

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**BANK OF ANN ARBOR,  
Plaintiff,**

v.

**Case No. 13-135876-CK  
Hon. James M. Alexander**

**INFINITI TITLE AGENCY OF MICHIGAN, INC, ET AL,  
Defendants.**

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**OPINION AND ORDER FOLLOWING BENCH TRIAL**

This matter is before the Court on Plaintiff's First Amended Complaint, which seeks damages on claims that it was essentially defrauded into lending money to fund the purchase of property commonly known as 30959 County Ridge Circle in Farmington Hills, Michigan. The Court conducted a one-day bench trial on October 16, 2014. Plaintiff generally claims that it was damaged when Defendant Anita Groggins failed to pay under a verbal lease agreement with the home's owner, non-party Nina Smith. Defendants, on the other hand, argue that Ms. Smith purchased the home from Ms. Groggins and Mark Tyler, and if Ms. Smith failed to pay on her mortgage loan, Plaintiff's only recourse is against her.

At trial, the Court heard the testimony of Ms. Groggins, Ms. Smith, and Barbara Morrison – a Plaintiff employee. Following trial, the parties were directed to order the transcript and file proposed findings of fact and conclusions of law. Final briefs were filed on January 30, 2015.

The Court has considered the trial testimony and reviewed the exhibits and post-trial submissions of the parties. Based on the foregoing, the Court issues this Opinion and Order as its findings of fact and conclusions of law, pursuant to MCR 2.517.

## **I. Introduction**

Plaintiff is a Michigan banking corporation. Defendant Infiniti Title Agency of Michigan is a dissolved Michigan corporation with offices in Oakland County. Defendant Groggins Realty, Inc. is a dissolved Michigan corporation with offices in Oakland County. Defendant Groggins Realty, LLC is an active Michigan limited liability corporation doing business in Oakland County. And Defendant Anita Groggins, also known as Anita Tyler, is an Oakland County resident.

Ms. Groggins was the resident agent and sole owner of Groggins Realty, Inc. and Infiniti Title and is the current resident agent and sole owner of Groggins Realty, LLC.

Almost all of the evidence and testimony presented revolved around the extent and effect of verbal agreements between Ms. Groggins (as lessee of the property) and the property's owner, Ms. Smith, relative to Plaintiff's loan.

## **II. Findings of Fact**

Ms. Groggins is a licensed real estate broker, licensed mortgage broker, and licensed title agent in Michigan, and is otherwise knowledgeable in the ways of the real estate industry. Ms. Groggins initially lived in and owned the subject property. In 2008, Ms. Groggins sold the property to Ms. Nina Smith for approximately \$350,000. But Ms. Smith never lived in the home.

Instead, she immediately verbally leased the property back to Ms. Groggins, who continued to use it as her domicile.

Ms. Groggins sold the property through Groggins Realty and received a commission for the sale. Groggins sent the closing to Blue Sky Title and also received a commission from the title company. In order to purchase the home, Ms. Smith received a mortgage from Plaintiff, who subsequently sold the loan to JPMorgan Chase Bank.

Ms. Groggins testified that she had an agreement with Ms. Smith that she “would make the mortgage payments.” (Tr. 9:13-16). She promised Ms. Smith that she would do so. (Tr. 28:8-11). And she testified that she intended Ms. Smith rely on that promise, so she could live in the home. (Tr. 28:12-15). It was also Ms. Groggins’ “responsibility” to “pay other associated costs with the house, . . . like the cable bill” and “to keep the house up.” (Tr. 11:8-13).

Ms. Groggins also testified that she “did not complete all 12 payments . . . that we agreed to.” (Tr. 9:21-22). Ms. Groggins also testified that she understood that a failure to make mortgage payments causes the lender to lose money. (Tr. 33:19-21). But she testified that she did not make any promises to the Plaintiff. (Tr. 54:22-24; 55:2-4).

The Court finds that none of the remaining Defendants made any promises or representations to Plaintiff.

Ms. Groggins testified that she believed that she did not need to make tax payments separately because “the tax payment was included in the mortgage payment.” (Tr. 11:23-12:3). She understood that this meant that “by not paying the mortgage payment, the tax payment wasn’t being made either.” (Tr. 12:7-10). This was also true for the insurance payment. (Tr. 12:11-16).

Ms. Groggins also testified that she understood that not paying the mortgage payments under the lease agreement caused Ms. Smith financial problems. (Tr. 13:19-25). When she was evicted, Ms. Groggins took the home's appliances with her. (Tr. 16:12-14).

