# STATE OF MICHIGAN

# COURT OF APPEALS

FIRST MACOMB MORTGAGE CO.,

Plaintiff–Appellee,

v

MICHAEL DAVID SCHWARTZ,

Defendant–Appellant

and

DAVID L. LEVY,

Defendant.

UNPUBLISHED
August 5, 1997

Nos. 173988 & 176208
LC No. 91-414173

Before: Gribbs, P.J., and Reilly and J. P. Adair, * JJ.

PER CURIAM.

In this consolidated case concerning a dispute over a mortgage loan, defendant Michael David Schwartz appeals as of right the trial court's orders granting summary disposition in favor of plaintiff, First Macomb Mortgage Company, Inc. (First Macomb), and mediation sanctions in favor of First Macomb. The dispute in this case centers around a deficiency in a mortgage loan signed by David Levy and guaranteed by Schwartz that occurred after the sale of the mortgage property. We reverse.

I

Defendant Schwartz first contends that the trial court erred by granting summary disposition in favor of First Macomb when a genuine issue of material fact existed as to whether First Macomb acted in good faith in its dealings with Schwartz. Schwartz alleges the evidence presented in the trial court indicated that First Macomb was aware that the property was steadily declining in value through its inspections of the property yet did not notify Schwartz of the destruction and waste of the residence until over a year after it was known to First Macomb.

* Circuit judge, sitting on the Court of Appeals by assignment.

This Court reviews a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Borman v State Farm*, 198 Mich App 675, 678; 499 NW2d 419 (1993). A party is entitled to a judgment as a matter of law when there are no genuine issues of material fact. MCR 2.116(C)(10). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The party opposing the motion then has the burden of showing that a genuine issue of material fact exists and may not rest upon mere allegations or denials in the pleadings but must, by documentary evidence, set forth specific facts that show a genuine issue for trial. *Id.*

Schwartz contends that First Macomb was required to act in good faith in its dealings with him, the guarantor of Levy's mortgage, because First Macomb is a bank governed by the provisions of the UCC. Schwartz argues that First Macomb would not be able to contractually waive all notice of the damage Levy caused to the property because such a waiver would violate the good faith requirement of the UCC pursuant to MCL 440.4103; MSA 19.4103. Furthermore, Schwartz contends that a bank has a duty to take affirmative action to preserve a security interest under Article 9 of the UCC pursuant to MCL 440.9207(1); MSA 19.9207(1). We note that the trial court agreed with Schwartz and concluded that the wavier of notice provision contained in the Guaranty Agreement signed by Schwartz was manifestly unreasonable and contrary to good faith because it effectively waived all his rights to notice. Yet, this finding by the trial court assumes that the transaction at issue is covered by the jurisdiction of the UCC and specifically by Article 4 of the UCC. However, we find that the good faith duty requirements under the UCC are not applicable to this case because Schwartz's agreement to guarantee payment of Levy's mortgage is a transaction outside the jurisdiction of the UCC.

The UCC governs only those transactions that fall under the jurisdiction of its articles. It does not govern all commercial transactions. As stated by Summers and White:

> The Uniform Commercial Code does not apply to the sale of realty nor to the security interests in realty (except fixtures), yet these are undeniable commercial matters. . . . It does not apply to suretyship transactions (except where the surety is a party to a negotiable instrument). [White & Summers, *Uniform Commercial Code*, (Third Edition) ¶ 2, p 6.]

Schwartz argues that the UCC's good faith requirement extends to banks "in terms of guaranty agreements." Although the UCC places a general good faith requirement on every contract or duty within the jurisdiction of the UCC, MCL 440.1203; MSA 19.1203, Schwartz contends that Article 4 of the UCC, MCL 440.4101 *et. seq.*; MSA 19.4101 *et. seq.*, entitled "Bank Deposits and Collections," is applicable to First Macomb and prohibits a bank from contractually waiving the good faith requirement under the Code pursuant to MCL 440.4103(1); MSA 19.4103(1). That section states in pertinent part:

> The effect of the provisions of this article may be varied by agreement except that no

> agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care . . . but the parties by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable. [MCL 440.4103(1); MSA 19.4103(1).][1]

As the title to the article suggests, Article 4 of the UCC governs bank deposits and collections. See MCL 440.4101; MSA 19.4101. No aspect of the instant case relates to bank deposits and collections. The guaranty agreement signed by Schwartz is not a negotiable instrument that could be deposited or collected by a bank nor did Schwartz co-sign the mortgage promissory note with Levy. See MCL 440.3104; MSA 19.3104. It appears that First Macomb's only connection to Article 4 is that it may qualify as a bank under the UCC, as defined in MCL 440.1201(4); MSA 19.1201(4). However, we find that this connection does not place the transaction between Schwartz and First Macomb under the jurisdiction of Article 4 of the UCC.[2]

Furthermore, Article 9 of the UCC, MCL 440.9101 *et. seq.*; MSA 19.9101 *et. seq.*, is not applicable to this case as argued by Schwartz. Although Article 9 generally covers secured transactions, the article is not applicable to the creation of the real estate mortgage. See MCL 440.9102; MSA 10.9102. In this case, the original mortgagee, First Macomb, is simply attempting to collect a deficiency on the mortgage note after sale of the mortgaged property. Consequently, Article 9 is not applicable, and First Macomb was not required to use reasonable care in the custody and preservation of the secured collateral in its possession. MCL 440.9207(1); MSA 19.9207(1).

