

STATE OF MICHIGAN
COURT OF APPEALS

SANFORD INVESTORS, L.L.C.,

UNPUBLISHED
March 21, 2013

Plaintiff/Counter-Defendant-
Appellant,

and

ESTES REALTY SERVICES, INC., CARL
ALGERA, and MARK BRIEDEN,

Plaintiffs-Appellants,

v

No. 309082
Kent Circuit Court
LC No. 11-002438-CZ

RIVERTOWN SPORTS MANAGEMENT, L.L.C.,
FRANKLIN GARY, and RICHARD RILETT,

Defendants,

and

MERCANTILE BANK MORTGAGE
COMPANY, L.L.C.,

Defendant/Counter-Plaintiff-
Appellee.

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Plaintiff and counter-defendant Sanford Investors, L.L.C. (Sanford), appeals as of right¹ from an order granting summary disposition to defendant and counter-plaintiff Mercantile Bank Mortgage Company, L.L.C. (Mercantile), with respect to Mercantile's counterclaim. We affirm.

¹ Of the various appellants listed in the claim of appeal, only Sanford has filed an appellate brief.

Rivertown Sports Management, L.L.C. (Rivertown), desired to purchase a building in Grandville from Sanford. Accordingly, on April 2, 2004, Rivertown obtained financing from Mercantile, with Richard Rilett and Franklin Gary (members of Rivertown), signing a promissory note on behalf of Rivertown for \$740,000. Rivertown obtained further financing from Sanford and executed a promissory note for \$137,500, also on April 2, 2004. Rilett and Gary executed personal guaranties in connection with both promissory notes.

Also on April 2, 2004, Sanford entered into a subordination agreement whereby it agreed that it would not accept principal payments from Rivertown on the \$137,500 promissory note until the \$740,000 owing to Mercantile had been paid. Under the agreement, Rivertown could make interest-only payments to Sanford if Rivertown was not in default with respect to the Mercantile loan. Subsequently, Rivertown defaulted on the loan from Mercantile.²

Sanford filed suit on March 15, 2011, to collect on its promissory note; it included Mercantile as a defendant.³ On August 9, 2011, Mercantile filed a counterclaim, alleging, in part, that Sanford breached the terms of the subordination agreement in seeking to collect on the subordinated indebtedness. Meanwhile, Rivertown had failed to answer the original complaint and, on September 2, 2011, the trial court entered an order stating: “Judgment is entered in favor of Plaintiffs and against Defendants Franklin Gary and Richard Rilett, jointly and severally, in the amount of \$141,286.92.”

Mercantile filed a motion for summary disposition on its counterclaim, pursuant to MCR 2.116(C)(10), on September 16, 2011, alleging that Sanford could not attempt to collect on the promissory note from Rivertown while the debt to Mercantile remained unpaid. In response, Sanford asserted that it terminated the subordination agreement by way of a letter dated September 30, 2011. It further argued that because the subordination agreement listed a “maturity date” of April 2, 2009, any obligations the agreement contained were terminated by that date and Sanford was free to collect on its promissory note. Finally, it asserted that Mercantile had failed to mitigate its damages. The trial court ruled for Mercantile, stating:

In the opinion of the Court, Sanford’s termination [of the subordination agreement] cannot affect Mercantile’s debt existing before the termination or any renewals or substitutions of that debt. . . . Sanford’s termination only means that any new debts granted by Mercantile after the termination are not subordinated.

² A letter from Mercantile to Rivertown and Sanford suggests that this default commenced on or about March 21, 2009.

³ The complaint alleges, in part, that certain individuals were planning to “purchas[e] the Sanford membership interest” but that Mercantile prevented this purchase from taking place. It appears that the proposed purchase would have been used to circumvent the subordination agreement (which, as noted, prevented payments to Sanford).

Therefore, Mercantile is correct that Sanford may not enforce its debt until the Mercantile debt has been satisfied.^[4]

This appeal followed.

We review de novo a grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion brought under MCR 2.116(C)(10), the trial court must consider the “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden*, 461 Mich at 120. “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

This Court also reviews issues of contract interpretation de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

In interpreting a contract, it is a court’s obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties’ intent as a matter of law. [*In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) (citation omitted).]

Sanford argues that because it terminated the subordination agreement by mail and, alternatively, because the subordination agreement had a “maturity date” of April 9, 2009, the trial court erred in granting summary disposition to Mercantile.

The “maturity date” argument is patently without merit. The “maturity date” is contained at the very top of the subordination agreement in a shaded area containing the terms of the underlying \$740,000 loan. Indeed, the subheadings in the shaded area include “Principal,” “Loan Date,” “Maturity,” “Loan No.,” and “Officer.” In addition, the subordination agreement states, immediately below the shaded area, that “[r]eferences in the shaded area are for Lender’s [Mercantile’s] use only and do not limit the applicability of this document to any particular loan or item.” The only reasonable interpretation is that the information in the shaded area is for “reference” use by Mercantile and does not impact the duration of the subordination agreement.

Sanford’s argument regarding the termination letter is also untenable. Sanford correctly notes that it sent a termination letter to Mercantile on September 30, 2011, and that the subordination agreement contains the following paragraph:

⁴ The court did not address the “maturity date” or “mitigation of damages” arguments.

DURATION AND TERMINATION. This Agreement . . . will remain in full force and effect until Creditor [Sanford] shall notify Lender [Mercantile] in writing at the address shown above to the contrary. Any such notice shall not affect the Superior Indebtedness owed Lender by Borrower [Rivertown] at the time of such notice, nor shall such notice affect Superior Indebtedness thereafter granted in compliance with a commitment made by Lender to Borrower prior to receipt of such notice, nor shall such notice affect any renewals of or substitutions for any of the foregoing. *Such notice shall affect only indebtedness of Borrower to Lender arising after receipt of such notice* and not arising from financial assistance granted by Lender to Borrower in compliance with Lender's obligations under a commitment. . . . [Emphasis added.]

Sanford argues that this paragraph is, at a minimum, ambiguous, and should be construed in Sanford's favor. This argument is disingenuous. The language of the paragraph is plain and unambiguous and indicates that a notice of termination "affect[s]" only indebtedness arising after the notice is received. Because the indebtedness at issue arose before the notice of termination, it was not affected by the notice. Sanford's loan remains subordinated, and thus the attempt to collect violates the subordination agreement. The trial court's ruling was correct.⁵

Sanford argues that Mercantile failed to mitigate its damages.⁶ It is unclear, however, what "damages" Sanford is arguing that Mercantile should have mitigated, because the trial court did not grant a money judgment in favor of Mercantile but instead issued a declaratory ruling that Sanford could not pursue collection efforts until Mercantile had been paid. Accordingly, we consider this issue waived due to inadequate briefing. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).⁷ At any rate, we note that Mercantile, in seeking to enforce the subordination agreement, was taking proactive steps to minimize any damages it might incur with respect to the \$740,000 loan.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan

⁵ As astutely noted by Mercantile on appeal, "Sanford's interpretation of the Subordination Agreement would permit termination of the agreement even one (1) day after execution and render the entire Subordination Agreement nugatory."

⁶ Although Sanford's argument is less than clear, it argues at one point that Mercantile should have "collected on the collateral"

⁷ Sanford refers at one point to "unclean hands" but does not adequately develop this argument, such as with citations to binding authority.