sign documents for limited liability corporations.[11] Hance relies on the statutory language, "Any document other than original articles of organization required or permitted to be filed under this act that this act requires be executed on behalf of the domestic limited liability company shall be signed by a manager of the company if management is vested in 1 or more managers, by at least 1 member if management remains in the members, or by any authorized agent of the company."[12] She asserts that this language permits an organizer of a company to file the articles of organization without necessarily creating "liability or responsibility for the company's actions." Impliedly, she contends that her husband as the manager of Executive Estate was responsible for all documents indicating the occurrence of fraud and that she should be held harmless as merely the company's organizer. The initial problem with this argument is that Stephanie Hance cites no legal authority in support of her premise. "[T]his Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal."[13] Her argument also fails to address the circumstantial evidence demonstrating her knowledge of the use and purpose of Executive Estate and its accounts. Her status or authority as a manager is functionally irrelevant. All that need be shown is that Stephanie Hance had actual knowledge of the use and purpose of Executive Estate and its assets for an illicit purpose.

II. DOCKET NO. 294698

Fifth Third added First American as a defendant and alleged breach of contract, indemnity, and vicarious liability. Continental Title Insurance Agency, Inc. (hereinafter "Continental") and its principal Paul J. Nicoletti, issued title commitments and policies underwritten by First American on at least seven residential mortgages valued at $1,000,000 or more, which were later determined to be fraudulently originated and closed. First American asserted before the trial court that it was entitled to have Fifth Third's claims dismissed. After a hearing, the trial court agreed and dismissed First American. On appeal, Fifth Third challenges these rulings.

Regarding the breach of contract claim, the record shows that Fifth Third provided instructions to Continental delineating the requirements for the title agent in conducting the closings. The instructions relevant to these mortgages indicated that Continental was to provide a closing protection letter (CPL) before the closing date set for each loan. After the closings were conducted, Fifth Third became concerned about the mortgages and undertook a review of the files. During the review, Fifth Third discovered that CPLs covering the loans had not been issued as requested. Fifth Third then contacted Continental and requested that Continental issue

[11] MCL 450.4103.

[12] MCL 450.4103(2).

[13] *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

a CPL, which Continental did on November 17, 2005. The CPL was directed to Fifth Third Mortgage and designated the issuing agent as Continental.

In the trial court, First American challenged the enforceability of the CPL on grounds that the CPL, by its terms, only had prospective application and could not be retroactively applied to the mortgages. The trial court agreed and dismissed Fifth Third's claim for breach of contract. On appeal, Fifth Third asserts that the CPL issued by Continental after the mortgage closings provided coverage and imposed liability on First American for the wrongdoing of Continental in the disbursement of funds.

This Court has previously stated the following about a CPL:

> A closing protection letter is typically issued by a title insurance underwriter "[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds." 2 Palomar, Title Ins Law, § 20:11. These letters are issued incidentally to title insurance, and they are to persuade customers to trust their agents, so that their policies can be sold." *Id.*, § 20:13. Thus, consideration is given, i.e., the purchase of the insurance policy, and a breach of contract action may be maintained independent of the title insurance policy. *Id.*[14]

"The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement."[15] If the language of a contract is unambiguous, the contract must be construed and enforced as written.[16] An unambiguous contract is reflective of the parties' intent as a matter of law.[17] Only where a contract is ambiguous does interpretation of the contract become an issue of fact.[18] A contract is ambiguous when two provisions irreconcilably conflict or when a term is equally susceptible to more than one meaning.[19] The language of a contract is to be interpreted in accordance with the rules of grammar.[20] Thus, the language of a contract, like that of a statute, must be read and understood in its proper grammatical context.[21] It is a

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[14] *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 80; 761 NW2d 832 (2008).

[15] *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007).

[16] *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

[17] *Id.*

[18] *Butler v Wayne Co*, 289 Mich App 664, 671-672; 798 NW2d 37 (2010).

[19] *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010).

[20] *Pendill v Maas*, 97 Mich 215, 218; 56 NW 597 (1893).

