

STATE OF MICHIGAN  
COURT OF APPEALS

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MARC BEGININ and BOOM BOOM ROOM,  
L.L.C.,

UNPUBLISHED  
October 11, 2012

Plaintiffs-Appellants,

v

THG HOSPITALITY GROUP, INC. AND  
MICHAEL E. SCHEID,

No. 304903  
Oakland Circuit Court  
LC No. 2010-109251-CK

Defendants-Appellees.

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Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

In this dispute over the wrongful distribution of escrow funds, plaintiffs, Boom Boom Room, L.L.C. (BBR) and Marc Beginin, appeal the trial court's order that denied their motion for summary disposition and granted summary disposition to defendants, Thomas Hospitality Group, Inc. (THG) and Michael Scheid. For the reasons set forth below, we reverse.

THG moved for summary disposition under MCR 2.116(C)(8) and (C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).<sup>1</sup> Further, "questions involving the proper

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<sup>1</sup> "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Only the pleadings are considered, and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* "The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion for summary disposition under MCR 2.116(C)(10) questions the factual support of the plaintiff's claim and should be granted, as a matter of law, where no genuine issue of any material fact exists to warrant a trial. *Spiek*, 456 Mich at 337. In considering a motion under MCR 2.116(C)(10), the Court considers the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120. "The moving party has the initial burden of supporting its position by

interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo.” *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

This dispute involves the interpretation of three agreements: a purchase agreement, an escrow agreement, and a 2007 agreement which BBR characterizes as a final agreement, concerning \$40,000 held in escrow by THG on behalf of BBR in relation to a purchase agreement entered into by BBR and T&F Restaurant, Inc. T&F operated a business called “Crazy Moe’s Café” in Pontiac, Michigan, on property leased from ULD Partners. The purchase agreement provided for the sale of “all” T&F’s assets, including a liquor license and related permits, all leases (including the property lease for the restaurant location), equipment, fixtures, good will, and inventory.

“[A]n escrow agreement, like all contracts, is to be construed to effectuate the intent of the parties.” *Smith v First Nat Bank & Trust Co of Sturgis*, 177 Mich App 264, 268; 440 NW2d 915 (1989). As a matter of law, unambiguous contractual provisions reflect the intent of the parties and should be construed as written. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). The role of the judiciary is to enforce contracts as written. *Rory*, 473 Mich at 468-469. In construing contracts, words are given their “plain and ordinary meaning, and technical or constrained constructions are to be avoided.” *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998).

Considering the three agreements, we hold that only the escrow agreement and purchase agreement are relevant to the dispute. BBR offers e-mails from August 2007, arguing they evidence a “final agreement” governing the distribution of the escrow funds. We see nothing in the language of the e-mails to suggest that they were intended to be a final agreement, which would supersede the escrow agreement. The August 2007 e-mails amount to a side agreement calling for the release of \$22,000 from the escrow fund to pay back rent to ULD, T&F’s landlord, for the year 2007. These funds were replenished by Beginin to the escrow fund and the agreement did not alter the escrow agreement, which provided for the payment of rent owed by T&F for the year 2006.

In holding that both the purchase agreement and escrow agreement govern the present dispute, we reject THG’s argument that only the escrow agreement controls. By its plain terms, an escrow agreement may incorporate a purchase agreement. *Smith*, 177 Mich App at 268. Here, the escrow instructions were entitled “Escrow Instructions *relative to Purchase Agreement* by and between T&F Restaurants, Inc. (“SELLER”) and Boom Boom Room, LLC (“BUYER”).” Moreover, the escrow agreement clearly envisioned that the \$40,000 was being held in relation to a transaction between BBR and T&F. The document identifies BBR and T&F as “BUYER” and “SELLER” and one of the triggering events specifies that “if funds are released, said funds

