

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

THE SHOPPES PLAZA LLC,

Plaintiff/Counter-Defendant,

Case No. 13-08223-CKB

vs.

HON. CHRISTOPHER P. YATES

NHS RETAIL ONE, LLC; NORMAN  
LESLIE, individually; BRODY  
VENTURES, LLC; and CHRISTIAN  
and KERRY WISER, individually,

Defendants/Counter-Plaintiff.

---

OPINION AND ORDER DENYING SUMMARY DISPOSITION  
ON COUNT IV OF THE AMENDED COMPLAINT, BUT GRANTING  
SUMMARY DISPOSITION ON DEFENDANT NHS'S COUNTERCLAIM

This opening skirmish in a larger battle presents a dispute about the disposition of \$75,000 placed in an escrow account as part of a transaction involving the sale of a strip mall on the busiest corner in Kent County. By all accounts, Defendant NHS Retail One, LLC ("NHS") placed \$75,000 in escrow with First American Title Insurance Company ("First American") in conjunction with the impending sale of the strip mall on the northwest corner of 28th Street and the East Beltline in the City of Kentwood. The \$75,000 was intended to pay for the acquisition of a permanent easement allowing access to the strip mall, but NHS never acquired the easement. As a result, the parties have asked the Court to decide whether the \$75,000 placed in escrow must be returned to NHS or, instead, awarded to Plaintiff The Shoppes Plaza LLC ("Shoppes Plaza") as compensation to Shoppes Plaza for NHS's inability to acquire the permanent easement for the benefit of Shoppes Plaza. The Court concludes that NHS has no right to the funds in escrow unless it obtains a permanent easement.

## I. Factual Background

In requesting a disposition of the \$75,000 held in escrow, Plaintiff Shoppes Plaza has relied upon MCR 2.116(C)(9) and (10). A motion ““for summary disposition under MCR 2.116(C)(9) is tested solely by reference to the parties’ pleadings[,]”” Glass v Goeckel, 473 Mich 667, 677 (2005), so the Court must confine itself to the amended complaint and the counter-complaint in addressing that aspect of Shoppes Plaza’s motion. But the request for relief under MCR 2.116(C)(10) permits the Court to consider “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties[.]” Maiden v Rozwood, 461 Mich 109, 120 (1999). Consequently, the Court shall set forth the facts by discussing the pleadings in the first instance, and then filling in the record as the Court sees fit by referring to the parties’ submissions.

During the negotiations leading up to the sale of the strip mall by Defendant NHS to Plaintiff Shoppes Plaza, the parties came to understand that Shoppes Plaza desired a permanent easement that allowed customers to enter the strip-mall parking lot from 28th Street.<sup>1</sup> NHS placed \$75,000 into escrow with First American as part of the process of converting NHS’s existing temporary easement into a permanent easement. But as events unfolded, NHS was unable to obtain the type of permanent easement from 28th Street that Shoppes Plaza desired. Consequently, the parties closed on the sale without the expenditure of the \$75,000 placed in escrow, and Shoppes Plaza had to satisfy itself with an easement of limited duration from 28th Street. Not surprisingly, in the wake of the closing, NHS and Shoppes Plaza both laid claim to the \$75,000 in escrow. NHS asserts an entitlement to the funds in escrow because NHS was the source of that \$75,000. Indeed, NHS’s counter-complaint presents

---

<sup>1</sup> The parties agree that a permanent easement will enable customers to enter the strip mall from the East Beltline in perpetuity. As a result, the permanent easement at issue would provide a second point of entry in perpetuity.

a single claim for “Termination of Escrow,” which demands the return of the \$75,000 held in escrow by First American. In contrast, Count IV of Shoppes Plaza’s amended complaint contends that the \$75,000 in escrow must be awarded to it by virtue of NHS’s failure to obtain a permanent easement from 28th Street. See Amended Complaint, ¶¶ 39-44. In moving for summary disposition pursuant to MCR 2.116(C)(9) and (10), Shoppes Plaza has framed the dispute concerning the viability of the competing claims for termination of escrow set forth in Count IV of its amended complaint and the counterclaim advanced by NHS.