The issue of whether First Macomb owed a duty to notify Schwartz of any diminution in the value of the property that was known to First Macomb is primarily a question involving real estate and mortgage law. The UCC does not cover transactions in real estate. See *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 89; 360 NW2d 876 (1984). Nor does the UCC generally cover guaranty contracts. The cases cited by Schwartz in support of an implied duty of good faith were cases which involved a transaction clearly under the jurisdiction of the UCC. See e.g. *Piasecki v Fidelity Corp*, 339 Mich 328; 63 NW2d 671 (1954); *Michigan National Bank v Metro Institutional Food Services*, 198 Mich App 236; 497 NW2d 225 (1993); *Karibian v Paletta*, 122 Mich App 353; 332 NW2d 484 (1983); *Wayne Bank v Dore*, 119 Mich App 634; 326 NW2d 528 (1982); *Nat'l Bank of Detroit v Alford*, 65 Mich App 634; 237 NW2d 592 (1975); *KLT Industries, Inc v Eaton Corp*, 505 F Supp 1072, 1079 (ED Mich, 1981). Schwartz did not provide any authority which would place a good faith requirement on the part of First Macomb. Consequently, this Court need not search for authority to sustain Schwartz's position. *Davenport v Grosse Pointe Farms Zoning Bd*, 210 Mich App 400, 405; 534 NW2d 143 (1995).

We note that outside of the UCC, First Macomb did not have an implied contractual duty of good faith and fair dealing under Michigan common law. Michigan does not appear to recognize an implied contractual duty of good faith and fair dealing. *Ulrich v Federal Land Bank*, 192 Mich App 194, 197; 480 NW2d 910 (1991). This Court has refused to recognize such a duty because it would create a radical departure from this state's common law and recognition of such a duty should be left to the Michigan Supreme Court. *Dahlman v Oakland University*, 172 Mich App 502, 507; 432 NW2d 304 (1988). Nonetheless, Michigan courts may recognize a duty of good faith in a contractual

relationship where a party is given discretion to make a determination under the contract. *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 373; 354 NW2d 341 (1984). We find that this exception does not exist under the Guaranty Agreement at issue in this case. Therefore, Michigan common law does not provide a good faith obligation on First Macomb as claimed by Schwartz.

Because Michigan does not recognize an implied duty of good faith, the express terms of the Guaranty Agreement should control in this case. The agreement contains the following waiver provision:

> The undersigned hereby expressly waive{s}: (a) notice of the acceptance by the Bank of this guaranty; (b) notice of the existence or creation or non-payment of all or any of the Liabilities; (c) presentment, demand, notice of dishonor, protest, and all other notices whatsoever: and (d) all due diligence in collection or protection of or realization upon the Liabilities or any thereof, any obligation hereunder, or any security for or guaranty of any of the foregoing. [Guaranty Agreement, attached as "Defendant's Exhibit J" to Defendant's Brief on Appeal.]

Thus, under the express terms of the contract, Schwartz waived his rights to notification that the value of the property had diminished. Therefore, summary disposition in favor of First Macomb was appropriate. Although the trial court granted summary disposition in favor of First Macomb because it found that First Macomb did act in good faith in its dealings with Schwartz, we affirm the conclusions of the trial court because it reached the correct result, but for the wrong reason. *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995).

II

Schwartz next contends that the trial court committed error when it granted summary disposition in favor of First Macomb on Schwartz' avoidable mitigation of damages defense pursuant to MCR 2.116(C)(10). Schwartz argued that when the evidence is viewed in a light most favorable to him, a question of material fact existed as to whether First Macomb acted reasonably in avoiding ongoing damage to the property when First Macomb possessed superior knowledge that the mortgaged property was being damaged and could have informed Schwartz so that he could have prevented further damage to the property.

In contract law, the "avoidable consequences" doctrine prevents parties from recovering damages which could have been avoided by reasonable effort or expenditure. *In re Prichard Estate*, 169 Mich App 140, 153; 425 NW2d 744 (1988). Our Court further expanded on the doctrine when it stated:

> The goal in awarding damages for a breach of contract is to give the innocent party the benefit of his bargain--to place him in a position equivalent to that which he would have attained had the contract been performed. The injured party, however, must make every reasonable effort to minimize the loss suffered, and the damages must be reduced by any benefits accruing to the plaintiff as consequence of the breach. *In other words, under the avoidable consequences doctrine, the plaintiff is not allowed to recover*

> *for losses he could have avoided by reasonable effort or expenditure. He has a duty to do whatever may reasonably be done to minimize his loss.* [*Tel-Ex Plaza v Hardees*, 76 Mich App 131, 134-135; 255 NW2d 794 (1977).] (emphasis supplied)