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affidavits or other documentary evidence; the burden then shifts to the nonmovant to establish that a genuine issue of disputed fact exists.” *Williams v Rochester Hills*, 243 Mich App 539, 547; 625 NW2d 64 (2000). Where the burden of proof at trial would rest on the nonmoving party, “the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

shall be applied as a credit of Buyer toward the *purchase price*.” Likewise, it was specified that “at the closing” the buyer shall execute two checks. Moreover, THG was supposed to receive \$12,000 “at closing as commission (sic) *Purchase Agreement* between Buyer and Seller.” Furthermore, without the purchase agreement, the escrow agreement is incomplete because it does not establish what should be done with the money if none of the triggering events occur and there is no closing. “Parol evidence is admissible to establish the full agreement of the parties where the document purporting to express their intent is incomplete.” *In re Skotzke Estate*, 216 Mich App 247, 251-252; 548 NW2d 695 (1996). Here, the purchase agreement is not inconsistent with the escrow agreement and establishes that BBR was entitled to the return of the \$40,000 in certain circumstances. Because the escrow agreement was incomplete, the purchase agreement must be considered to establish the full agreement between BBR & T&F. *Id.* In reaching this conclusion, we reject THG’s argument that the purchase agreement is without relevance because the parties failed to create the escrow fund within three days of the purchase agreement as required in the purchase agreement. Given the references in the escrow agreement to the purchase agreement, it is clear the parties intended for the purchase agreement to continue in effect despite the failure of BBR and T&F to establish the escrow fund within three days.

In arguing that the purchase agreement should be ignored, THG also goes to great lengths to argue that the escrow fund was for the payment of rent and not purchase money. As discussed, a plain reading of the escrow agreement contradicts THG’s assertion that BBR undertook the payment of rent to ULD unrelated to the purchase agreement. Likewise the purchase agreement establishes that the \$40,000 deposit placed in escrow was to be applied toward the purchase price at closing. In his deposition, Scheid acknowledged that “the \$40,000 was in escrow for rent that was *to be paid upon closing*.” Based on the evidence, it is clear that the money in question would become a rent payment to ULD at closing, but it was, in substance, purchase money related to the agreement between BBR and T&F.

In part, the trial court based the decision to grant summary disposition on a finding that BBR failed to establish a claim superior to ULD. The trial court correctly noted that ULD was the undisputed beneficiary of the fund. However, the trial court erred in concluding ULD had a superior interest in the \$40,000. THG inaccurately argues that ULD was the intended beneficiary of the escrow fund in every imaginable circumstance. Such an argument is contrary to the plain language of the controlling agreements, which provide three specific triggering events that would lead to the release of the funds to ULD in addition to a release of funds at closing. The specified triggering events were:

- a) the transfer of the liquor license;
- b) if the buyer does not close on the transaction within 8 months, unless its (sic) for a reason that is demonstrably not his fault (if funds are released, said funds shall be applied as a credit of Buyer toward the purchase price);
- c) if there is a material and uncured default In the Management Agreement or lease.

Moreover, as discussed, the purchase agreement is also relevant to complete the parties’ agreement. Under the purchase agreement, BBR had a right to the return of the funds if T&F

defaulted. The evidence, including an e-mail from Scheid, established that government approvals were not obtained because the building at issue was not brought up to code. Because governmental approval was a condition of the purchase agreement, T&F was in default and BBR had a right to a refund of the \$40,000.

