

STATE OF MICHIGAN  
COURT OF APPEALS

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JEFFREY D. FENLEY TRUST, by JEFFREY D.  
FENLEY, Trustee,

UNPUBLISHED  
March 5, 2013

Plaintiff-Appellee,

v

No. 306737  
Oakland Circuit Court  
LC No. 2010-115021-CK

FIRST VENDING PARTNERS, L.L.C.,

Defendant-Appellant.

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Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

In this action to enforce promissory notes, defendant appeals as of right from an order granting summary disposition to plaintiff pursuant to MCR 2.116(C)(9) and (10). We reverse and remand.

Plaintiff filed this action to enforce three promissory notes, each for \$50,000, that defendant executed in favor of plaintiff in 2004 and 2005 and that were payable on demand after a specified date. Defendant admitted in its answer to plaintiff's complaint that it still owed the principal balances stated in the promissory notes, but defendant alleged as an affirmative defense that its obligations to repay the principal balances were governed by a subordination agreement executed by plaintiff and a financial lender, whereby plaintiff agreed to accept interest-only payments and agreed that defendant would not have to repay the principal balances on the notes until defendant first paid back a loan (guaranteed by the Small Business Association) from the lender. In response to plaintiff's motion for summary disposition, defendant submitted a copy of a Standby Creditor Agreement between plaintiff (identified as "Standby Creditor") and a lender who provided a \$1,550,000 loan ("Lender's Loan") to defendant (identified as "Standby Borrower"). Defendant also submitted an affidavit alleging that all interest payments under the promissory notes had been made. The trial court rejected defendant's contention that it had a right to enforce the Standby Creditor Agreement. Accordingly, the trial court granted plaintiff's motion for summary disposition and entered judgment on the notes.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court granted summary disposition to plaintiff pursuant to MCR 2.116(C)(9) and (10). Summary

disposition may be granted under MCR 2.116(C)(9) when “[t]he opposing party has failed to state a valid defense to the claim asserted against him or her.”

Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim. *Nicita v Detroit (After Remand)*, 216 Mich App 746, 750, 550 NW2d 269 (1996). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant’s pleadings by accepting all well-pleaded allegations as true. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991). If the defenses are “so clearly untenable as a matter of law that no factual development could possibly deny plaintiff’s right to recovery,” then summary disposition under this rule is proper. *Id.*, quoting *Domako v Rowe*, 184 Mich App 137, 142; 457 NW2d 107 (1990).

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Further, a court may look only to the parties’ pleadings in deciding a motion under MCR 2.116(C)(9). MCR 2.116(G)(5). “Pleadings,” as defined in MCR 2.110(A), include only a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. [*Village of Dimondale v Grable*, 240 Mich App 553, 564-565; 618 NW2d 23 (2000).]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden*, 461 Mich at 120. Summary disposition may be granted under that subrule when “there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law.” In evaluating a motion under MCR 2.116(C)(10), the court analyzes the pleadings and the documentary evidence submitted by the parties and views them in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120.

Defendant contends that it was entitled to enforce the Standby Creditor Agreement because it was a third-party beneficiary of that agreement under MCL 600.1405, which states, in pertinent part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do *or refrain from doing something directly to or for said person*. [Emphasis added.]

The Michigan Supreme Court has emphasized the significance of the word “directly,” explaining:

In describing the conditions under which a contractual promise is to be construed as for the benefit of a third party to the contract in § 1405, the Legislature utilized the modifier “directly.” Simply stated, *section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the*

*promisor undertakes an obligation “directly” to or for the person.* This language indicates the Legislature’s intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. [*Shay v Aldrich*, 487 Mich 648, 663; 790 NW2d 629 (2010), quoting *Koenig v South Haven*, 460 Mich 667, 676-677; 597 NW2d 99 (1999) (emphasis added by *Shay*.)]

“[A] court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of § 1405.” *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003).

According to the Standby Creditor Agreement, plaintiff agreed “[t]o take no action to enforce claims against Standby Borrower [defendant] on Standby Loan until Lender’s Loan is satisfied.” Plaintiff also agreed “to accept interest only payments at a rate of 10.00 % per annum (no principal payments) on Standby Loan until Lender’s Loan is satisfied or until notified by Lender to stop accepting payments[.]” The agreement refers directly to defendant, who is identified by name as the Standby Borrower.

By making these promises, plaintiff “undert[ook] to . . . refrain from doing something directly to” defendant. MCL 600.1405(1). Thus, the promises are construed as having been for defendant’s benefit. MCL 600.1405(1). Accordingly, defendant “has the same right to enforce said promise that [defendant] would have had if the promise had been made to [defendant] directly as the promisee.” MCL 600.1405.

Although the Standby Creditor Agreement referred only to \$50,000 in principal owed by defendant to plaintiff, the agreement also stated that “Additional Loans made by Standby Creditor will be subject to the terms of this Agreement, unless Lender agrees otherwise in writing.” There are issues surrounding whether the various promissory notes, although executed before the Standby Creditor Agreement, were subject to the agreement, and these issues shall be addressed on remand.<sup>1</sup>

We recognize that it is questionable whether defendant properly preserved the third-party beneficiary argument by raising it below. Although defendant included an allegation that it was a third-party beneficiary of the agreement in its affirmative defenses to plaintiff’s complaint, it did not raise the point in response to plaintiff’s motion for summary disposition. Nevertheless, even if the issue was not properly preserved below, it may be reviewed for plain error affecting substantial rights, which “occurs at the trial court level if (1) an error occurred (2) that was clear

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<sup>1</sup> Plaintiff claims that the first promissory note involved Jeffrey D. Fenley as an individual and not the Jeffrey D. Fenley Trust and that the Standby Creditor Agreement has no bearing on this note. At the same time, however, plaintiff’s complaint makes clear that it brought suit in the name of the *trust only*, and plaintiff argued in its motion for summary disposition that “plaintiff,” i.e., the trust, made the initial loan to defendant. These circumstances present another issue that, presumably, the parties and the trial court will address on remand.

or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.” *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). The plain language of MCL 600.1405 renders the error here clear and obvious, and defendant’s status as a third-party beneficiary entitled to enforce the agreement affects plaintiff’s entitlement to summary disposition.

In sum, plaintiff was not entitled to summary disposition under MCR 2.116(C)(10) because the Standby Creditor Agreement and supporting affidavit established a factual dispute concerning plaintiff’s entitlement to recover on the promissory notes. Plaintiff also was not entitled to summary disposition under MCR 2.116(C)(9) because defendant pleaded a defense based on its status as a third-party beneficiary of the Standby Creditor Agreement, and that defense was “not so clearly untenable as a matter of law that no factual development could possibly deny plaintiff’s right to recovery.” *Village of Dimondale*, 240 Mich App at 564 (internal citations and quotation marks omitted).

Contrary to plaintiff’s contention, MCL 566.132(2) has no bearing on this matter. That statute states in part that “[a]n action shall not be brought against a financial institution to enforce [certain enumerated] promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution[.]” Plaintiff contends that the absence of an authorized signature for the bank on the submitted Standby Creditor Agreement has some significance, but the present matter does not involve any action against a financial institution.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot  
/s/ Kathleen Jansen  
/s/ Patrick M. Meter