## II. Legal Analysis

Plaintiff Shoppes Plaza’s request for summary disposition under MCR 2.116(C)(9) rests on the contention that Defendant NHS has failed to state a valid defense to the claim for “termination of escrow” asserted in Count IV of the amended complaint. This request must be judged exclusively by reference to the amended complaint and the corresponding answer, see Glass, 473 Mich at 677, and relief is appropriate only if “a party’s defenses are so untenable as a matter of law that no factual development could possibly deny the plaintiff’s right to recovery[.]”<sup>2</sup> See Hackel v Macomb County Comm’n, 298 Mich App 311, 316 (2012). Shoppes Plaza’s demand for summary disposition under MCR 2.116(C)(10) stands on different footing because, in addressing that request, the Court may consider the entire record to determine whether “the proffered evidence fails to establish a genuine issue regarding any material fact[.]” Maiden, 461 Mich at 120. Such a “genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open

---

<sup>2</sup> Our Court of Appeals has explained that a “motion under MCR 2.116(C)(9) ‘is analogous to one brought pursuant to MCR 2.116(C)(8) in that both motions are tested by the pleadings alone, with the court accepting all well-pleaded allegations as true.’” Hackel v Macomb County Comm’n, 298 Mich App 311, 316 (2012).

an issue upon which reasonable minds might differ.” West v General Motors Corp, 469 Mich 177, 183 (2003). Applying these standards, the Court must decide whether Shoppes Plaza is entitled to summary disposition on the competing claims for the \$75,000 currently held in escrow.

The parties’ competing claims to the \$75,000 in escrow hinge primarily upon interpretation of the parties’ contracts. “The goal of contract construction is to determine and enforce the parties’ intent on the basis of the plain language of the contract itself.” St Clair Medical, PC v Borgiel, 270 Mich App 260, 264 (2006). If “there are several agreements relating to the same subject matter, the intention of the parties must be gleaned from all the agreements.” Omnicom of Michigan v Giannetti Investment Co, 221 Mich App 341, 346 (1997). If the contract language is unambiguous, the Court must enforce the contract as written. Rory v Continental Ins Co, 473 Mich 457, 468 (2005). But if the contract is capable of conflicting interpretations, the meaning of the contract “is a question of fact that must be decided by the jury.” Klapp v United Ins Group Agency, 468 Mich 459, 469 (2003). Accordingly, the Court must determine whether the language of the parties’ contracts yields one clear meaning.

The parties plainly indicated in the First Amendment to Commercial Real Estate Purchase Agreement that Defendant NHS had to obtain an easement for entry from 28th Street as “a condition precedent to closing[.]” See Counter-Complaint, Exhibit 2 (First Amendment to Commercial Real Estate Purchase Agreement, § 3). A condition precedent ““is a fact or event that the parties intend must take place before there is a right to performance.”” See Harbor Park Market, Inc v Gronda, 277 Mich App 126, 131 (2007). Therefore, Plaintiff Shoppes Plaza bore no obligation to close on the purchase agreement unless NHS secured a permanent easement providing access from 28th Street. Nevertheless, despite the inability of NHS to obtain a permanent easement, Shoppes Plaza elected

to close on the transaction on December 3, 2012. Although the parties agree on that fact, they draw significantly different conclusions from that chain of events.

Defendant NHS contends that, by closing on the transaction, Plaintiff Shoppes Plaza waived its right to enforce the condition precedent concerning the easement from 28th Street. This argument suffers from a fatal flaw. That is, the purchase agreement affords Shoppes Plaza the right to sue for breach of the condition precedent even after the closing of the transaction. Specifically, section 20 of the Commercial Real Estate Purchase Agreement states as follows:

**Termination.** If either Buyer or Seller is not obligated to complete this Agreement because a condition precedent is not met, that party may terminate this Agreement by notifying the other party of the intention to terminate this Agreement and the reason. Buyer or Seller may waive any obligations of the other party without prejudicing the right to subsequently assert other conditions *or to make a claim against the other party for the breach of a condition* or warranty.

See Counter-Complaint, Exhibit 1 (Commercial Real Estate Purchase Agreement, § 20 (emphasis added)). Under Michigan law, the merger doctrine ordinarily precludes a participant in the sale of real property from filing suit on the terms of a purchase agreement after the transaction closes. See Johnson Family Ltd Partnership v White Pine Wireless, LLC, 281 Mich App 364, 374-375 (2008). “But this rule is not absolute.” Id. at 375. For example, “where delivery of the deed represents only partial performance of the preceding contract, the unperformed portions are not merged into it.” Id. Here, section 20 of the purchase agreement not only granted Shoppes Plaza the right to terminate that agreement if a condition precedent was not satisfied, but also entitled Shoppes Plaza to “waive any obligations of the other party” and subsequently “make a claim against the other party for the breach of a condition[.]” See Counter-Complaint, Exhibit 1 (Commercial Real Estate Purchase Agreement, § 20). Consequently, the purchase agreement unambiguously entitles Shoppes Plaza to proceed on

a claim for breach of the condition precedent even though Shoppes Plaza chose to close on the sale of the property prior to fulfillment of the condition precedent. In other words, NHS's obligation to obtain a permanent easement was not merged into the deed at the time of closing.<sup>3</sup>

