

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LAND HOLDINGS, LLC,

Plaintiff,

v

Case No. 2014-140158-CK
Hon. Wendy Potts

RSZ ENTERPRISES, LLC, et al,

Defendants.

OPINION AND ORDER RE: THIRD-PARTY DEFENDANT PNC BANK, NA'S MOTION
FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND/OR (C)(10)

At a session of Court
Held in Pontiac, Michigan

On

SEP 03 2014

In March 2005, National City Bank loaned Defendant/Third-Party Plaintiff RSZ Enterprises, LLC, \$361,025 to purchase a small industrial building in Madison Heights. Defendants/Third-Party Plaintiffs Ron's Carpet Cleaning, LLC and Radoslav Temelkovski guaranteed RSZ's loan. National City also extended a line of credit to Ron's Carpet Cleaning, which was secured by a mortgage on RSZ's building. The loans were later acquired by Third-Party Defendant PNC Bank, N.A., and in July 2010 PNC and the debtors and guarantors entered into a forbearance agreement. That agreement required Third-Party Plaintiffs to make interest-only payments and pay overdue taxes, which they claim they did.

In April 2012, PNC brought an action alleging Third-Party Plaintiffs breached the notes and guarantees. PNC dismissed that case by stipulation in December 2012. Third-Party Plaintiffs claim they tried to sell the property and received offers in December 2012, January 2013, February 2013, and April 2013 but PNC failed to give them payoff information and refused to approve the offers.

In February 2013, the property flooded due to a burst pipe and RSZ filed an insurance claim with Travelers Insurance and hired contractor D&N Services to repair damage. Travelers approved the work and sent PNC a check for \$35,261.28 made out to PNC and Ron's Restoration, LLC. Temelkoski claims he deposited the money in RSZ's account at PNC, and PNC refused to release the funds preventing RSZ from paying the contractor.

PNC assigned its interest in the RSZ debt, guarantees, and mortgage to Plaintiff Land Holding, LLC in February 2013. Land Holding sold the property in a foreclosure sale in April 2013 where it bid \$251,475, which Third-Party Plaintiffs claim was less than the last offer they received on the property. PNC assigned the line of credit to Land Holding in April 2014, and Land Holding filed this action seeking a deficiency judgment. Third-Party Plaintiffs filed a third-party complaint against PNC seeking an accounting and claiming that PNC breached the loan agreements, breached fiduciary duties, tortiously interfered with the efforts to sell the property, and converted the insurance proceeds.

PNC now moves for summary disposition of the third-party claims under MCR 2.116(C)(8), which tests the legal sufficiency of the claims, and (C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). PNC first asserts that the breach of contract claim fails because Third-Party Plaintiffs cannot demonstrate that PNC breached any obligation under the loan or forbearance agreements. Third-Party Plaintiffs contend that PNC had an implied duty to act in good faith, which it failed to do by not providing payoff information and approving the purchase offers. However, a claim for breach of the implied covenant of good faith and fair dealing would apply only if the contract made the manner of PNC's performance a matter of its own discretion. *Burkhardt v City National Bank*, 57 Mich App 649, 652; 226 NW2d 678 (1975). Because PNC's performance was not discretionary, the claim for breach of implied duty of good faith fails. Further, because Third-

Party Plaintiffs have not identified any other contractual obligation that PNC breached, PNC is entitled to summary disposition of the breach of contract claim.

PNC next argues that the breach of fiduciary duty claim fails because a lender generally owes no fiduciary duty to the borrower. See *Farm Credit Services v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). Third-Party Plaintiffs contend that a fiduciary duty existed because they reposed faith and trust in PNC and its agents. See *Rose v National Auction Group, Inc*, 466 Mich 453, 469; 646 NW2d 455 (2002). However, they have not explained how their decision to repose faith and trust in PNC would overcome the general rule that a lender relationship does not give rise to fiduciary duties. Third-Party Plaintiffs also have not explained how it was reasonable for them to repose faith and trust in PNC, which is a key requirement for a fiduciary relationship. *Rose, supra*. Because Third-Party Plaintiffs fail to demonstrate that PNC owed them a fiduciary duty, PNC is entitled to summary disposition of their breach of fiduciary duty claim.

PNC also asserts that Third-Party Plaintiffs' equitable claim for an accounting should be dismissed because they have an adequate remedy at law and the information they seek through an accounting can be determined in discovery. Indeed, Third-Party Plaintiffs are generally not entitled to seek an accounting where the issue is a specific sum due under a contract. *Boyd v Nelson Credit Centers, Inc*, 132 Mich App 774, 779; 348 NW2d 25 (1984). Further, an accounting is unnecessary if discovery is sufficient to determine the amounts at issue. *Boyd, supra*. Because Third-Party Plaintiffs have not explained what they would learn through an accounting that they cannot obtain through discovery, PNC is entitled to dismissal of the accounting claim.