[21] See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

general rule of grammar that a modifying clause is confined solely to the last antecedent, unless a contrary intent appears.[22]

The relevant portion of the CPL reads:

> When title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan in which you are *to be* the seller or purchaser of an interest in the land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by the Issuing Agent (an Agent authorized to issue title insurance for the Company), referenced herein and when such loss arises out of: . . . .[23]

On appeal, Fifth Third and First American both argue that the language of the CPL, and specifically the "to be" clause, is unambiguous. According to Fifth Third, the "to be" clause simply describes the type of interest of the insured that is subject to coverage and is not relevant to the timing of the real estate transaction. First American contends that the "to be" clause provides for prospective application only because it is a clear reference to future real estate transactions.

Initially, we note that neither First American nor Fifth Third maintains that any extrinsic evidence exists to illuminate the parties' understanding of the CPL. In particular, it is undisputed that when Continental printed the CPL from First American's website that Continental was an approved title agent authorized to obtain CPLs from First American's website. It is also undisputed that the CPL issued to Fifth Third is enforceable according to its terms and conditions and that Fifth Third paid the consideration required for the protection provided by the CPL.

With regard to whether the CPL must be given prospective application, we find that a grammatical examination of the sentence in which the "to be" language is found supports Fifth Third's interpretation. The subject, verb, and object of the independent clause of the complex sentence at issue states that "the Company [First American] . . . agrees to reimburse you [Fifth Third] for actual loss . . . " subject to terms and conditions not relevant here. This independent clause is preceded by two dependent clauses. The first dependent clause reads: "[w]hen title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan[.]" The second dependent clause that follows states: "in which you are *to be* the seller or purchaser of an interest in the land or a lender secured by a mortgage

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[22] *Id.*

[23] Emphasis added.

(including any other security instrument) of an interest in land[.]"[24] The first clause sets forth circumstances concerning title insurance of First American that is "specified" for closing on real estate in Michigan that will be subject to the agreement laid out in the subsequent independent clause. The second clause modifies the preceding clause by more particularly describing what "land located in the state of Michigan" is subject to the terms of the CPL. That is, it is not just any land in Michigan subject to a real estate transaction, but it is specifically land in Michigan subject to a real estate transaction that the named party, Fifth Third, will be the "seller," "purchaser," or "lender secured by a mortgage." Thus, the "to be" clause only operates to further identify the property covered by the CPL. When interpreted in context, the clause containing the "to be" language has no applicability to whether the CPL itself is to have prospective application because the language that it modifies does not relate to when the CPL becomes binding. Indeed, no language in the CPL specifies when the CPL becomes binding.

However, we cannot ignore the fact that the use of the phrase "to be" lends some credence to the notion that the real estate transactions subject to the CPL are ones in which Fifth Third will be the "seller," "purchaser" or "lender" in the future. Construing the "to be" language in this manner arguably gives the CPL prospective application.

But, even assuming that we were to find merit in First American's interpretation of the "to be" language, the "to be" clause would be ambiguous and application of the rule of *contra proferentem* would require that the CPL be construed against the drafter, First American. Pursuant to the rule of *contra proferentem*, ambiguities in a contract are to be construed against the drafter of the contract.[25] The rule, however, is only to be applied if all other conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, leaves the trier of fact unable to determine the parties' intent.[26] Here, even if the "to be" clause of the CPL is ambiguous, there is, as noted previously, no relevant extrinsic evidence that would aid a trier of fact in determining the parties' intent. The CPL contains boilerplate language that was not the subject of any negotiations. Continental simply printed the CPL after accessing it on First American's website. Because there is no relevant extrinsic evidence regarding the parties' intent, application of the rule of *contra proferentem* is proper and the CPL must be construed against First American. Accordingly, the trial court erred in concluding that the CPL only had prospective use and could not have retroactive application to the mortgages.

