

STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

MEDIA ONE COMMUNICATIONS, LLC,
a Michigan Limited Liability Corporation,

Plaintiff,

v

MACATAWA BANK CORPORATION,
a Michigan Corporation; **COSTAL REAL
ESTATE,** a Michigan Limited Liability
Company; and **MACATAWA LEGENDS
HOMEOWNERS ASSOCIATION,** a
Domestic Nonprofit Corporation,

Defendants.

OPINION and ORDER

Case No.: 15-4299-CB

Hon. Jon A. Van Allsburg

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At a session of said Court, held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan,
on the 19th day of November, 2015

The curious contractual dispute in this case involves the meaning of two phrases not uncommonly found in legal documents: “subject to” and “honor and recognize.”

Defendant Macatawa Bank Corporation and defendant Costal Real Estate (hereinafter collectively referred to as Macatawa Bank) bring a joint motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of frauds) and (C)(8).

Factual Background

Plaintiff Media One Communications LLC (Media One) installs and maintains fiber optic communications networks. In 2002, Partners Fore Development Group LLC (PFD) commenced construction of “Macatawa Legends,” a multi-unit residential development. Macatawa Bank, as mortgagee, provided the financing for the development. In 2004, Media One entered into an



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agreement with PFD (hereinafter, the Fiber Optic Agreement). Under the Fiber Optic Agreement, Media One agreed to provide fiber optic broadband service to each unit in the development. In return, PFD agreed to pay Media One \$2,460 per unit, plus \$85 per unit per month.

On February 8, 2005, PFD recorded a document titled "Easement" (Easement #1). Easement #1 grants Media One an easement for the installation and maintenance of the fiber optic lines and accessories described in the Fiber Optic Agreement. Easement #1 provides, in pertinent part: "This easement shall be *subject to* all of the terms and conditions contained in the Fiber Optic Agreement" (emphasis added). On the same day, Macatawa Bank executed and recorded a document titled "Consent" (Consent #1). Consent #1 states that Macatawa Bank consents to Easement #1 and that the bank "... agrees that it shall *honor and recognize* the rights granted by that Easement." (emphasis added).

On March 8, 2005, PFD executed a document titled "Amended and Restated Declaration of Easements" (Easement #2). Easement #2 states that it amends and restates in its entirety Easement #1. Like Easement #1, Easement #2 states: "This easement shall be subject to all of the terms and conditions contained in the Fiber Optic Agreement." On the same day, Macatawa Bank executed a second "Consent" (Consent #2). Like Consent #1, Consent #2 states that Macatawa Bank consents to Easement #2 and that the bank "... agrees that it shall honor and recognize the rights granted by that Easement."

On August 15, 2006, PFD executed a document titled "Amendment to Easement." The Amendment to Easement amends, modifies, and adds to the provisions of Easements #1 and #2. The Amendment to Easement states: "This Amendment to Easement shall be subject to all of the terms and conditions contained in the Fiber Optic Agreement." On the same day, Macatawa Bank executed a third "Consent" (Consent #3). Consent #3 states that Macatawa Bank consents to the Amendment to Easement and that the bank shall "honor and recognize" the "releases and rights" made and granted by the Amendment to Easement.

Throughout 2005 and into 2006, PFD made the payments to Media One called for in the Fiber Optic Agreement. However, in 2006, PFD ceased making these payments. Media One now seeks to hold Macatawa Bank responsible for the payments. Macatawa Bank responds that it has no obligation to make the payments.

Standard of Review

"In reviewing a (C)(7) motion, the court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties." *Jones v State Farm Ins Co*, 202 Mich App 393, 396-397; 509 NW2d 829 (1993). Plaintiff's well-pled factual allegations are accepted as true and are to be construed in favor of the plaintiff. *Wakefield v Hills*, 173 Mich App 215, 220; 433 NW2d 410 (1988). "Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, "[t]he moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other

documentary evidence, the substance of which would be admissible at trial.” *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008). “The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Maiden*, 461 Mich at 119.

A motion brought pursuant to MCR 2.116(C)(8) “tests the legal sufficiency of the complaint.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). “All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Id.* When deciding a (C)(8) motion a court considers only the pleadings. MCR 2.116(G)(5); *Maiden*, 461 Mich at 119. If, as in the case at bar, the claim is based on a written instrument or instruments, the instrument or instruments must be attached to the pleading as an exhibit and, once so attached, become a part of the pleading for all purposes. See MCR 2.113(F). The instruments on which Media One’s claim is based are in fact attached to Media One’s complaint as exhibits A through G.

Analysis

A. The (C)(7) Ground

Citing the pertinent statute of frauds — MCL 566.132(1)(b) — Macatawa Bank argues that an agreement to answer for the debt or default of another person must be in writing and must be signed by the person to be charged. The Court finds that exhibits A through G are more than sufficient to satisfy the statute of frauds. As to the (C)(7) ground, Macatawa Bank’s motion must be denied.