Based on this evidence, we hold that the trial court erred in granting summary disposition to THG. THG was the moving party for summary disposition and, therefore, bore “the initial burden of supporting its position by affidavits or other documentary evidence; the burden then shifts to the nonmovant to establish that a genuine issue of disputed fact exists.” *Williams*, 243 Mich App at 547. The moving party may meet its initial burden of production in two ways: (1) submitting affirmative evidence that negates an essential element of the nonmoving party’s claim, or (2) demonstrating that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Quinto*, 451 Mich at 362 (citation omitted). Moreover, in making its motion for summary disposition under MCR 2.116(C)(10), THG was required to “specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact.” MCR 2.116(G)(4). Here, as the moving party, THG never argued that ULD had the superior interest to the \$40,000 as a matter of law. On the contrary, before the trial court, THG’s counsel stated that the propriety of the \$40,000 distribution to ULD was not an issue before the court. Accordingly, THG did not identify this as an issue on which it believed there was no material question of fact in dispute as required by MCR 2.116(G)(4). Moreover, THG did not meet the initial burden of supporting its position. THG submitted no affirmative evidence to suggest that distribution of the \$40,000 to ULD was proper and THG failed to demonstrate (indeed, THG claimed it was not an issue) that BBR could not demonstrate the distribution was proper. *Quinto*, 451 Mich at 362. Accordingly, the trial court erred in granting summary disposition to THG under MCR 2.116(C)(10), holding BBR had not established a superior claim to the proceeds dispersed to ULD.

In contrast, BBR satisfied its initial burden under MCR 2.116(C)(10). As discussed, the purchase agreement was a document governing the present dispute and under the purchase agreement, BBR was entitled to the return of funds when T&F defaulted. Rather than distributing the funds to BBR, THG released the funds to ULD. As a result, BBR lost the \$40,000 held in escrow. BBR met its initial burden of establishing its position. THG then bore the burden of demonstrating some material question of fact existed as to a defense to the contract action. However, THG took no such action. THG merely claimed BBR could not show causation and that BBR did not properly plead its contract claim. These arguments are insufficient to properly challenge the evidence offered by BBR. In disputing a motion for summary disposition, THG cannot rely on “mere allegations or denials.” *Quinto*, 451 Mich at 362. THG’s unsupported assertions do not satisfy its burden. Accordingly, the trial court erred in denying summary disposition to BBR under MCR 2.116(C)(10). In reaching our conclusion, we acknowledge that on appeal, for the first time, THG asserts without evidentiary support that, under the terms of the purchase agreement, T&F was not given sufficient opportunity to cure its default and notice via e-mail was insufficient. Both assertions are contrary to the evidence. Specifically, the notice provision in the purchase agreement recognized delivery by “facsimile or other electronic means,” which indicates e-mail is acceptable. Likewise, evidence presented by BBR showed that a demand for a return of the funds was made because of T&F’s “failure to cure.”

The trial court also erred in granting THG's motion for summary disposition under MCR 2.116(C)(8). THG inaccurately asserted that BBR failed to properly plead a theory of causation. THG's argument was based on the inclusion of statutory obligations within BBR's contract claim. However, THG's argument ignores that BBR did in fact allege the wrongful disbursement of funds. Particularly, the complaint alleged that THG received \$40,000 as a purchase money deposit from BBR and that both a written purchase agreement and written escrow agreement governing THG's possession of the funds existed. BBR also clearly accused THG of "wrongfully" releasing the funds to ULD when in fact the money belonged exclusively to BBR. In a breach of contract claim, the recoverable damages "are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426 n 3; 751 NW2d 8 (2008). In this case, THG violated its contractual obligations and released money properly owed to BBR to ULD. BBR was undisputedly damaged by the release of its money to someone else.

As part of its claim that BBR was not damaged, THG submits an affidavit from Scheid attesting to the fact that THG could make another \$40,000 payment if required. The fact that THG could make another payment if ordered by a court is not grounds for summary disposition. There is no law that allows a defendant's solvency to negate the possibility of finding a plaintiff was damaged. Indeed, it is inapposite to argue a plaintiff should be precluded from seeking recovery merely because a defendant has the means to pay damages if an award is entered in plaintiff's favor. Because THG's arguments under MCR 2.116(C)(8) are without merit, the trial court erred in granting summary disposition to THG.

Reversed and remanded for entry of summary disposition in favor of plaintiffs. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ David H. Sawyer  
/s/ Mark J. Cavanagh