

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2828

Cir. Ct. No. 2008CV3346

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SHEKU KAMARA AND JANET KAMARA,

PLAINTIFFS-APPELLANTS,

v.

**McCOLLUM HOMES, LLC, BILLY ENIS MCCOLLUM AND CRYSTAL
MCCOLLUM,**

DEFENDANTS-RESPONDENTS,

HERITAGE TITLE SERVICES, INC.,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,**

M&I MARSHALL & ILSLEY BANK,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 NEUBAUER, P.J. After a dispute with their homebuilder, McCollum Homes, LLC, Sheku and Janet Kamara brought a complaint alleging breach of contract and negligence against McCollum, their lender M&I Marshall & Ilsley Bank, and its disbursing agency, Heritage Title Services, Inc. M&I and Heritage Title filed motions for summary judgment which were granted by the trial court. This appeal renews the Kamaras' failed argument that M&I and Heritage Title had contractual and common law duties to ensure work represented in the homebuilder's draw request was satisfactorily completed before a distribution of funds. Because the contract agreements clearly disclaim any such duty and there is no independent basis for a common law duty, we affirm the trial court.

Facts

¶2 In February 2007, the Kamaras hired McCollum Homes to construct their new home. The General Contractor Agreement called for an initial deposit of \$69,700. The Kamaras obtained financing from M&I. M&I hired Heritage Title as the disbursing agent. In May 2007, contract agreements were executed accordingly: a Residential Construction Loan Agreement and Disbursement Agreement.

¶3 *The Residential Construction Loan Agreement.* The Residential Construction Loan Agreement between M&I and the Kamaras provides that the Kamaras are responsible "for completion of construction in accordance with the

plans and specifications.” Conversely, it states that M&I “shall not be responsible” for “any aspect of the construction, including without limitation: supervision, inspections … enforcement or performance of the [Kamaras’] construction agreement with the builder.” M&I was “acting solely as a mortgage lender.”

¶4 The Residential Construction Loan Agreement also provides that M&I has the right to inspect “but is in no way obligated to do so” and “[a]ny appraisals or inspections of the Property made, by or on behalf of M&I shall be solely for its benefit in determining the adequacy of its security, and the [Kamaras] shall not (and hereby waive[] any right to) rely upon such appraisals, inspections or determinations of M&I in any way.”

¶5 The Residential Construction Loan Agreement further states that “all funds for construction shall be disbursed only upon the [Kamaras’] order and satisfaction of the requirements of [M&I]” and “[a]ll funds disbursed by M&I hereunder shall be disbursed to [Heritage Title] pursuant to [the] Disbursement Agreement.”

¶6 *The Disbursement Agreement.* The Disbursement Agreement between the Kamaras (Owner), M&I (Bank) and Heritage Title (Disbursing Agent) provides that after receipt of a draw request from the homebuilder, the Kamaras had three business days to approve the request. The Disbursement Agreement requires that “before disbursement” a “[s]igned Owner’s Authorization of Draw” must be provided to Heritage Title. The Kamaras’ authorization is to be “for work completed in accordance with the terms of the Construction Documents.” The Disbursement Agreement allows Heritage Title or M&I to inspect and verify completion of the work represented in the draw, but does not

expressly require inspection and verification (“shall not be required”). Directly addressing the Kamaras’ contention here, the agreement provides:

IT IS NOT DISBURSING AGENT’S OR BANK’S RESPONSIBILITY TO REVIEW, VERIFY OR MAKE ANY ASSURANCES TO OWNER AS TO QUALITY OF WORK OR CONFORMITY TO THE CONSTRUCTION DOCUMENTS. DETERMINATION OF ACCEPTABILITY TO OWNER IS THE RESPONSIBILITY OF OWNER. DISBURSING AGENT IS RESPONSIBLE FOR THE GENUINENESS OF THE LIEN WAIVERS AND OWNER PAYMENT AUTHORIZATIONS DISBURSING AGENT ACCEPTS.

