Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-401

APRIL TERM, 2020

Matthew Chapa* & Katelyn Chapa* v. Barbara Gay	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 1026-12-18 Cncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Plaintiff buyers appeal the civil division's decision in favor of defendant seller in this dispute involving a residential real estate transaction. We reverse the trial court's decision and remand the matter for further proceedings.

The material facts and the civil division's findings are undisputed. Plaintiffs were tenants in a separate apartment in defendant's home, which defendant had purchased in 2003 and converted what was then a beauty salon into the apartment to be used as a rental unit. In January 2018, the parties entered into a purchase-and-sales agreement for the property. The purchase and sale agreement provided, among other things, that seller, at her sole expense, shall have a fire safety inspection of the property, and shall, prior to closing, bring the property into compliance as required in the report. Plaintiffs' title search revealed that two permits were still needed for the rental unit: a state wastewater permit and a building permit that required a fire and safety code inspection. The city inspector determined that a firewall would have to be constructed between the apartment and the main part of the house before the building permit could be obtained.

In April 2018, the parties, who were all represented by counsel, decided to close on the real estate transaction without waiting for the permits. On April 10, 2018, at closing, defendant conveyed the property by warranty deed, and they signed an escrow agreement placing $5000 in escrow. The agreement provided that, in order for defendant to receive the escrow funds, she would have to, by July 10, 2018: (1) obtain a wastewater permit or a certificate stating that the permit was not required; and (2) close out the city building permit for the rental unit. The agreement further stated that plaintiffs would receive all the remaining escrow funds if either of the above items were not completed.

The wastewater-permit issue was resolved without reduction of the escrow amount. Regarding the building permit, defendant hired a contractor who, for reasons that are not clear from the record, left the job after doing $1525 worth of work, which the parties agreed to pay from the escrow funds. Buyers then hired another contractor, who did $25,000 of work for them.

When defendant refused to reimburse plaintiffs for the work done by their contractor beyond what was left in the escrow account, plaintiffs sued defendant, alleging breach of the warranty deed and breach of contract. Defendant counterclaimed, alleging breach of contract by not submitting their claim to mediation and abuse of process.

Following an evidentiary hearing, the civil division issued a decision and entered judgment in favor of defendant. The court concluded that the escrow agreement set forth only two options: (1) defendant would resolve the permit issues by July 10, in which case she would receive the escrow funds; or (2) defendant would not resolve those issues by that date, in which case plaintiffs would receive any remaining escrow funds. The court concluded that because defendant did not resolve the permit issues by the specified date, plaintiffs were entitled to the remaining escrow funds, but nothing more. The court did not reach defendant's counterclaims.

On appeal, plaintiffs argue that the civil division effectively incorporated into the parties' escrow agreement a liquidated damages clause releasing defendant from any further liability beyond the escrow amount. According to plaintiffs, a plain reading of the escrow agreement reveals no agreement to cap defendant's liability at $5000. Plaintiffs contend that the civil division never determined if the agreement was ambiguous. In their view, the trial testimony showed that the $5000 escrow amount was established based on the parties' mutually mistaken belief that obtaining a building permit would cost no more than $1000.

We conclude that the civil division's decision cannot stand. The parties' escrow agreement contains neither a liquidated damages provision nor a waiver of claims that establishes the escrow amount as the limit of plaintiffs' remedies under the parties' purchase-and-sales agreement or the warranty deed conveyed by seller. Nothing in the escrow agreement provides that any claim beyond the $5000 escrow amount is waived. LaFrance Architect v. Point Five Dev. S. Burlington, LLC, 2013 VT 115, ¶ 38, 195 Vt. 543 (acknowledging general legal maxim that "a waiver is an intentional relinquishment of a known right involving both knowledge and intent on the part of the waiving party" (quotation omitted)); see also Smiley v. State, 2015 VT 42, ¶ 10, 198 Vt. 529 (stating that "a waiver may be express or implied, but before a waiver may be implied, caution must be exercised both in proof and application, such that the facts and circumstances relied upon must be unequivocal in character" (quotation and alteration omitted)). Nor does any provision in the escrow agreement express the parties' intent for the agreement to act as a liquidated damages provision limiting to the escrow amount any claim for breach of contract with respect to the firewall or breach of warranty. See Murphy v. Stowe Club Highlands, 171 Vt. 144, 152 (2000) (stating that we must "construe contracts to give effect to the intent of the parties as that intent is expressed in their writings").

This case is controlled by Murphy, where we held that the parties' escrow agreement, which did not include a liquidated damages provision, did not limit the plaintiffs' damages for breaches of independent obligations to the escrowed amount. Id. ("Nothing in the escrow agreement states or implies that the escrow agreement was intended to supersede provisions of the purchase and sales contract."). In this case, as in Murphy, neither the parties' purchase-and-sales agreement nor the escrow agreement indicated "that the delivery of the escrow amount was the exclusive remedy" for defendant's failure to satisfy her obligations under the parties' purchase-and-sales agreement or pursuant to the warranty deed. Id. at 153 ("In the absence of such provisions, we cannot construe the purchase and sales contract as limiting plaintiffs' remedies to retention of the escrow amount, or establishing the escrow amount as liquidated damages.").

That is not to say, however, that defendant is necessarily obligated to reimburse plaintiffs for the full amount they paid to their contractor. On remand, plaintiffs must prove breach of an

obligation other than the escrow agreement itself, and that any claimed amount of damages was reasonably incurred to cure the claimed breach.

Reversed and remanded.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice