

STATE OF MICHIGAN
COURT OF APPEALS

BANK OF AMERICA, NA,

Plaintiff-Appellant,

v

FIRST AMERICAN TITLE INSURANCE COMPANY, PATRIOT TITLE AGENCY, KIRK D. SCHIEB, WESTMINSTER ABSTRACT COMPANY, WESTMINSTER TITLE AGENCY, INC, PRIME FINANCIAL GROUP, INC, VALENTINO M. TRABUCCHI, PAMELA S. NOTTURNO, f/k/a PAMELA S. SIIRA, DOUGLAS K. SMITH, JOSHUA J. GRIGGS, STATE VALUE APPRAISALS, LLC, NATHAN B. HOGAN, and CHRISTINE D. MAYS,

Defendants-Appellees,

and

FRED MATSON, MICHAEL LYNETT, JO KAY JAMES, and PAUL SMITH,

Defendants.

UNPUBLISHED
March 27, 2014

No. 307756
Oakland Circuit Court
LC No. 2010-112606-CK

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

MURPHY, C.J. (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's construction of the closing protection letters (CPLs) issued by defendant First American Title Insurance Company (First American) to plaintiff Bank of America, NA (BOA). I further disagree with the majority's analysis and rulings regarding the CPLs and the two closings administered by Westminster Abstract Company (Westminster). Additionally, I disagree with the majority's acceptance of *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63; 761 NW2d 832 (2008), relative to the application of the full credit bid rule. Although I agree that *New Freedom* requires us to apply the full credit bid rule here, I would formally challenge the opinion by requesting that a conflict panel be convened. Finally, I respectfully disagree with, in part, the majority's evaluation of BOA's

contract claim that was brought against Westminster based on alleged violations of closing instructions. In sum, I concur in part and dissent in part.

In *New Freedom*, the CPLs at issue provided for indemnification to the mortgage company in connection with real estate closings for actual losses arising out of “[f]raud or dishonesty of the Issuing Agent in handling your funds or documents in connection with such closings.” *New Freedom*, 281 Mich App at 80-81 (emphasis added). The *New Freedom* panel construed this language as requiring evidence showing that the closing agent committed fraud or dishonesty “in handling funds or documents that belonged to [the mortgage company],” which did not encompass an agent’s conduct in violating closing instructions or in failing to notify the mortgage company that a purchaser was not occupying a property. *Id.* at 83. Additionally, even though “there were discrepancies in the HUD-1 settlement statement and the attachment to the HUD-1 settlement statement was falsely attested, these documents did not belong to plaintiff.” *Id.*

Here, on close examination of the CPLs, they provided for indemnification to BOA in connection with real estate closings for actual losses arising out of “[f]raud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.” (Emphasis added.) The term “in” is not found between the words “Issuing Agent” and “handling,” as was the case in *New Freedom*. This affects the meaning of the quoted passage. If the word “in” is included, it defines, and effectively restricts, the types or categories of fraudulent or dishonest activities by a closing agent that can give rise to a right to indemnification, limiting them to conduct associated with handling the mortgage company’s funds or documents. If the word “in” is not included, as is the case here, the phrase “handling your funds or documents in connection with . . . closings” simply defines or identifies the closing agent, effectively broadening the indemnification coverage to any acts of fraud or dishonesty by the closing agent related to a closing. The acts of fraud or dishonesty need not be tied solely to the closing agent’s handling of BOA’s funds or documents, but can extend to, for example, the handling of HUD-1 settlement statements, even though the statements *do not belong* to BOA.

I agree with the majority that there was sufficient evidence to create a genuine issue of material fact with respect to fraud or dishonesty and the conduct of defendant Patriot Title Agency (Patriot) relative to the two closings handled by Patriot. I will address below the impact of the full credit bid rule on BOA’s claims of breach of the CPLs brought against First American. In regard to the two closings involving Westminster, given my expanded construction of the associated CPLs due to the absence of the word “in,” I would find that there existed a genuine issue of material fact regarding fraud or dishonesty by Westminster. BOA submitted evidence regarding discrepancies in and/or problems with the HUD-1 settlement statements, along with evidence of unusual, unexpected, and questionable money sources utilized by transaction participants, interrelated or associated second transactions of a suspicious nature, and an illogical same day price fluctuation. From this evidence one could reasonably infer fraud or at least dishonesty on the part of Westminster. “When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, *drawing all reasonable inferences in favor of the nonmoving party*, determine whether a genuine issue of material fact exists.” *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010) (emphasis added).