After Ms. Smith purchased the home and while Ms. Groggins was still living in the home, Ms. Groggins attempted to help Ms. Smith obtain a loan modification and to market the home for sale. (Tr. 19:12-13; 20:7). But Ms. Groggins testified that she was supposed to be the buyer on a short sale. (Tr. 21:18-19). But she did not tell the lender that she was living in the home and attempting to buy it in a short sale. (Tr. 21:20-23).

Ms. Smith testified that she did not know that she was buying the home, and she "just signed documents" at Ms. Groggins' request. (Tr. 56:25; 58:17-24). This was in an effort to start a real estate business. (Tr. 62:4-7). And Ms. Smith testified that Ms. Groggins and her husband, Mark, were supposed to make the mortgage and tax payments. (Tr. 64:3-4).

Ms. Smith also testified that she did not sign the hardship letter or submit the hardship loan modification application as testified by Ms. Groggins. (Tr. 66:2-20). The way that Ms. Smith understood the transaction is that the home was Ms. Groggins' and her husband's all along. (Tr. 74:14-20). Ultimately, Ms. Smith filed for bankruptcy because there was "a bunch of stuff" in her name that she couldn't pay for. (Tr. 73:9-11).

In April 2008, JPMorgan notified Plaintiff that the borrower defaulted on the initial payment, which forced Plaintiff to pay JPMorgan the service release premium received from the initial sale of the loan. (Tr. 79:8-19). In September 2008, after further defaults, JPMorgan sent a repurchase demand to Plaintiff, who ultimately was forced to repurchase the loan for \$404,000. (Tr. 80:17-18; 85:18). This was greater than the original loan of \$370,000 to cover legal fees and interest and insurance payments tied to the mortgage and property. (Tr. 86:2-7).

When the loan payments were not made, Plaintiff foreclosed on the loan and evicted Ms. Groggins and others in July 2013. (Tr. 89:23-24). By this time, Ms. Groggins had lived in the home for a little over ten years. But Ms. Smith never lived in the home. (Tr. 63:14-15). Plaintiff did not think Ms. Smith lived there, but included her on the eviction because she was on the deed. (Tr. 90:3-7).

Ms. Groggins also testified about the condition of the home as she left and pictures were admitted into evidence. While Plaintiff believes that the condition of the home amounted to “waste,” the Court is not inclined to so find. Rather, Ms. Groggins appeared to have reasonable explanations for each of Plaintiff’s questions regarding specific conditions of the home. Most of the cleanliness issues appear related to Ms. Groggins 36-hour eviction window.

The Court has had the opportunity to observe the witnesses’ demeanor and assess their credibility. Based on the same, the Court finds that the testimony of each witness was credible. The Court is also left with the firm impression that Ms. Groggins was dishonest in her sale of the home to Ms. Smith. The Court is also convinced that Ms. Smith was naïve to rely on Ms. Groggins’ representations, which ultimately contributed to Ms. Smith’s bankruptcy filing. And while Ms. Groggins misled Ms. Smith, she never misled or made any material representations to Plaintiff with respect to the Smith loan.

### **III. Conclusions of Law**

Based on the foregoing findings of fact, the Court makes the following conclusions of law.

A. Breach of Contract of Insurance – Defendant Infiniti Title

The Court initially notes that Plaintiff only brings its Breach of Contract claim against Defendant Infiniti Title and only as it pertains to a policy of title insurance issued by First American in the amount of \$288,411.94. Plaintiff reiterated this specific claim in the parties' Final Pre-Trial Order.

Plaintiff, however, does not explain or present any evidence regarding how Defendant Infiniti Title is liable for breach of a contract that it was apparently not a party to (the Smith loan). Instead, Plaintiff spent the overwhelming majority of time when presenting its proofs and in its Proposed Findings of Fact and Conclusions of law arguing that it was a third-party beneficiary of the verbal lease between Ms. Smith and Ms. Groggins. But this claim was never pled. Plaintiff's Complaint simply does not allege a breach of contract claim against Defendant Groggins. The only claims against Ms. Groggins, individually, are those for fraud and conversion, which the Court will address in time.

But the Court is also aware that under MCR 2.118(C)(1), the Court may address issues not raised by the pleadings if they are "tried by express or implied consent of the parties." But MCR 2.118(C)(1) requires a "motion of a party at any time." The Court only has discretion to allow the amendment if Plaintiff so moves. Since a motion is a prerequisite to the Court exercising any discretion, and Plaintiff never moved for an amendment, the Court must limit the allegations of wrongdoing to those contained in Plaintiff's First Amended Complaint.

As a result, the Court finds that Plaintiff's breach of contract claim only relates to a breach of a purported insurance contract by Infiniti Title.

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET*

*Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

The existence of a valid contract requires an offer, acceptance, consideration, and mutual agreement to all of the contract's essential terms. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006).