¶7 With the loan and disbursement contracts in place, construction on the Kamaras’ home began in September 2007. Work continued on the home, and on or about December 5, 2007, McCollum and the Kamaras submitted to Heritage Title the first draw request in the amount of \$126,800.

¶8 Heritage Title conducted an inspection in conjunction with this draw request and recommended payment of the \$126,800. Sheku Kamara signed and approved the first draw request.

¶9 At some point the relationship between the Kamaras and McCollum began deteriorating. Eventually, when McCollum submitted a second draw request, the Kamaras did not approve it and no funds were disbursed to McCollum. After the Kamaras’ refusal to approve, McCollum terminated its construction contract, on or about May 16, 2008. Ultimately, the Kamaras completed their home with a new builder.

¶10 The Kamaras filed a complaint against McCollum in September 2008. They amended the complaint in February 2009 to include Heritage Title and again in December 2009 to add M&I. The Kamaras alleged breach of contract and negligence, contending that M&I and Heritage Title had contractual and

common law duties to ensure work represented in the draw request was satisfactorily completed before a distribution of funds. M&I and Heritage Title moved for summary judgment.

¶11 At the motion hearing, the trial court determined that the Residential Construction Loan Agreement did not create a “contractual responsibility upon [M&I] to inspect, to supervise the draws to the extent that [M&I] should be a supervisor or a referee ... to ensure that the level of construction meets the amount of money that is being disbursed so that the Kamaras are protected.” In rejecting the Kamaras’ argument that the bank is supposed to protect the owner from what happens between the owner and the general contractor, the court explained that the provisions of the contract that deal with allowing the bank to inspect “really protect the bank from a security standpoint, that is, to protect their number one position on the property, not to protect the owner.”

¶12 The court also rejected the Kamaras’ negligence claim. The court found that the contract does not create any type of “service relationship,” and the common law does not require the bank to “superintend and watch over [the construction in order] to protect the owner.”

¶13 Having concluded that the Residential Construction Loan Agreement did not create a duty in contract or common law on M&I’s part to supervise and ensure that the draw requests matched the work completed, the court went on to examine what duties the Disbursement Agreement created. It again did not find any duty to supervise and ensure draws on M&I’s part.

¶14 Likewise, for Heritage Title, the court found no duty to supervise and ensure draws and pointed out Heritage Title’s responsibilities under the Disbursement Agreement were limited to ensuring the genuineness of the lien

waivers and ensuring the owner payment authorizations. Like M&I, Heritage Title did not have a duty in contract or common law to supervise and ensure that the draw requests matched the work completed.

¶15 Accordingly, the trial court granted summary judgment to M&I and Heritage Title and dismissed the Kamaras' complaint. The Kamaras appeal.

Discussion

¶16 On appeal, the Kamaras argue that the trial court erred in dismissing their contract and negligence claims against M&I and Heritage Title. They contend the bank and disbursing agent were legally responsible for ensuring that the builder was not paid "too much too soon." We do not agree.

¶17 *Breach of Contract Claims.* The interpretation of a contract is a question of law which we review de novo. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Where the terms of a contract are plain and unambiguous, we will construe it as it stands. *Id.*

¶18 Summary judgment is proper when the terms of a contract are unambiguous and the intent of the parties is clear. See *Energy Complexes, Inc. v. Eau Claire Cnty.*, 152 Wis. 2d 453, 466-67, 449 N.W.2d 35 (1989). Whether a contract is ambiguous is itself a question of law. *Borchardt*, 156 Wis. 2d at 427.

¶19 The applicable provisions of the Residential Construction Loan Agreement and the Disbursement Agreement unambiguously disclaim any duty by M&I or Heritage Title to inspect and ensure that the work reflected in the draw request was accurate before disbursing funds. The contracts clearly define the parties' relationships. The relevant language from each agreement is related earlier in this opinion; it makes clear the parties' duties and nonduties: Under the

Residential Construction Loan Agreement, the Kamaras were solely responsible for completion of the construction in accordance with the plans, and were required to sign off on the draw request—which they did. Conversely, M&I disclaimed responsibility in the agreement for “any aspect of the construction” and stated that it was acting solely as a mortgage lender. While M&I had the right to inspect, it was not obligated to do so. Any inspections or determinations were made solely for M&I’s benefit, and the Kamaras agreed that they could not rely on any inspections by M&I in any way.

¶20 Pursuant to the Disbursement Agreement, because the funds were to be disbursed as the work progressed, draw requests were to be submitted by the builder, and the required signed draw authorizations the Kamaras provided were to be for work completed in accordance with the terms of the construction documents. The Disbursement Agreement allowed for inspection and verification of completion of the work, but did not require it. Both M&I and Heritage Title disclaimed any responsibility to “review, verify or make any assurances to the owner as to the quality of work or conformity to the construction documents. Determination of acceptability was “the responsibility of owner.” In short, the Kamaras contractually accepted responsibility to determine acceptability of the quality of work or conformity to the construction contract, and expressly absolved M&I and Heritage Title of such responsibility.

¶21 The Kamaras also point to a provision in the Disbursement Agreement which provides: “First Draw by General Contractor will be reduced by the amount of funds previously paid to General Contractor.” They contend that Heritage Title overpaid the builder’s fee. The “reduction” clause is included among the items, including the draw requests and owner authorization, the Kamaras or the builder were required to provide to Heritage Title before

disbursement. This provision squarely placed the responsibility upon the Kamaras in conjunction with their authorization of the draw request.¹ The trial court properly dismissed all breach of contract claims.

¶22 Negligence Claims. The Kamaras seek to impose a common law duty independent of the contract, arguing that “it was foreseeable that disbursement of excessive construction funds to McCollum Homes would harm the Kamaras.” However, the contracts between these parties completely define the parties’ relationships as regards the disbursement of funds. The contracts unambiguously disclaimed any duty on behalf of M&I and Heritage Title to ensure that the work represented in draw request was satisfactorily completed before a distribution of funds. Moreover, the responsibility was squarely placed on the Kamaras—who were required to, and did, sign off on the draw request. The Kamaras provide no facts giving rise to a duty independent of the contracts at issue. *See Landwehr v. Citizens Trust Co.*, 110 Wis. 2d 716, 723, 329 N.W.2d 411 (1983) (In Wisconsin “there must be a duty existing independently of the performance of the contract for a cause of action in tort to exist.”)

¹ Moreover, this claim is not borne out by the summary judgment record. Conceding that McCollum was contractually entitled to a builder’s fee of \$57,000, the Kamaras contend that McCollum received a “total compensation [of] \$91,500.00” which is “more than it was ever entitled to upon payment of the first draw.” The Kamaras come up with this “total compensation [of] \$91,500.00” by adding the total of the itemized deposits initially made pursuant to the General Contractor Agreement (i.e., \$69,700) to the sum listed as builder overhead (i.e., \$21,800) in the first draw. However, the amount allocated to the builder’s fee in the General Contractor Agreement’s itemized list is \$35,000, not the total \$69,700. Thus, McCollum received \$35,000 in builder fees and \$21,800 for overhead—which does not add up to \$91,500 in total compensation. While the Kamaras suggest the contractor may not have disbursed the other original itemized amounts to subcontractors, we reiterate that the Kamaras were required to reduce the draw request by amounts previously paid and to sign off on the draw request.

Conclusion

¶23 The contractual agreements at issue unambiguously disclaim responsibility on behalf of M&I or Heritage Title for ensuring draws accurately represent work completed before disbursing funds. No independent common law basis for such a duty exists. The trial court properly dismissed the Kamaras' contract and negligence claims.

By the Court.—Judgment affirmed.

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