B. The (C)(8) Ground

Exhibits A through G are a part of the complaint for all purposes — including a (C)(8) motion for summary disposition. See MCR 2.113(F). The Court’s first task is to determine *which* of these documents are pertinent to Macatawa Bank’s (C)(8) motion.

The Amendment to Easement recites that the purpose of the Amendment is to “amend, modify, and add to the Existing Easements.” Based on this language, the Court holds that the Amendment to Easement supersedes and replaces Easement #1 and Easement #2. It logically follows that Consent #3 supersedes and replaces Consent #1 and Consent #2. Thus, the Court finds that the two documents that pertain to Macatawa Bank’s (C)(8) motion are the Amendment to Easement and Consent #3. The Court further finds that these two documents are not ambiguous. Therefore, they must be given their plain-sense meaning. See *Grosse Pointe Park v Michigan Mutual Liability and Property Pool*, 473 Mich 188, 198; 702 NW2d 1006 (2005).

As previously stated, Consent #3 states that Macatawa Bank consents to the Amendment to Easement and that the bank shall “honor and recognize” the releases and rights made and granted by the Amendment to Easement. The Amendment to Easement states that it shall be “subject to” the terms and conditions contained in the Fiber Optic Agreement. Media One argues that because the Amendment to Easement states that it is “subject to” the Fiber Optic Agreement, by promising to “honor and recognize” the rights made in the Amendment to

Easement — which include the rights contained in the Fiber Optic Agreement — Macatawa Bank agreed to make the payments that PFD promised to make in the Fiber Optic Agreement should PFD fail to do so.

Our analysis begins with this question: what is meant by the phrase “honor and recognize” in Consent #3?

To “honor” means: “1. To accept or pay (a negotiable instrument) when presented. 2. To recognize, salute, or praise.” Black’s Law Dictionary (10th ed). A “negotiable instrument” is: “A written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money, (3) is payable on demand or at a definite time, and (4) is payable to order or to bearer.” *Id.*

The Amendment to Easement does not contain an unconditional promise or order to pay a specified sum of money. Nor is the Amendment to Easement payable on demand or at a definite time. Nor is it payable to order or to bearer. Therefore, the Court finds that the Amendment to Easement is not a negotiable instrument. For this reason, Black’s first definition of “honor” has no application in the case at bar. This leaves Black’s second definition. Applying Black’s second definition yields the conclusion that the phrase “honor and recognize” in Consent #3 means that Macatawa Bank agrees to “recognize, salute, or praise” the releases and rights spelled out in the Amendment to Easement and, by implication, in the Fiber Optic Agreement. However, it would strain Black’s second definition beyond recognition to hold that the phrase “honor and recognize” commits Macatawa Bank to performing PFD’s obligations under the Fiber Optic Agreement should PFD fail to perform such obligations. Instead, by-executing Consent #3, Macatawa Bank promised to do no more than recognize the releases and rights spelled out in the Amendment to Easement. Something more than “honor and recognize” is required to construe a recognition of *rights* as an assumption of *obligations*.

We next turn to this question: what is meant by the phrase “subject to” in the Amendment of Easement?

“Subject to” means “dependent upon.” *Mayor of the City of Lansing v Public Service Commission*, 470 Mich 154, 160; 680 NW2d 840 (2004). The Amendment to Easement is “dependent upon” the Fiber Optic Agreement because, in the absence of the Fiber Optic Agreement, there would be no need for the releases and rights spelled out in the Amendment to Easement. Thus, the Amendment to Easement is “dependent upon” the Fiber Optic Agreement for its very existence. But this does not mean that the Amendment to Easement incorporates by reference wholesale the rights and obligations set forth in the Fiber Optic Agreement. Nor does it mean — as Media One would have it — that the use of the phrase “subject to” converts the Amendment to Easement into a vehicle for the transfer to others of the rights and obligations set forth in the Fiber Optic Agreement. A document that states that it is “subject to” another document but that contains no further covenants or understandings that purport to assume the

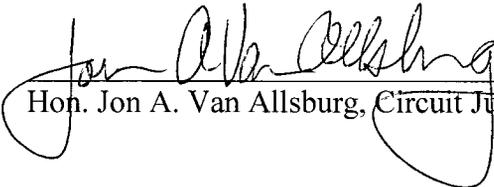
obligations undertaken by the parties to the other document will not be read to assume such obligations. *Clark v Detroit Curling Club*, 298 Mich 339, 340; 299 NW 99 (1941).¹

Conclusion

For all of the foregoing reasons, this Court holds that Consent #3 cannot reasonably be read to constitute a commitment by Macatawa Bank to make the payments to Media One that PFD promised to make in the Fiber Optic Agreement in the event that PFD failed to make such payments. Therefore, Macatawa Bank's motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8).

IT IS SO ORDERED.

Dated: November 19, 2015


Hon. Jon A. Van Allsburg, Circuit Judge

¹ But cf. *Unger v Smith*, 44 Mich 22, 24; 5 NW 1069 (1880) (a grantee who takes real property through a deed that states "this conveyance subject to a mortgage" becomes personally liable to satisfy the note secured by the mortgage even in the absence of any further express commitment to assume responsibility for said note).