

STATE OF MICHIGAN
COURT OF APPEALS

CLARKSTON HOLDINGS, LTD, d/b/a
AVINGTON PARK,

UNPUBLISHED
June 4, 2013

Plaintiff/Counter-Defendant,

v

AVINGTON PARK CONDOMINIUM
ASSOCIATION, INC.,

No. 308758
Oakland Circuit Court
LC No. 2010-115717-CZ

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

v

ISMAIL AHMED and RONALD KIEF,

Third-Party Defendants,

and

PRS ASSETS, INC., f/k/a PHILIP R. SEAVER
TITLE COMPANY,

Third-Party Defendant-Appellee.

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Third-party plaintiff Avington Park Condominium Association, Inc., appeals as of right from an order denying its motion for summary disposition and granting summary disposition to

third-party defendant PRS Assets, Inc., formerly known as Philip R. Seaver Title Company.¹ We affirm.

On December 20, 2010, Clarkston Holdings, Ltd, a real-estate developer, filed suit against Avington,² claiming that Avington had wrongfully recorded liens against condominium units owned by Clarkston. Clarkston asserted that Avington had an obligation to “cause its members [and not Clarkston] to pay” for certain expenses “in connection with maintaining the common elements of Avington Park otherwise benefitting the Association and its members.” Clarkston stated, “Because [Clarkston] has not yet completed paving of the roads in the condominium, [Clarkston] requests that the invoiced amounts be paid into Court and applied against the cost of completing paving of the roads.”

On January 31, 2011, Avington filed a counterclaim, asserting that Clarkston had committed negligence and violated various statutes and administrative rules, as well as the condominium documents. On May 2, 2011, Avington filed an amended third-party complaint against Ahmed Ismail, the president of Clarkson,³ and against PRS, which, according to the third-party complaint, was the “Escrow Agent disclosed to purchasers of condominium units at the Condominium in the purchase agreements and disclosure statements provided to the purchasers.” Avington claimed that PRS entered into an escrow agreement with Clarkston and that Avington was a third-party beneficiary of this agreement. Avington stated:

22. The Michigan Condominium Act [MCL 559.101 *et seq.*] requires that a developer of a condominium establish an escrow account in order to assure completion of uncompleted structures and improvements labeled under the terms of the condominium documents “must be built.” MCL 559.184 and MCL 559.203b.

23. The roads at the Condominium are listed as “must be built” in the condominium documents . . . and they were not completed.

Avington asserted that PRS “did not retain any amounts in escrow upon the closing of units at the Condominium” and “failed to obtain evidence of adequate security to assure the completion of ‘must be built’ roads in the Condominium before it released escrowed funds to [Clarkston] in violation of the Michigan Condominium Act.” Avington thus raised a “breach of Condominium Act” count against PRS, and it also raised a breach-of-contract count, stating:

¹ While PRS was known as Philip R. Seaver Title Company, Inc., during many of the relevant proceedings, for ease of reference we will use the term “PRS” in this opinion.

² The complaint was later amended to clarify that the lawsuit encompassed the association and its members.

³ Avington repeated against Ismail the same allegations it had made against Clarkston and also asserted a breach of fiduciary duties. Avington had originally also sued a man named Ronald Kief, but he was later dismissed from the lawsuit.

86. [PRS] entered into an escrow agreement with [Clarkston] in order to retain funds as required by the Michigan Condominium Act, MCL 559.184 and MCL 559.203b. . . .

87. This escrow agreement was incorporated by reference into the purchase agreement and disclosure statement of co-owners that purchased condominium units at the Condominium. . . .

88. [Avington] is a third party beneficiary of the escrow agreement as it is intended to assure that “must be built” roads in the Condominium be completed.

89. “Must be built” roads were not completed.

90. Upon information and belief, [PRS] failed to retain escrowed funds and/or released escrowed funds in violation of the escrow agreement resulting in a breach of the agreement.

91. Upon information and belief, [PRS] failed to obtain evidence of adequate security to assure the completion of “must be built” roads in the Condominium before it released escrowed funds to [Clarkston] resulting in a breach of the agreement.

92. [Avington] and its member co-owners have been damaged as a result of [PRS’s] breach of that agreement.

On June 10, 2011, PRS filed a short counterclaim and third-party complaint, stating:

2. Avington . . . alleges that [PRS] is liable for amounts that may have been required to be paid into an escrow account by Clarkston . . . and Ismail, to be used for completion of condominium “must-be-builts.”

3. In the event that [the] [c]ourt determines that [PRS] is liable for any amounts necessary to complete condominium “must-be-builts,” and which amounts should have been paid into an escrow account by Clarkston and Ismail, that Clarkston and Ismail, jointly and severally, are liable to [PRS] for all such amounts.

On September 7, 2011, Avington filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it was entitled to summary disposition with regard to Clarkston’s complaint and with regard to its own claims against PRS, Clarkston, and Ismail. With regard to PRS, Avington argued that based on MCL 559.184(3) and MCL 559.203b(2), (3), (5), and (9), and based on the fact that the roads in question were never completed, PRS was in clear violation of the Condominium Act. Avington further argued that PRS was clearly in breach of contract, stating, in part:

The roads are “must be built” items according the Master Deed and are a common elements [sic] to which the Association is now charged with maintaining. As stated above, [PRS] has failed to maintain an escrow as provided

for in both the Escrow Agreement and the Condo Act and failed to make a proper determination as to the adequacy of other security for completion of the roads. As such, no genuine issue of material fact exists as to whether [PRS] is liable to [Avington] for breach of contract under the third-party beneficiary theory of liability and the Association is entitled to summary disposition in accordance with MCR 2.116(C)(10).

Subsequently, a case evaluation took place and Avington, Clarkston, and Ismail accepted the awards, leaving outstanding only the claims involving PRS.⁴

On November 30, 2011, PRS filed a response to Avington's summary-disposition motion and asked that summary disposition be granted to it under MCR 2.116(I)(2). PRS asserted that the roads in question *had* in fact been installed and that Avington's claims related solely to a "top coat," which was not a "must-be-built" element. PRS stated, "Asphalt paving, such as [Avington] now demands . . . is not required by anything in the Master Deed." PRS also stated that Clarkston did not "deposit with [PRS] any of the funds it received upon the sale of the individual units. [PRS] cannot have liability to account for . . . funds that it never received. [Avington] has provided no evidence that [PRS] ever received funds from [Clarkston] to be held in escrow."

PRS also stated that summary disposition for Avington would not be appropriate because, even disregarding the issue of liability, there were questions of fact concerning the appropriate cost of the paving. PRS asserted that Clarkston had obtained an estimate of \$83,750, whereas Avington listed a much higher figure, which included certain repairs to the existing road that were clearly not "must-be-builts." PRS also alleged that, in any possible outcome, it could not be held liable for more than \$65,000, the net amount obtained by Avington in the case evaluation.

PRS requested alternative relief: (1) a dismissal of Avington's claims against it or (2) a denial of summary disposition to Avington because of issues of fact, with an added proviso that PRS's liability could not exceed \$65,000.

Avington filed a response on December 2, 2011, stating, in part, that (1) the plans filed with Independence Township clearly indicated that the roads must be paved to meet Oakland County Road Commission standards, (2) any questions regarding damages would not preclude a grant of summary disposition concerning liability, (3) at any rate, Avington's expert engineer's estimate of \$151,094 had not been rebutted, and (4) PRS was independently liable to Avington and any award was not constrained by the \$65,000 obtained from Clarkston. With regard to the last point, Avington stated that "Whether [Clarkston] must indemnify [PRS] is an issue between [PRS] and [Clarkston] and has no bearing on [PRS's] liability to [Avington]"

On February 10, 2010, the trial court issued an order granting summary disposition to PRS. The court stated:

⁴ The evaluation resulted in awards of \$35,000 for Clarkston and \$100,000 for Avington.

The Association asserts that PRS violated the Condominium Act and breached its escrow agreement by failing to retain escrowed funds from the Developer's sale of condominium units.

The Condominium Act requires developers to retain sufficient funds from the sale of condominium units in escrow to assure completion of portions of the development deemed "must be built." *Hills of Lone Pine Ass'n v Texel Land Co, [Inc,]* 226 Mich App 120, 121[; 572 NW2d 256] (1997). The Act allows the escrow agent to release funds only if certain conditions are met, such as the escrow agent receiving "a certificate signed by a licensed professional engineer or architect" confirming that the "must be built" items are substantially complete. See MCL 559.203b(3)(c) and (d). In the alternative, the escrow agent may release funds if the developer furnishes the agent with evidence of "adequate security" for the amount required to complete the "must be built" items. See MCL 559.203b(5). The language of the escrow agreement between the Developer and PRS mirrors the requirements of the Act.

The Association asserts that PRS failed to retain escrowed funds despite the fact that it did not receive a certificate of substantial completion or adequate security for completion of the paving of access roads in the development. PRS first asserts that the top paving was not a "must be built" feature because the Master Deed did not require the roads to be paved. However, the detailed plans for the development that were filed with Independence Township specified that the roads would be paved, and the Master Deed incorporates those plans by reference. Further, the Oakland County Road Commission required the roads to be paved. Even though the Master Deed only identified "roads" as "must be built," and roads in general do not require paving, the particular roads at issue here had to be paved. PRS cannot escape liability on this ground.

PRS next argues that it cannot be held liable for failing to escrow funds because the Developer never deposited funds with PRS. The Association does not dispute PRS's claim that the Developer failed to escrow funds. Instead, the Association contends that PRS's position is "contrary to both the Condo Act and the Provisions of the Escrow Agreement." But the Association fails to identify what portion of either the Act or the agreement imposes an affirmative obligation on PRS to obtain funds from the Developer. To the contrary, the Act requires the Developer to escrow the funds: "Upon receipt of payment under a purchase agreement, the developer shall deposit all funds in an escrow account with an escrow agent." MCL 559.184(3). The Act imposes liability if the agent fails to comply with its provisions, see MCL 559.203b(9), but the statutory requirements for the agent all pertain to retaining or releasing funds. Because the Association fails to explain how PRS could be liable for retaining escrowed funds when the Developer failed to deposit any such funds, PRS is entitled to summary disposition of the Association's claim and the Court dismisses those claims with prejudice.

We review de novo a trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers 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. 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. [*Maiden*, 461 Mich at 120.]

Under MCR 2.116(I)(2), "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Avington argues on appeal that the trial court erred in determining that PRS never had funds in escrow because Avington "had attached copies of the purchase agreements and copies of documents showing that PRS had received deposits under those purchase agreements to its motion for summary disposition" ⁵ Avington argues that it conceded below only that no funds were placed in escrow *upon closings*. Therefore, Avington argues that PRS *did* have funds in escrow and that it subsequently violated MCL 559.203b, which states, in part:

(2) Deposits in escrow with an escrow agent required under sections 83 and 84^[6] shall be released pursuant to those sections upon cancellation of a

⁵ On appeal, Avington states that "PRS handled the closing on all but seven" out of the 37 units and that the total amount of deposit money received was \$178,000. (Avington concedes that it is making "estimates" with regard to six of the sold units because no records were available for those six.)

⁶ MCL 559.183 involves preliminary reservation agreements, which the parties do not mention in this appeal. MCL 559.184 states, in relevant part:

(3) Upon receipt of payment under a purchase agreement, the developer shall deposit all funds in an escrow account with an escrow agent. Funds due a developer from the closing of a unit sale need not be deposited in escrow if such funds are not required by other provisions of this act to be retained in escrow after such closing. After the expiration of the withdrawal period provided in subsection (2), the developer shall retain amounts in escrow or provide other adequate security as provided in section 103b to assure completion of only those uncompleted structures and improvements labeled under the terms of the condominium documents, "must be built".

(4) A purchase agreement shall contain all of the following:

preliminary reservation agreement or withdrawal from a purchase agreement, and in all other cases shall be retained and released pursuant to this section and condominium documents which are not inconsistent with this section.

(3) Except as provided in subsection (5), amounts required to be retained in escrow in connection with the purchase of a unit shall be released to the developer pursuant to subsection (6) only upon all of the following:

* * *

(c) *Receipt by the escrow agent of a certificate signed by a licensed professional engineer or architect* either confirming that those portions of the phase of the project in which the condominium unit is located and which on the condominium subdivision plan are labeled “must be built” are substantially complete, or determining the amount necessary for substantial completion thereof.

(d) Receipt by the escrow agent of a certificate signed by a licensed professional engineer or architect either confirming that recreational or other facilities which on the condominium subdivision plan are labeled “must be built”, whether located within or outside of the phase of the project in which the condominium unit is located, and which are intended for common use, are substantially complete, or determining the amount necessary for substantial completion thereof.

(4)(a) Substantial completion and the estimated cost for substantial completion of the items described in subsections (3)(c) and (3)(d) and in

(a) A statement that all funds paid by the prospective purchaser in connection with the purchase of a unit shall be deposited in an escrow account with an escrow agent and shall be returned to the purchaser within 3 business days after withdrawal from the purchase agreement as provided in subdivision (b). The statement shall include the name and address of the escrow agent.

(b) A statement that unless the purchaser waives the right of withdrawal, the purchaser may withdraw from a signed purchase agreement without cause and without penalty if the withdrawal is made before conveyance of the unit and within 9 business days after receipt of the documents required in section 84a including the day on which the documents are received if that day is a business day.

(c) A statement that after the expiration of the withdrawal period provided in subsection (2), the developer is required to retain sufficient funds in escrow or to provide sufficient security to assure completion of only those uncompleted structures and improvements labeled under the terms of the condominium documents, “must be built”.

subsection (6) *shall be determined by a licensed professional engineer or architect*

* * *

(5) In place of retaining funds in escrow under subsection (3), the developer may, if the escrow agreement so provides, furnish an escrow agent with evidence of adequate security, including, without limitation, an irrevocable letter of credit, lending commitment, indemnification agreement, or other resource having a value, in the judgment of the escrow agent, of not less than the amount retained pursuant to subsection (3).

(6) Upon receipt of a certificate issued pursuant to subsection (3)(c) and (d) determining the amounts necessary for substantial completion, the escrow agent may release to the developer all funds in escrow in excess of the amounts determined by the issuer of such certificate to be necessary for substantial completion. In addition, upon receipt by the escrow agent of a certificate signed by a licensed professional engineer or architect confirming substantial completion in accordance with the pertinent plans of an item for which funds have been deposited in escrow, the escrow agent shall release to the developer the amount of such funds specified by the issuer of the certificate as being attributable to such substantially completed item. However, if the amounts remaining in escrow after such partial release would be insufficient in the opinion of the issuer of such certificate for substantial completion of any remaining incomplete items for which funds have been deposited in escrow, only the amount in escrow in excess of such estimated cost to substantially complete shall be released by the escrow agent to the developer. Notwithstanding a release of escrowed funds that is authorized or required by this section, an escrow agent may refuse to release funds from an escrow account if the escrow agent, in its judgment, has sufficient cause to believe the certificate confirming substantial completion or determining the amount necessary for substantial completion is fraudulent or without factual basis.

* * *

(9) The escrow agent in the performance of its duties under this section shall be deemed an independent party not acting as the agent of the developer, any purchaser, co-owner, or other interested party. *So long as the escrow agent relies upon any certificate, cost estimate, or determination made by a licensed professional engineer or architect*, as described in this act, the escrow agent shall have no liability whatever to the developer or to any purchaser, co-owner, or other interested party for any error in such certificate, cost estimate, or determination, or for any act or omission by the escrow agent in reliance thereon. The escrow agent shall be relieved of all liability upon release, in accordance with this section, of all amounts deposited with it pursuant to this act. [Emphasis added.]

Avington argues that no engineer's or architect's certificate or determination was issued in the present case and that, accordingly, PRS was clearly liable under the Condominium Act.

In its brief in support of its motion for summary disposition, Avington stated that “MCL 559.203b(5) provides the only instance in which funds are not required to be held in escrow for completion of the must be built items. . . . [I]t is clear that no funds were retained upon closing of the Condominium units.” It then went on to state that, as a result, the “onus” was placed on the escrow agent, under MCL 559.203b(5), to determine whether any “alternate security” was adequate. While Avington did refer to the purchase agreements⁷ for the purpose of showing that the purchasers “accepted the conditions of the Escrow Agreement,” it did not make the explicit argument—as it now does on appeal—that the money paid by the purchasers directly to PRS as deposits was somehow improperly released by PRS. Avington merely stated that “[PRS] has failed to maintain an escrow as provided for in both the Escrow Agreement and the Condo Act and failed to make a proper determination as to the adequacy of other security for completion of the roads.” In fact, in another section of its brief, pertaining to the claims against Clarkston and Ismail, Avington argued that Clarkston had not established an escrow account or provided other adequate security to the escrow agent for the “must-be-built” roads.