Because Defendant NHS's obligation to obtain a permanent easement from 28th Street for the benefit of Plaintiff Shoppes Plaza endured beyond the closing, NHS cannot assert a right to the \$75,000 held in escrow absent procurement of such a permanent easement or the assent of Shoppes Plaza to such a disbursement. See Counter-Complaint, Exhibit 5 (Escrow Agreement, §§ 1 and 2). Accordingly, the Court must grant summary disposition to Plaintiff Shoppes Plaza pursuant to MCR 2.116(C)(10) on NHS's counter-complaint. But because there remain two possible outcomes under the terms of the escrow agreement – either NHS obtains a permanent easement after the closing and thereby qualifies for receipt of the \$75,000 in escrow or NHS fails to obtain a permanent easement after closing, leaving Shoppes Plaza with a superior claim to the \$75,000 in escrow – the Court will not yet grant summary disposition to Shoppes Plaza under MCR 2.116(C)(9) or (10) on the claim in Count IV of its amended complaint for the \$75,000 in escrow. Instead, the Court will permit NHS to attempt to secure a permanent easement during the pendency of this case, and thereby qualify for

---

<sup>3</sup> Beyond that, both the escrow agreement (which the parties signed three days before closing) and the seventh amendment to the purchase agreement (which the parties executed on the date of the closing) refer to Defendant NHS's continuing obligation to obtain a permanent easement from 28th Street. Specifically, the escrow agreement itself states that the \$75,000 placed in escrow should be disbursed to NHS “upon confirmation of the recording of the easement documents[,]” see Counter-Complaint, Exhibit 5 (Escrow Agreement, § 1), or “as so directed” by “written direction of Seller [*i.e.*, NHS] and Purchaser [*i.e.*, Shoppes Plaza.]” See id. (Escrow Agreement, § 2). Similarly, the seventh amendment to the purchase agreement – signed on the closing date of December 3, 2012 – emphasizes that NHS “shall provide Buyer [*i.e.*, Shoppes Plaza] with an easement ensuring access to the Premises” and that “said easement shall be closed in escrow at Closing.” See id., Exhibit 4 (Seventh Amendment to Commercial Real Estate Purchase Agreement, § 2). These two references fortify the Court's conclusion that NHS's obligation to obtain a permanent easement remained after the parties closed on the real property.

the funds held in escrow. In other words, the Court shall declare at this stage that NHS has no right to the \$75,000 held in escrow unless and until it obtains a permanent easement from 28th Street, but the Court shall not yet award the \$75,000 to Shoppes Plaza because the parties' escrow agreement affords NHS the opportunity to earn the funds in escrow by obtaining a permanent easement.<sup>4</sup>

### III. Conclusion

Plaintiff Shoppes Plaza and Defendant NHS entered into a contract requiring NHS to place \$75,000 in escrow, but enabling NHS to reclaim those funds upon obtaining a permanent easement for Shoppes Plaza from 28th Street. The Court has determined at this juncture that NHS has no right to the funds in escrow unless it obtains such a permanent easement. For that reason, the Court must award summary disposition to Shoppes Plaza on NHS's counterclaim for the funds in escrow. But because NHS can still fulfill its obligation, and thereby qualify for the \$75,000 in escrow, the Court shall deny summary disposition to Shoppes Plaza with respect to its claim for the funds in escrow. If NHS cannot fulfill its obligation during the pendency of this case, however, the Court shall award the \$75,000 in escrow to Shoppes Plaza.

IT IS SO ORDERED.

Dated: February 12, 2014



HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge

---

<sup>4</sup> Both Plaintiff Shoppes Plaza and Defendant NHS clearly contemplated that NHS would be able to procure a permanent easement from 28th Street for Shoppes Plaza. The inability of NHS to fulfill that obligation leaves both parties worse off than they would be if NHS had succeeded, so the allowance of additional time to satisfy that obligation potentially benefits both parties.