Although a plaintiff has a duty to mitigate his losses, a defendant bears the burden of proving a failure to mitigate. *Lawrence v Darrah & Associates*, 445 Mich 1, 15; 55 NW2d 149 (1994). A defendant must support its claim of failure to mitigate with proofs in the trial court. *Id.*

When viewed in a light most favorable to Schwartz, we find that the documentary evidence submitted to the trial court did support Schwartz's defense that First Macomb could have mitigated damages by notifying Schwartz that remodeling to the house was causing the property to diminish in value. Schwartz contends that First Macomb was not exposed to any real damage, given the fact that Schwartz was guarantor, and allowed the damages to increase almost geometrically. At a minimum, he alleges, the issue of damages should be decided by a trier of fact.

A trial court tests the factual support of a claim when it rules upon motion for summary disposition under MCR 2.116(C)(10) *Lichon v American Universal Ins. Co.,* 435 Mich 408, 414; 459 NW2d 288 (1990). The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. *Zamler v Smith*, 375 Mich 675, 678; 135 NW2d 349 (1965) *Skinner v Square D.Co.,* 445 Mich 153; 516 NW2d 475, 479 (1994). To determine if a genuine issue of material facts exists the test is whether the kind of record might be developed giving the benefit of reasonable doubt to the opposing party, would have opened an issue upon which reasonable minds might differ. *Farm Bureau Mutual Ins. Co. v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991); *Skinner, Id.* at 479. In reviewing a motion for summary disposition, the trial court must carefully avoid making findings of fact under the guise of determining that no issue of material fact exists, *Hickman v General Motors Corp.* 177 Mich App 426, 250; 441 NW2d 430 (1989).

In this case, evidence was presented that raised a genuine issue of material fact as to whether First Macomb acted reasonably in failing to avoid ongoing damage to the property and not informing Schwartz so that he could have prevented further damage to the property. According to the deposition of First Macomb's vice president and manager, it was standard practice to send agents to examine the property as to its condition when a mortgage became delinquent over 90 days. Schwartz submitted First Macomb's records that demonstrate that the property was inspected by its agents on 13 occasions over a period of one year. The initial estimated valuation was $140,000. Subsequent estimates varied considerably with the last estimated value set at $85,000. Schwartz alleges that the reductions in value reflected substantial material destruction of the property, and such deterioration was known by First Macomb and was never reported to Schwartz. He asserts that these facts establish First Macomb had superior knowledge and thus a duty to notify Schwartz of the wasting of the property when First Macomb had actual knowledge of the same and Schwartz did not. In response to these assertions First Macomb's president testified in his deposition that First Macomb did not rely on the estimates or appraisals. These questions of fact are to be resolved by the jury requested by First Macomb. In granting First Macomb's motion for summary disposition the trial court resolved these issues in its written opinion, stating: "…there is no indication that [First Macomb] acted unreasonably…."[3]

We hold that Schwartz's defense of avoidable consequences/mitigation of damages, when the evidence is viewed in a light most favorable to Schwartz, presents a question of material fact as to whether First Macomb acted reasonably in ignoring ongoing damages to the property. We conclude that the trial court erred in its determinations that First Macomb exercised reasonable diligence in avoiding damages to the property which diminished the property's value.

Therefore, summary disposition was erroneously granted in favor of First Macomb on Schwartz's available consequences defense.

III

Finally, Schwartz argues that the trial court erred when it awarded First Macomb mediation sanctions pursuant to MCR 2.403(O) because the underlying judgment of the trial court granting First Macomb summary disposition was erroneous. We agree. Because we find that the trial court's decision to grant First Macomb summary disposition was erroneous, the mediation sanctions imposed by the trial court are set aside pending the outcome of the trial.

Reversed.

/s/ Roman S. Gribbs
/s/ James P. Adair

[1] Article 4 of the UCC, as well as this section, were revised by the Legislature effective July 22, 1993, or more than three weeks after the trial court's order granting summary disposition in favor of First Macomb. The revisions to this section were minor and did not change the application of this section.

[2] Schwartz cites *KLT Industries, Inc v Eaton Corp*, 505 F Supp 1072 (ED Mich, 1981) for the proposition that the UCC good faith requirement would require First Macomb to give Schwartz notification to prevent "surprise, protect good faith judgment, and reduce uncertainty." However, the transaction in *KLT Industries* clearly was within the jurisdiction of the UCC because the transaction at issue involved goods and the parties were merchants of the goods involved. *Id.*, 1079.

[3] Another instance of the trial court's erroneous fact-finding is found in that part of its written opinion discussing the applicability of the UCC. The court states:

> Based on the facts and events discussed below, the Court is satisfied that under these rather unique circumstances Plaintiff did act in good faith, exercised ordinary care, and did not directly jeopardize or damage the collateral.

Such fact-finding is clear error where, as here, a trial court is asked to decide a motion for summary disposition.

As noted previously, we find the UCC issue correctly decided, although for the wrong reason. See Section I.