With respect to the full credit bid rule, in *New Freedom*, Commonwealth Land Title Insurance Company (Commonwealth) issued CPLs to lender New Freedom Mortgage Corporation (New Freedom) relative to two real estate transactions and associated promissory notes, which were later defaulted on, resulting in foreclosures and foreclosure sales. *New Freedom*, 281 Mich App at 65-66. *New Freedom* involved a number of claims against several defendants, including a claim by New Freedom that “Commonwealth violated its closing protection letters.” *Id.* at 67. The trial court granted summary disposition in favor of Commonwealth, ruling that New Freedom suffered no damages because a full credit bid had been tendered at the foreclosure sales, satisfying the debts. *Id.* This Court began its analysis by addressing New Freedom’s argument that the trial court erred in granting summary disposition in favor of several defendants, including Commonwealth, “in reliance on the full credit bid rule.” *Id.* at 68. The Court explained the full credit bid rule, noted the rule’s partial foundation in MCL 600.3280, stated that fraud, misrepresentation, negligence, and breach of contract claims require proof of damages, the absence of which supports a grant of summary disposition, recited cases employing the full credit bid rule, and found that the rule applies to bar actions against nonborrower third parties. *Id.* at 68-74. The Court ended its discussion by concluding “that the trial court properly applied the full credit bid rule to bar [New Freedom]’s claim[] against . . . Commonwealth, and did not err by granting summary disposition.” *Id.* at 74-75.

Later in its opinion, the *New Freedom* panel devoted an entire section specifically to the CPLs, introducing the section by stating that New Freedom was arguing “that the trial court erred in applying the full credit bid rule to prevent recovery under the [CPLs] that Commonwealth issued to [New Freedom].” *Id.* at 79-80. The Court then immediately proceeded to analyze whether Commonwealth was liable under the CPLs, concluding that Commonwealth had not violated the CPLs, never mentioning the full credit bid rule. I do not fully understand why the panel even engaged in this discussion, considering that it had, ostensibly, already determined that the full credit bid rule barred the action against Commonwealth. The introduction to the CPL section, referencing New Freedom’s argument that the trial court erred in applying the full credit bid rule to the CPLs, logically suggested that the Court had not yet addressed the issue, even though the earlier discussion appeared to have fully addressed the matter. BOA argues that the *New Freedom* panel never applied the full credit bid rule to the alleged violation of the CPLs, contending that the Court did not do so in recognition of a difference between damages and “actual losses,” which is triggering language in the CPLs. BOA’s argument appears speculative, as it does not find express support in the body of the *New Freedom* opinion. The majority concludes, partly on the basis of the Court’s initial discussion of the full credit bid rule, that the Court in *New Freedom* effectively applied the full credit bid rule to the claimed violations of the CPLs, even though it failed to analyze the full credit bid rule in the section of the opinion specifically concerning the CPLs. *New Freedom* was initially issued as an unpublished per curiam opinion, with it subsequently being changed to a published per curiam opinion. To say the least, the *New Freedom* opinion leaves much to be desired as to clarity and is difficult to decipher. The Court’s broad discussion in *New Freedom* regarding the full credit bid rule seemingly covered the CPL claims. Perhaps the Court was holding that the CPL claims against Commonwealth failed because (1) they were barred by the full credit bid rule as no damages could be established *and* because (2) there were no violations of the CPLs in the first place, even though either premise could have stood on its own to support a ruling against New Freedom. I conclude that, whether it was the intent of the *New Freedom* panel or not, the opinion effectively dictates application of the full credit bid rule here.

Here, the majority recognizes, correctly so, that *New Freedom* is controlling precedent that must be followed, MCR 7.215(C)(2) and (J)(1). I would rule consistent with *New Freedom* because it is binding precedent; however, I would indicate a disagreement with *New Freedom*, state that it is being followed only because it constitutes binding precedent, and request a polling of this Court to convene a special conflict panel. MCR 7.215(J)(2) and (3). MCL 600.3280 effectively provides a full-credit-bid-rule defense to a “mortgagor, trustor or other maker of any [mortgage] obligation, or any other person liable thereon,” and the cases from Michigan, aside from *New Freedom*, otherwise reflect application of the full credit bid rule to protect borrowers, obligors, or debtors on a loan, see, e.g., *Smith v Gen Mtg Corp*, 402 Mich 125; 261 NW2d 710 (1978), not nonborrower third parties like First American. I agree with the assessment of the United States Bankruptcy Appellate Panel (BAP) of the Ninth Circuit that the full credit bid rule and anti-deficiency statutes are not concerned about the relationship between a lender and a third-party nonborrower; rather, they are designed to protect debtors or borrowers by restricting the remedies available to secured creditors for defaulted debts secured by mortgages or deeds of trust. *In re King Street Investments, Inc.*, 219 BR 848, 855 (BAP 9, 1998). I am even more convinced that the full credit bid rule should not be applied here, given that the CPLs covered BOA for “actual losses,” which determination would entail going beyond mere contemplation of a lender’s winning bid at a foreclosure sale. I was swayed by BOA’s assertions at oral argument that full credit bids, as opposed to credit bids tied to fair market value, are utilized to benefit both lenders and borrowers, allowing lenders to swiftly obtain clear title and relieving borrowers from being subjected to deficiency actions, but should not work to the benefit of nonborrower third parties, especially where fraud is involved. Thus, if not restrained by the ruling in *New Freedom*, I would conclude that the full credit bid rule is not applicable here and that BOA’s CPL-breach claims with respect to all four closings should be allowed to proceed.

Ultimately, I agree with the majority that BOA’s CPL claim against First American related to Patriot’s Golf Ridge closing can go forward, and I agree with the majority that BOA’s CPL claim against First American related to Patriot’s Kirkway closing, while being subject to a genuine issue of material fact, is barred by the full credit bid rule, but only because we must abide by *New Freedom*; I would request the convening of a conflict panel. Further, I disagree with the majority that BOA’s CPL claim against First American related to Westminster’s Heron Ridge closing cannot go forward, and while I disagree with the majority that BOA’s CPL claim against First American related to Westminster’s Enid Blvd. closing is not the subject of a genuine issue of material fact, I agree that it is barred by the full credit bid rule, but only because we must abide by *New Freedom*; again, I would request the convening of a conflict panel.¹

Finally, in regard to BOA’s contract claim against Westminster for violations of the closing instructions, I disagree with the majority’s reasoning that appears to confuse the CPLs, which served as contracts between BOA and First American, with the closing instructions, which, in my view, served as separate and distinct contracts between BOA and Westminster.

¹ I also note that, as to the two closings not barred by the full credit bid rule, I would further conclude that any indemnification potentially recoverable by BOA is not necessarily limited by those foreclosure sale bids. Rather, BOA should be entitled to damages for “actual losses.”

BOA's contract claim against Westminster was not based on the CPLs, nor could it have been. BOA's breach of contract claim against Westminster was predicated on the allegation that the closing instructions were not adhered to by Westminster when it disbursed funds to payees not identified on the HUD-1 settlement statements. Contrary to the majority's view, the CPLs are irrelevant to BOA's contract action against Westminster. I also highly question the majority's alternative conclusion that BOA failed to show any causal link between the alleged breach and damages, which conclusion fails to give BOA the benefit of reasonable inferences arising out of the evidence presented. I do agree with the majority that, based on *New Freedom*, the full credit bid rule bars BOA's contract claim regarding the Enid Blvd. property, but I would call for the convening of a conflict panel to challenge *New Freedom*.

For the reasons stated above, I respectfully concur in part and dissent in part.

/s/ William B. Murphy