Fifth Third's argument that four of the mortgages had not closed because they were not recorded with the register of deeds at the time of the issuance of the CPL is unavailing. By statutory definition, only execution of the mortgage, not its recordation, is necessary for it to be deemed valid.[27] Recording of the mortgage merely provides or assures priority as "a properly recorded mortgage is notice to all subsequent purchasers that they take subject to any lien the

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[24] Emphasis added.

[25] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003).

[26] *Id.* at 471.

[27] MCL 565.154.

mortgagor may have on the property whether the record has been examined or not."[28] The fact that the four subject mortgages had not been recorded at the time of the issuance of the CPL is irrelevant to their validity.

Fifth Third sets forth two separate theories asserting the vicarious liability of First American based on the misconduct or negligence of Continental as its agent. One theory encompasses the liability of First American for what is the equivalent of a breach of contract based on Continental's failure to comply with Fifth Third's request for the completion of a CPL in conjunction with the issuance of the title insurance policies. The second theory pertains to the imposition of vicarious liability premised on the implied or apparent authority of Continental as an agent of First American in conducting the closings.

In evaluating Fifth Third's claim of vicarious liability premised on breach of contract, "[c]ourts traditionally have applied the common law of agency to decide whether a title insurance underwriter is liable for a title insurance agent's errors or dishonesty in escrowing funds and closing real estate transactions."[29] "In general, the title insurance underwriter only has liability for its agents' wrongful conduct in closings if the agent was acting within the course and scope of its actual or apparent authority as the title insurance underwriter's agent."[30] Factors designated as useful in making this determination include, but are not necessarily limited to (a) whether the agent is an attorney identified by the underwriter as an "approved attorney," (b) wording or content of the actual agency agreement between the agent and underwriter, (c) use by the agent of the underwriter's name on its letterhead, policies or other documentation, and (d) the extent of control the underwriter can exercise over the agent's escrow account or closing activities.[31]

The contract titled "Policy Issuing Agency Contract" indicates the appointment by First American of Continental as its agent "to act for, and in the name of, [First American] in transacting title insurance business, but only for the purposes and in the manner specifically set forth in this contract and for no other purpose and in no other manner whatsoever." Specifying the "AUTHORITY" granted, the contract indicates, "Agent is authorized to issue, in the name of Principal, title insurance commitments and policies (including endorsements thereto)" in accordance with specific provisions. The contract limits the authority of the agent, stating:

> This contract gives Agent no authority to incur obligations, contractual or otherwise, on behalf of Principal, except as herein specifically provided, no authority to commit Principal to any interpretation of the printed terms of any document, no authority to execute any agreement on behalf of Principal, except as

[28] *Ameriquest Mtg Co v Alton*, 273 Mich App 84, 94; 731 NW2d 99 (2006).

[29] 2 Title Ins Law (2010), § 20:17.

[30] *Id.*

[31] *Id.*

> authorized in writing by Principal, and no authority to accept services or summons or other process on behalf of Principal.

While the contract provides First American the right to "periodically inspect and audit" escrow accounts maintained by Continental, there is no indication of control by First American. In fact, "[t]he right of [First American] to periodically inspect and audit [Continental's] escrow accounts and escrow files shall not be construed by [Continental] or any party dealing with [Continental] as an undertaking on the part of [First American] to assume any responsibility or liability for the acts of or any errors or omissions of [Continental] in the performance of [Continental's] duties as escrowee under any escrow agreement."

The language of this contract clearly authorizes Continental only to issue title insurance commitments and policies. There is no specific authority granted to conduct closings or provide escrow services. The mere ability of First American to audit or inspect Continental's escrow accounts is insufficient to suggest any control over such accounts by First American. As noted by First American, in signing the documents pertaining to the mortgage closing instructions, the paperwork was endorsed by Nicoletti on behalf of Continental. First American was not identified or referenced in these documents. The Escrow Accounting Manual provided by First American to Continental does not alter these circumstances. The Manual is simply a tool provided by First American to "make suggestions about your escrow accounting system so that you can make it easier, more secure and more accurate" in anticipation of the periodic audits conducted. It does not contradict the actual contract between the parties indicating the lack of any control by First American over Continental's escrow accounts.