On this claim, Plaintiff presented no proofs. In fact, Plaintiff never introduced or referred to any contract for insurance that named Infiniti Title as a party – much less established a breach of the same. Because the Court is unconvinced that such a contract existed, there can be no breach.

For this reason, the Court concludes that Plaintiff failed to prove its Count I for Breach of Contract of Insurance against Defendant Infiniti Title, and the same is DISMISSED.

Assuming arguendo that the Court should consider an unpled breach of contract claim against Ms. Groggins, the Court will briefly address the same. As stated, there exists no contract between Plaintiff and Ms. Groggins. Rather, Plaintiff's unpled claim is apparently founded on its third-party beneficiary status based on the verbal lease.

#### *1. Statute of Frauds*

Defendants claim that the enforcement of any verbal lease agreement between Ms. Smith and Ms. Groggins is barred by the statute of frauds because: “[1.] there were no definite terms and assuming there was an agreement, [2.] the agreement could not be performed within one year, and [3.] the agreement was purportedly a promise to pay the debt of another.”

Indeed, there is inadequate testimony to determine the precise obligations under the verbal lease. The Court, however, is left with the impression that Ms. Groggins promised Ms.

Smith to pay all obligations of the home – including the mortgage payment, insurance, tax, and all utilities and upkeep. But one essential term is missing – the length of the agreement. Such a term is essential to a binding agreement. *Kloian*, 273 Mich App at 452-453. Without it, the Court finds that the underlying verbal lease did not amount to a valid agreement.

Assuming arguendo (despite this missing term) the agreement was enforceable, the Court will briefly examine the applicability of the statute of frauds. Under MCL 566.132(1):

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

(a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

(b) A special promise to answer for the debt, default, or misdoings of another person.

As stated, there was no testimony or evidence of any kind relative to the length of the verbal lease. Plaintiff argues that Ms. Smith essentially assigned the mortgage to Ms. Groggins. As a result, the verbal lease would be incapable of being performed within one year and is, therefore, barred by the statute of frauds.

With respect to MCL 566.132(1)(b), the Court is convinced that all evidence pointed to the verbal lease amounting to Ms. Groggins' promise to pay Ms. Smith's mortgage payments directly to the bank. Indeed, even Plaintiff's own proofs and third-party beneficiary arguments hinge on this fact. But, as such, it also amounts to the promise to answer for the debt of another, which must be in writing in order to be enforceable.

The Court is aware, however, that **original** promises to answer for the debt of another may be excepted from the statute of frauds. *Schier, Deneweth & Parfitt, PC v Bennett*, 206 Mich

App 281, 282; 520 NW2d 705 (1994). But there was no evidence presented relative to the timing of Ms. Groggins' promise.

As the Court understands the agreement, however, Ms. Groggins made certain promises to Ms. Smith in order to induce her to buy the home and lease it back to her. These promises must have included a promise to make the mortgage payments directly to the bank. And this promise would have been made prior to Ms. Smith obtaining the loan. After all, Ms. Smith was never supposed to live in the home; it was always supposed to be Ms. Groggins' home. As a result, the Court is convinced that Ms. Groggins' promise was an original promise that may be excepted from application of MCL 566.132(1)(b).

For the foregoing reasons, the Court finds that the lease was unenforceable because it did not include all essential terms – specifically the length of the purported lease. Assuming arguendo that the lease was enforceable, the Court would have concluded that it was barred by MCL 566.132(1)(a) as one “not to be performed within 1 year from the making of the agreement.”

## *2. Third-Party Beneficiary*

As stated, Plaintiff spends the bulk of its argument claiming that it was a third-party beneficiary of a verbal lease agreement between Ms. Smith and Ms. Groggins. But the Court has concluded that no valid agreement existed, on which, to base such a claim. Assuming arguendo that a valid agreement existed, the Court will briefly address Plaintiff's third-party beneficiary claim.

Under the Revised Judicature Act, MCL 600.1405, “Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said

promise that he would have had if the said promise had been made directly to him as the promisee.”

Our Supreme Court has held:

A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise “directly” to or for that person. By using the modifier “directly,” the Legislature intended “to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.” *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003); citing MCL 600.1405 and *Koenig v South Haven*, 460 Mich. 667, 677; 597 N.W.2d 99 (1999).

The *Schmalfeldt* Court continued, “a court should look no further than the ‘form and meaning’ of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of 1405.” *Id.*

On this issue, the Court of Appeals has also noted that in order to be a third-party beneficiary, a party must not only be in a position to benefit from the performance of the contract, but there must be “an express promise to act to the benefit of the third party.” *Kisiel v Holz*, 272 Mich App 168, 171; 725 NW2d 67 (2006).