PNC next argues that the tortious interference claim fails because Third-Party Plaintiffs cannot show that PNC wrongfully interfered with or caused a breach of their relationship with potential purchasers. To prevail on their tortious interference theory, Third-Party Plaintiffs must

demonstrate that PNC, among other things, improperly induced a breach or termination of a business relationship. *Badiee v Brighton Area School*, 265 Mich App 343, 366-367; 695 NW2d 521 (2005). Improper interference occurs if PNC committed a per se wrongful act or a lawful act with malice and unjustified in law for the purpose of invading Plaintiff's business relationship. *Badiee, supra* at 367. As support for their position, Third-Party Plaintiffs claim that they received several offers to purchase the mortgaged property, but their efforts to sell it were thwarted because PNC either did not approve a short sale or failed to promptly give them payoff information. However, Third-Party Plaintiffs point to no provision in the loan agreements that required PNC to do either of these things. Further, they cite no evidence or authority supporting their position that PNC's refusal to approve a short sale or alleged failure to provide payoff information was wrongful per se. In addition, there is no evidence to support Third-Party Plaintiffs' position that PNC's alleged failure or refusal to cooperate with the property sale was motivated by malice or was without justification. Thus, PNC is entitled to summary disposition of the tortious interference claim.

Regarding the conversion claim, PNC asserts that Third-Party Plaintiffs are not real parties in interest because the check from Traveler's was made out to PNC and Ron's Restoration, LLC. PNC further asserts that even if the check was properly payable to one of the Third-Party Plaintiffs, the funds can only be claimed by the contractor who performed the repairs. To be a real party in interest who has the right to bring a cause of action for conversion of the insurance proceeds, Third-Party Plaintiffs would have to show that they have a right to claim the funds. *Hofmann v Auto Club Ins Assn*, 211 Mich App 55, 95; 535 NW2d 529 (1995). Although Third-Party Plaintiffs claim that Traveler's made the check out to Ron's Restoration in error, they present no evidence of this claim. In fact, they attach to their brief a copy of a letter from Traveler's stating that the insured is Ron's Restoration. Third-Party Plaintiffs further claim

that Ron's Restoration is an assumed name for Ron's Carpet Cleaning, however, they present no evidence of this fact. Because the insurance proceeds were paid to PNC and Ron's Restoration, and neither Ron's Restoration nor the contractor that performed the repairs are parties to this action, Third-Party Plaintiffs are not real parties in interest on the conversion claim.

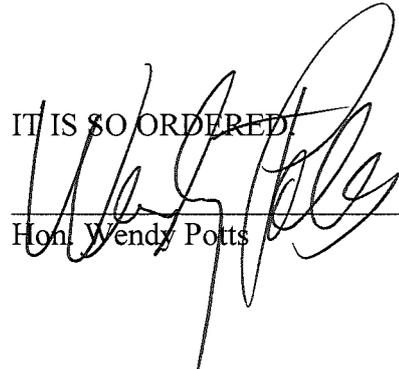
Even if the insurance proceeds had been paid to one or more of the Third-Party Plaintiffs in this case, they still fail to demonstrate a question of fact on all elements of their conversion claim. To establish a claim for conversion, Third-Party Plaintiffs must show (1) an act of dominion by PNC, (2) wrongly exerted over the property, (3) that is inconsistent with Third-Party Plaintiffs' ownership rights. *Check Reporting Services, Inc v Michigan National Bank*, 191 Mich App 614, 626; 478 NW2d 893 (1991). Because Temelkoski voluntarily deposited the funds in a PNC account, there is no question of fact that PNC did not wrongfully exert dominion over the funds by accepting them for deposit. Because Third-Party Plaintiffs were in default of their loan obligations, there is no question of fact that PNC's refusal to release funds in their account was not a wrongful exertion of dominion because the loan agreements allowed it to do so. Further, because none of the Third-Party Plaintiffs were payees on the check, they fail to show a question of fact whether they had any ownership rights to the check or the deposited funds. Thus, PNC is entitled to summary disposition of the conversion claim.

For all of these reasons, the Court grants PNC's motion and dismisses the third-party complaint with prejudice.

Dated:

SEP 03 2014

IT IS SO ORDERED


Hon. Wendy Potts