In asserting vicarious liability, Fifth Third "overlooks that an employer is only vicariously liable for the acts its employees commit while performing a duty within the scope of employment, and an employer is not liable for torts intentionally or recklessly committed by an employee beyond the scope of his master's business."[32] Fifth Third attempts to circumvent this rule by contending that the issuance of a CPL comprises standard practice in the title insurance trade and is typically provided in conjunction with a title insurance policy or commitment.[33] Yet, contrary to this assertion, Fifth Third acknowledges that the request for a CPL was not automatic with the issuance of a title policy or commitment but, rather, was part of a separate request pertaining to the closings. Although such requests may be standard or routine does not translate into an understanding that they are automatic given the need for a separate instruction to obtain a CPL. Contrary to Fifth Third's implication, "[a] lender who also wants the title insurer to be responsible for the agent's acts in connection with escrow closing activities and services

[32] *New Freedom Mtg Corp*, 281 Mich App at 79 (internal citations and quotation marks omitted).

[33] See Murray, *Closing Protection Letters: What Is (And Is Not) Covered?*, Practising Law Institute, Real Estate Law and Pratice Course Handbook Series, PLI Order No. 13949, (2008), citing *Sears Mtg Corp v Rose*, 134 NJ 326, 350-52 (1993), "which holds that while a CPL does not constitute a separate contract of insurance or provide a separate right of action against the title insurer, it is integrated into and is a part of the title policy."

must separately contract with the title insurer for such additional protection by entering into an 'insured closing letter' or 'closing protection letter.'"[34]

Fifth Third further asserts liability of First American in accordance with the doctrine of apparent authority.

> Under an apparent authority theory, vicarious "liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of business provided to him."[35]

"Simply put, [First American] as putative principal, must have done something that would create in [Fifth Third's] mind the reasonable belief that [Continental] was acting on behalf of [First American]."[36] "Apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent."[37] Fifth Third's communication directly with Continental regarding closing instructions and Continental's acknowledgement of such instructions in its own name, without reference to First American, fails to support Fifth Third's contention for the imposition of liability premised of apparent authority. This line of communication and documentation serves to highlight the absence of any asserted reliance by Fifth Third with regard to First American, based on the lack of reference to any representation involving First American in the solicitation of a CPL directly from Continental. We, therefore, find Fifth Third has failed to support its assertion of Continental's liability based on the absence of either actual or apparent authority.

Finally, we reject Fifth Third's contention that the grant of summary disposition was premature. Summary disposition is deemed to be premature if it is granted before discovery is complete unless it is unlikely that further discovery would reveal factual support for the litigant's position.[38] To preclude the grant of summary disposition on this basis it must demonstrate through the provision of "some independent evidence that a factual dispute exists."[39] Mere

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[34] *Id.*

[35] *Jones v Federated Fin Reserve Corp*, 144 F3d 961, 965 (CA 6, 1998), quoting *American Society of Mechanical Eng'rs, Inc v Hydrolevel Corp*, 456 US 556, 566; 102 S Ct 1935; 72 L Ed 2d 330 (1982).

[36] *Chapa v St Mary's Hosp*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991).

[37] *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995).

[38] *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

[39] *Michigan Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993).

speculation that material or relevant evidence might be revealed by conducting additional discovery is insufficient.[40]

Fifth Third had almost two years to conduct discovery. Despite the prolongation of discovery and the decision by the trial court to permit additional discovery regarding the existence of previous CPLs related to the questionable mortgages, Fifth Third simply conducted one deposition. It did not use the opportunity to submit additional discovery requests for admissions or production. There is nothing substantive to suggest that further discovery would contradict what evidence has already been admitted. "Michigan's commitment to open and far-reaching discovery does not encompass fishing expeditions. Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition."[41] The trial court correctly put an end to this protracted litigation based on Fifth Third's failure to provide a more definitive offer of proof demonstrating what further discovery would actually reveal.

Affirmed in part, reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

[40] See *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540-541; 687 NW2d 143 (2004).

[41] *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004) (citation omitted).