As noted earlier, PRS argued in its response to Avington’s summary-disposition motion that no escrow money was at issue and that PRS could not “have liability to account for . . . funds that it never received.” Avington responded to this argument *not* by referring to the deposits made by the purchasers but merely by stating the following:

Next, Seaver argues that it is not liable for the release of escrowed funds, because the Developer never submitted any funds to it to be held in escrow up [sic] the closing of the units. This argument is completely contrary to both the Condo Act and the Provisions of the Escrow Agreement. The Association's argument in this regard is fully briefed in its Brief in Support of Its Motion for Summary Disposition and will not be repeated herein.

Even more importantly, at the summary-disposition hearing, the following colloquy occurred:

THE COURT. Did [Clarkston] escrow money for this?

MS. FORD [Avington’s attorney]. No, there was no -- there were no funds escrowed, that’s not disputed. The records reveal that no --

THE COURT. Okay.

MS. FORD -- money was escrowed on the closing of the units. So what we have here is a case where, both under the escrow agreement that was entered [into] and under the Condominium Act, there should have been a determination made as to other adequate securities to secure the completion -- the cost of completion of the roadways in the condominium because there must be both

⁷ As noted, Avington relies on the deposits made under these purchase agreements in arguing, on appeal, that PRS did in fact have funds in escrow that it improperly released.

under -- items under the Master Deed. And in making that determination for adequate security the escrow agent has to rely on certificates from licensed engineers that state how much is needed to complete the cost of the roads. Obviously that's not a determination that's going to be left up to a developer or a title company, or escrow agent; I mean, a licensed engineer has to say this is what needs to be done to complete the roads, this is how much it's going to cost. So, basically, when people are buying their condominium units they're already paying for the cost of the completion of the roads.

Um, in this case there were no certificates from licensed engineers to make the determination as to other adequate security, and clearly there is no other adequate security because there's no money to complete the roads.

In response --

* * *

THE COURT. What portion -- where -- what document says that the title company had an affirmative obligation to obtain funds from the developer on this?

MS. FORD. It's . . . MCL 559.203b in the Condo Act, and then there's also the provisions of the escrow agreement; they basically mirror each other.

And so it's not that the title company has to obtain funds, they have two mechanisms for getting these funds; there's the option of escrowing the funds --

THE COURT. If they're given to them.

MS. FORD. *If they're given to them. In this instance they chose to go the opposite route of other adequate security so the developer didn't have to deposit those funds with the escrow agent.*

THE COURT. Okay.

A. So here, like I said, but to determine what is other adequate security you have to rely on certificates from licensed engineers; there were none of those here; so whatever determination was made as to whether or not the security was adequate, it . . . wasn't a correct determination. [Emphasis added.]

Avington's attorney later stated the following, citing MCL 559.203b(5): "[I]n regards to the argument that in order for . . . a determination of other adequate security to be made funds had to first be placed in escrow[, that] is completely contrary to the Condo Act."

It is clear that Avington's strategy below was to argue that proper funds had *not in fact been escrowed* and that PRS was liable because it failed to make a proper determination of other adequate security. As such, we reject Avington's argument that the trial court's ruling with regard to the lack of escrow funds was erroneous because of the existence of the deposits paid by

the purchasers. Indeed, arguments not raised in the lower court are not preserved for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). “We need not address issues first raised on appeal.” *Id.* A party may not, on appeal, assign error to something to which it acquiesced below. See, generally, *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Avington argued below that funds had not in fact been escrowed and that, therefore, PRS should have made a proper determination regarding other security. The trial court based its ruling on this argument by Avington, and we will not allow Avington to use a “bait-and-switch” tactic in order to try to obtain appellate relief. See, generally, *Polkton*, 265 Mich App at 96.

Because Avington argued below that no funds had been escrowed, and we decline to allow it to change tactics for purposes of appeal, its appellate argument centered upon MCL 559.203b(5) is untenable. As noted by the trial court, “the statutory requirements for the [escrow] agent all pertain to retaining or releasing funds.” If no escrowed funds were at issue (as *conceded to below* by Avington), then there can be no liability on the part of PRS for a failure to properly judge the adequacy of any alternate security. Similarly, Avington’s argument based on the escrow agreement is untenable. That agreement essentially mirrors the pertinent provisions of the Condominium Act, and again, if no escrowed funds were at issue (again, as conceded to below by Avington), there can be no liability on the part of PRS. The trial court properly relied upon the arguments and representations made by Avington in making its ruling, and we decline to revisit the trial court’s ruling merely because Avington has decided to change tactics for purposes of appeal.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Patrick M. Meter