

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CITIZENS BANK,

Plaintiff/Counter-Defendant-  
Appellee,

v

MITAN & ASSOCIATES, P.C.,

Defendant/Counter-Plaintiff-  
Appellant.

UNPUBLISHED

January 21, 2003

No. 236293

Oakland Circuit Court

LC No. 99-014355-CZ

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Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion for reconsideration and motion for summary disposition of its counter complaint. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1996 defendant, a law firm, opened a checking account with National Bank of Royal Oak, plaintiff's predecessor in interest. The account was transferred to plaintiff and became subject to plaintiff's terms and conditions for checking accounts. The authorized signatory on the account was Keith Mitan, defendant's president. Defendant's clients made deposits directly into the account. On July 6, 1998 Pellestar Ltd., defendant's largest client, deposited a check in the amount of \$2,600 into the account. The deposit was erroneously recorded in the amount of \$26,000. Pellestar's check was returned for insufficient funds, and in August 1998 the account was charged for the amount of \$2,600. Defendant operated as though it had received a deposit in the amount of \$26,000, and spent the funds. In January 1999 plaintiff discovered the error, froze the account, and attempted to contact defendant to resolve the matter. When defendant did not respond to plaintiff's inquiries, plaintiff charged back \$26,000 to the account. The charge back left the account overdrawn in excess of \$25,000. Defendant failed to pay the amount due, and plaintiff closed the account.

Plaintiff filed suit seeking payment of the overdrawn funds. Defendant filed a counter complaint alleging that plaintiff committed a breach of contract by freezing the account and failing to release funds as they became available. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the clear and unambiguous language of the terms and conditions governing the account, provided that it was authorized to correct an error such as the one that resulted in the incorrect posting of a \$26,000 deposit in the account, that the account

holder was liable for any overdrafts, and that the account could be closed at any time by either party with or without cause. Plaintiff also argued that because documentary evidence demonstrated that defendant had spent \$25,275.75 by the time the posting error was detected, defendant could not establish the existence of a genuine issue of fact regarding the availability of funds.

The trial court granted plaintiff's motion for summary disposition on its complaint, but denied the motion as to defendant's counter complaint. The trial court determined that plaintiff was entitled to damages in the amount of \$23,400 on the ground that a charge back of \$2,600 had been posted to the account. The trial court denied plaintiff's motion for summary disposition on the counter complaint on the ground that the motion did not specifically address the allegations in the counter complaint.

Plaintiff moved for reconsideration. Plaintiff accepted the trial court's analysis and resulting damage award of \$23,400 as set out in the original opinion and order; however, plaintiff asserted that the trial court erred in concluding that the original motion for summary disposition did not address the allegations contained in defendant's counter complaint.<sup>1</sup>

The trial court granted plaintiff's motion for reconsideration and granted summary disposition in favor of plaintiff on defendant's counter complaint. The court observed that documentary evidence in the form of bank statements submitted by plaintiff in support of its motion for summary disposition established that in each month following the erroneous deposit until the time the error was discovered, the balance in the account was below \$23,400. Therefore, the account contained no funds that belonged to defendant. The court concluded that under the terms and conditions governing the account plaintiff was not required to honor any item that would result in the account being overdrawn.

Defendant moved for reconsideration of the trial court's order granting plaintiff's motion for reconsideration and granting plaintiff summary disposition on the counter complaint. Defendant argued that the terms and conditions relied on by plaintiff were void because pursuant to MCL 440.4103(1) a bank was prohibited from disclaiming liability resulting from a lack of good faith or ordinary care. The trial court denied the motion on the ground that defendant failed to raise this argument until after summary disposition was granted in favor of plaintiff.<sup>2</sup>

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). We review a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

The terms and conditions governing the account constituted an agreement between the parties. Contractual language is construed pursuant to its plain and ordinary meaning. Technical

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<sup>1</sup> In a supplemental brief in support of its motion for reconsideration plaintiff agreed to withdraw its claim for an additional \$1,875.75 (the difference between plaintiff's original request for damages in the amount of \$25,275.75 and the trial court's award of \$23,400).

<sup>2</sup> Defendant does not raise this statutory argument on appeal.

or strained construction of the language is to be avoided. “Where contractual language is clear, its construction is a question of law for the court to decide.” *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996).

Defendant argues that the trial court erred by granting plaintiff’s motion for reconsideration and motion for summary disposition of its counter complaint. Defendant asserts that the account contained approximately \$700 at the time it was frozen,<sup>3</sup> and that plaintiff was not entitled to ignore the terms and conditions that required it to make those deposited funds available. We disagree and affirm the trial court’s decision. The trial court did not abuse its discretion by granting plaintiff’s motion for reconsideration because, contrary to the trial court’s statement in its original opinion and order, and as subsequently acknowledged by the trial court, plaintiff’s motion for summary disposition addressed the allegations raised in both the complaint and the counter complaint. *Churchman, supra*.

Furthermore, the trial court correctly concluded that plaintiff was entitled to summary disposition on defendant’s counter complaint. Defendant’s assertion that the account contained approximately \$700 at the time it was frozen in January 1999 is erroneous. The bank statements submitted by plaintiff in support of its motion established that after the erroneous deposit was recorded in defendant’s account in July 1998, the account never contained funds in an amount that exceeded the amount of the erroneous deposit. Thus, the account never contained a balance consisting of funds that were correctly deposited in the account and that were not attributable to the error. The terms and conditions that governed the account entitled plaintiff to refrain from honoring items if to do so would make the account further overdrawn, and to correct the error. Defendant cites no authority to support its apparent position that plaintiff was legally obligated to release funds that did not belong to defendant. A party cannot simply state its position and then leave it to this Court to search for authority to sustain that position. *Leitch v Switchenko*, 169 Mich App 761, 764; 426 NW2d 804 (1988). The trial court correctly decided the issue as one of law, *Dillon, supra*, and properly granted plaintiff’s motion for summary disposition of defendant’s counter complaint.

We also find that defendant's appeal was taken for purposes of hindrance or delay, without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a). Therefore, plaintiffs are entitled to costs and attorney fees incurred in opposition to defendant’s appeal. We remand for a determination of costs and attorney fees.

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<sup>3</sup> The final bank statement issued for the account indicates that on January 13, 1999 the account had a balance of \$724.25. On that date the erroneous deposit had not yet been detected. The statement indicates that on January 19, 1999 the account was overdrawn in the amount of \$25,275.75 (\$26,000 minus \$724.75).

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Richard A. Bandstra  
/s/ Michael J. Talbot