Based on the foregoing, the Court concludes that Plaintiff has failed to establish that it was an intended third-party beneficiary of the alleged verbal lease between Ms. Smith and Ms. Groggins. First, the agreement was not written, so this Court cannot look to the “form and meaning” of the contract itself. Second, there was no evidence that Ms. Smith and Ms. Groggins considered the bank when reaching their purported agreement – much less intended the bank to benefit from their verbal agreement.

Plaintiff simply fails to establish that it is an intended beneficiary of the unwritten verbal lease. To apply this doctrine under these circumstances would stretch it beyond its breaking

point. And this Court will not so extend absent clear caselaw that a lender may pursue a tenant under a verbal lease when the property owner defaults on a loan on a third-party beneficiary theory.

For all of the foregoing reasons, assuming *arguendo* that the Court properly considers Plaintiff's unpled breach of contract claim against Ms. Groggins based on a third-party beneficiary status, the Court would conclude that Plaintiff failed to establish such a claim.

#### B. Fraud – All Remaining Defendants

Plaintiff's next claim is one for fraud against all remaining Defendants. In order to establish a claim of fraudulent misrepresentation, a plaintiff must establish that:

(1) defendant made a material representation; (2) the representation was false; (3) defendant knew, or should have known, that the representation was false when making it; (4) defendant made the representation with the intent that plaintiff rely on it; (5) and plaintiff acted on the representation, incurring damages as a result. *Foreman v Foreman*, 266 Mich App 132, 141; 701 NW2d 167 (2005). *Hi-Way Motor Corp v Int'l Harvester Co*, 398 Mich. 330, 336; 247 N.W.2d 813 (1976), citing *Candler v Heigho*, 208 Mich. 115, 121; 175 N.W. 141 (1919).

In addition, "Plaintiff must also show that any reliance on defendant's representations was reasonable." *Foreman*, 266 Mich App at 141-142, citing *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

Further, "fraud . . . 'is not to be lightly presumed, but must be clearly proved,' 'by clear, satisfactory and convincing' evidence, [and] trial courts should ensure that these standards are clearly satisfied with regard to all of the elements of a fraud claim." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008); quoting *Palmer v Palmer*, 194 Mich 79, 81; 160 NW 404 (1916); and *Youngs v Tuttle Hill Corp*, 373 Mich 145, 147; 128 NW2d 472 (1964).

Quite simply, Plaintiff has failed to establish **all** fraud elements. This is so because Plaintiff failed to establish that any of the remaining Defendants made any representations **to Plaintiff** – much less false, material representations with the intent that Plaintiff rely on them. Rather, Plaintiff only established that Defendant Groggins may have made a material misrepresentation to Ms. Smith. But said representations may only serve as a potential foundation for a fraud claim brought by Ms. Smith – not Plaintiff.

For the foregoing reason, the Court finds that Plaintiff failed to prove its entitlement to relief based on its fraud claim.

C. Conversion – All Remaining Defendants

Finally, Plaintiff's last claim is one for conversion against all remaining Defendants. "The tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App. 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Plaintiff apparently bases this claim on MCL 600.2919 and MCL 600.2919a. Under MCL 600.2919(2):

(a) Any guardian, tenant in dower, life tenant, or tenant for years who commits or suffers any waste, during his term or estate, to the lands, tenements, or hereditaments, without having a lawful license to do so, is liable for double the amount of actual damages. . . .

(b) A claim under this provision may be brought by the person having the next immediate estate, in fee, for life, or for years or by any person who has the remainder or reversion in fee or for life after an intervening estate for life or for years; and each of the parties shall recover damages according to his estate in the premises. . . .

Further, under MCL 600.2919(6)(b), “Whenever any lands or tenements are sold by virtue of an execution issued upon any judgment, the person to whom the conveyance is executed by the sheriff pursuant to the sale has a claim for damages for any waste committed on the premises by any person after the sale.”

On this claim, however, Plaintiff has not established that Ms. Groggins committed any waste on the premises. There was no testimony or evidence about the condition of the premises at the time of Plaintiff’s loan on the property. As a result, it is unclear if the property was in any worse condition when Ms. Groggins left than it was when Ms. Smith purchased the property (and Plaintiff’s interest in the property began). And, as stated, Ms. Groggins’ explanations on the conditions of the property were reasonable.

For this reason, the Court finds that Plaintiff failed to establish, by a preponderance of the evidence, that Defendants committed any waste to the property such that Plaintiff is entitled to recover damages under a conversion theory.

#### **IV. Summary/Conclusion**

For all of the foregoing reasons, the Court finds no cause for action on all of Plaintiff’s remaining claims, enters Judgment in favor of Defendants, and dismisses Plaintiffs’ last remaining claims with prejudice.

This Order is a Final Order that resolves the last pending claim and closes the case.

**IT IS SO ORDERED.**

March 9, 2015  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge