STATE OF MICHIGAN

COURT OF APPEALS

PAL PROPERTIES LLC.,

Plaintiff-Appellant,

v

TICOR TITLE INS. CO.,

Defendant-Appellee,

and

CONSOLIDATED TITLE SERVICES, LLC, PIETRO LORIA, THOMAS MASTACUSA, and MARK CHAVES,

Defendants.

UNPUBLISHED
December 9, 2008

No. 280389
Oakland Circuit Court
LC No. 2006-073149-CK

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant, Ticor Title Insurance Company's ("Ticor") motion for summary disposition. Because Ticor cannot be held vicariously or directly liable for plaintiff's damages, we affirm.

This case arises out of plaintiff's purchase of real property from a third party. Ticor issued a title insurance commitment with respect to the property, through Consolidated Title Services, LLC ("Consolidated"), and Consolidated appeared at and conducted the closing. At the closing, plaintiff tendered a check to Consolidated for full payment (approx. $125,000.00) of all encumbrances on the property, including two mortgages and unpaid taxes, and closing costs.

Several months after the closing, plaintiff learned that one of the mortgages was not paid off and discharged, and that the deed to the home was not recorded. Apparently, the funds were deposited in Consolidated's escrow account, but were not properly distributed. Plaintiff attempted to contact Consolidated and, when unsuccessful, contacted Ticor, making a claim under the title insurance. Ticor advised plaintiff that a policy was never issued with respect to the property and that Ticor would thus not pay plaintiff's claim. Plaintiff was never refunded the monies it tendered at closing, the mortgage was never paid, and plaintiff eventually lost the home to foreclosure. Plaintiff thereafter sued defendants, with its claims against Ticor consisting of, among other things, negligent supervision, fraud, and breach of contract. The trial court granted

Ticor's motion for summary disposition, opining that there was no question of material fact that Ticor was not vicariously responsible for the actions of Consolidated and that Ticor was not directly liable to plaintiff on any of the legal bases set forth in plaintiff's complaint. This appeal followed.

We review a trial court's grant of summary disposition de novo. *King v Reed*, 278 Mich App 504, 513; 751 NW2d 525 (2008). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Robinson v Ford Motor Co*, 277 Mich App 146, 150-151; 744 NW2d 363 (2007).

On appeal, plaintiff first contends that the trial court erred in determining that Consolidated was merely an issuing agent for Ticor and thus not liable for Consolidated's actions at/arising out of the closing. Generally, where there is a disputed question of agency, any testimony, either direct or inferential, tending to establish agency creates a question of fact for the jury to determine. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). Issues of agency are not, however, *always* for the jury to decide. Rather, if there is no testimony or evidence sufficient to create a factual issue regarding agency, the court may decide the issue. But this Court has also stated "where the relationship of the parties has been defined by written agreement, it is the province of the trial judge to determine the relationship." *Birou v Thompson-Brown Co*, 67 Mich App 502, 506-507; 241 NW2d 265 (1976).

Generally, a principal is responsible for the negligence of its agent. *Little v Howard Johnson Co*, 183 Mich App 675, 679-680; 455 NW2d 390 (1990). Whether an agent has negligently dealt with the affairs of the principal depends upon the agreement with the principal, since the agreement defines the scope of the agent's undertaking. *Mayer v Auto-Owners Ins Co*, 127 Mich App 23, 26; 338 NW2d 407 (1983). The fact that one is an agent for one purpose does not make him an agent for all purposes. *Sherman v Korff*, 353 Mich 387, 397; 91 NW2d 485 (1958).

Here, Ticor and Consolidated undisputedly had an agency relationship as set forth in their written "Issuing Agency Contract" dated March 17, 2003. The issue for our resolution is the *scope* of the agency relationship. It being true that a written agency agreement defines the scope of an agent's undertaking, we, like the trial court, look to the "Issuing Agency Contract" to determine if (as plaintiff asserts) Consolidated was Ticor's agent for purposes of the closing on plaintiff's property and the ultimate acceptance and distribution of monies tendered at the closing. Issues of contract interpretation present questions of law, which are subject to de novo review. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006).

The contract between these parties designates Ticor as a principal and Consolidated as its "issuing agent." The contract specifically provides that Ticor appoints Consolidated as "an Issuing Agent of Principal for promoting and transacting of a title insurance business. . ." Plaintiff contends that the language appointing Consolidated "for promoting and transacting of a title insurance business" indicates that Ticor intended Consolidated to act as its agent for all purposes relating to the title insurance business. However, the designation as "issuing agent"

directly preceding the language at issue indicates an intent to limit the scope of Consolidated's agency. Moreover, the actions leading to plaintiff's loss took place at a closing conducted by Consolidated. Plaintiff has provided no authority suggesting that conducting a closing is an inextricable or necessary part of transacting or promoting title insurance business.

In addition, the duties of the issuing agent (Consolidated) were specified in the contract, in part, as follows:

> B. Receive and process applications for title insurance in a timely, prudent and ethical manner with due regard to recognized title insurance underwriting practices and in accordance with the rules and instructions of principal.
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> ***
>
> G. Keep safely in accounts separate from Issuing Agent's personal or operating accounts all funds received by Issuing Agency from any source in connection with transaction(s) in which Principal's title insurance is involved, disburse said funds only for the purposes for which the same were entrusted, and reconcile all such accounts not less frequently than monthly. Principal shall have the right to examine, audit and approve Issuing Agent's accounting procedures to assure compliance with the Escrow Accounting Standards Manual. . .
>
> H. Provide Principal on an annual basis, copies of annual financial statements of the Issuing Agent.

Notably absent from the contract is any reference to Consolidated attending closings or performing any duties at closings for the benefit of Ticor. Nowhere in the document does it indicate that Ticor directed Consolidated to attend or oversee closings, nor does it appear that Ticor dictated how Consolidated was to proceed with any closings.

In the contract, Ticor does direct that any monies Consolidated received in connection with transactions involving Ticor's title insurance should be kept in an account separate from Consolidated's personal accounts and distributed for the purpose in which the monies were entrusted, and Ticor reserved the right to inspect "all files, books, and accounts and other records of Issuing Agent relating to the business carried on hereunder and to the closing of transactions committed to the issuance of Principal's policies of insurance." While plaintiff argues that the above provides Ticor with the necessary control over Consolidated to find Ticor vicariously liable for Consolidated's actions at the closing, this Court has determined that for liability to attach, the principal must have retained some control and direction over the actual day-to-day work of the agent. See, e.g., *Little v Howard Johnson Co, supra* at 681. The Consolidated-Ticor contract provides Ticor only with a general right of inspection of Consolidated's financial records. Plaintiff has submitted no evidence establishing that Ticor retained or exercised control over Consolidated's day-to-day operations, or the methods and means by which Consolidated's work would be accomplished (for example, the management of its operating finances, hiring practices, performance of closings, etc.). Moreover, if Consolidated did not comply with the contract (for example, if it failed to disburse funds in its escrow account for the purposes for which the same were entrusted) Ticor's only recourse under the contract

would be to terminate the same. Ticor has no contractual right to take over Consolidated's business, to take control of the escrow account, or to force Consolidated to take any action.

As the trial court aptly stated, "[a]ll that the Issuing Agency Contract does is ensure the uniformity and standardization of services and authorizes Ticor to audit to determine whether an issuing agent has breached its contract and then terminate if so warranted. These contractual obligations do not affect the control of daily operations." The trial court correctly determined that Consolidated acted as only an issuing agent for Ticor and was thus not liable for Consolidated's mismanagement of its own escrow funds.

Plaintiff also contends that Consolidated was, if not an actual agent of Ticor for purposes of the closing, Ticor's apparent agent. As indicated by plaintiff, the authority of an agent to bind the principal may be either actual or apparent. *Meretta v Peach*, *supra*, at 698-699. To establish apparent agency, otherwise known as ostensible agency or agency by estoppel, three factors must be met:

> (1) the person dealing with the agent must do so with the belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence.
> *Chapa v St Mary's Hospital of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991).

In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 271; 288 NW2d 613 (1979). Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists. *Meretta v Peach*, *supra at* 698-699. Apparent authority must, however, be traceable to the principal and cannot be established by the acts and conduct of the agent. *Id*. Also, when "a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." *Id.* at 699. While the existence of an apparent agency is usually a question of fact for the jury, where the facts are either admitted or undisputed as to the existence of the principal-agent relationship and as to the scope of the agent's authority, the trial court may properly rule on the existence of apparent authority. *Duncan v Michigan Mutual Liability Co*, 67 Mich App 386, 388-389; 241 NW2d 218 (1976).

To establish that Consolidated acted as Ticor's apparent agent for purposes of the closing, plaintiff must show that Ticor, as putative principal, did something that would create in plaintiff's mind the *reasonable* belief that Consolidated was acting on behalf of Ticor, or that Ticor placed Consolidated in a position where plaintiff would be justified in assuming that Consolidated was acting as Ticor's agent at closing. Plaintiff has admitted that it had no contact with Ticor up to and throughout the closing. According to plaintiff, the first contact it had with Ticor was several months after the closing, when it learned that the deed to the property it had purchased had not been recorded and, when it tried to contact Consolidated to inquire about the

situation, found out Consolidated was no longer in business. Having had no contact with Ticor until well after the closing, there could be no act or appearance by Ticor that would have led plaintiff to believe Consolidated was its agent for purposes of the closing.

As to whether Ticor placed Consolidated in a position where plaintiff would be justified in assuming that Consolidated was acting as Ticor's agent at closing, plaintiff relies upon the affidavit of LaDonna Szatkowski, co-owner of plaintiff. According to Szatkowski, an independent loan closer, it is common knowledge in the industry that underwriters have control over their agents and was also commonly known that Ticor representatives would monitor their agents. Szatkowski's affidavit does not, however, contain an affirmative statement that she believed Consolidated represented Ticor for any purpose other than issuing title insurance. Moreover, as indicated in the settlement statement for the property, Consolidated conducted the closing and collected a fee from plaintiff for the same. Consolidated also prepared the necessary closing documents (again collecting a fee from plaintiff) and was the only entity, other than the buyer and seller, to sign the settlement statement. The settlement documents speak for themselves and were provided to plaintiff. All of plaintiff's dealings were with Consolidated and there is no allegation that either Consolidated or Ticor made any representation or engaged in any act that would justify an assumption that Ticor was involved in or vicariously responsible for all aspects of the closing. There is no question of material fact that Consolidated was not Ticor's apparent agent for purposes of conducting the closing and collecting and distributing the monies associated with the closing.

Plaintiff next asserts that a material question of fact existed with respect to whether Ticor failed to properly supervise its agent. We disagree.

Generally, an individual has no duty to protect another who is endangered by a third person's conduct. *Doe v Young Marines of The Marine Corps League*, 277 Mich App 391, 401; 745 NW2d 168 (2007). "Where there is a duty to protect an individual from a harm by a third person, that duty to exercise reasonable care arises from a 'special relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury. *Id*. A duty arises from a special relationship between the plaintiff and the defendant such that the plaintiff entrusts himself to the control and protection of the defendant, who thereby assumes a legal obligation to act with due care for the benefit of the plaintiff. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8-9; 492 NW2d 472 (1992). Such special relationships recognized under Michigan law include common carrier-passenger, innkeeper-guest, employer-employee, doctor-patient, landlord-tenant, and invitor-invitee. *Graves v Warner Bros*, 253 Mich App 486, 494; 656 NW2d 195 (2002).

Here, plaintiff presumably argues that the special relationship (principal-agent) between Consolidated and Ticor serves to impose liability for Consolidated's conduct on Ticor. Plaintiff has provided no authority or evidence upon which to find that Ticor was responsible for protecting plaintiff from Consolidated's mismanagement of its escrow funds. Undisputedly, neither Ticor and Consolidated's relationship, nor Ticor and plaintiff's relationship falls within those "special relationships" this Court has identified as significant enough to impose a duty to protect from a third party's actions. Plaintiff's relationship with Ticor was contractual in nature, the details of which were spelled out in the title insurance commitment. Nothing in the title insurance commitment serves to impose a duty upon Ticor to protect plaintiff from Consolidated's actions.

Consolidated's relationship with Ticor was as an agent for, as previously discussed, the purpose of issuing title insurance only. Ticor could conceivably be held responsible, then, for any action of Consolidated related to the issuance of title insurance. Plaintiff does not complain about anything to do with the issuance of title insurance, however. Its complaint is premised upon Consolidated's handling of its own escrow funds, tendered to it by plaintiff for the purpose of paying off certain encumbrances on the property at issue. Notably, the Issuing Agency contract provides Ticor with the *right* to inspect Consolidated's records—not the responsibility. The contract does not provide that Ticor was to monitor Consolidated's escrow accounts or supervise Consolidated in its distribution or collection of escrow monies, and there is no indication that plaintiff entrusted itself to Ticor's protection for purposes of the closing and lost the ability to protect itself. The trial court thus properly granted summary disposition with respect to plaintiff's claim of negligent supervision.

Next, plaintiff argues that its willful concealment claim against Ticor was improperly dismissed. Plaintiff contends that the trial court erroneously held that plaintiff was required to show the existence of false material representation by Ticor in order to proceed with its willful concealment claim. Plaintiff relies solely upon *McClure v Steele*, 326 Mich 286*;* 40 NW2d 153 (1949) to support its position that a willful concealment cause of action does not require a showing of false representation. *McClure*, however, involved an action for negligence based upon an automobile accident and where the court indicated, "[t]he principal question at issue in the case is whether a judgment based on wilful and wanton negligence is dischargeable under the provision of the Bankruptcy Act." *Id*. at 293. *McClure* has no bearing on the instant case and plaintiff's misplaced reliance on that case is borne out of its taking the court's definition of willful and wanton misconduct out of context.

It is clear from plaintiff's complaint and the proceedings that followed that plaintiff's claim of willful concealment concerned Ticor's failure to advise plaintiff of its knowledge of Consolidated's mis/malfeasance. In fact, plaintiff specifically brought its allegation that Ticor misrepresented or willfully concealed its knowledge concerning the closing monies under a cause of action entitled "fraud."

"Fraud" is an intentional perversion or concealment of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right. *Barkau v Ruggirello*, 113 Mich App 642, 647; 318 NW2d 521 (1982). There are essentially three theories to establish fraud: (1) traditional common-law fraud, (2) innocent misrepresentation, and (3) silent fraud. *M&D, Inc v WB McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998). To establish *any* of these types of fraud, there must be some type of misrepresentation. See, *Id*; *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004).

Here, plaintiff has not alleged that it had any contact whatsoever with Ticor until after the closing, when it informed Ticor of its discovery that the mortgages had not been paid out of the funds it had tendered to Consolidated. Plaintiff has further not alleged that Ticor made any representation to it whatsoever, at any time, with respect to the escrow monies or whether or not the mortgages would be paid out of the escrow funds. Lacking the essential element of a misrepresentation, plaintiff has no claim for fraud against Ticor, and the trial court correctly dismissed such claim.

Plaintiff next claims that a material factual dispute existed with respect to whether Ticor breached the title insurance policy. We disagree.

It is undisputed that Ticor issued a title "commitment" to plaintiff with respect to the property. Pursuant to MCL 500.7301(d), "'Title insurance commitment' means a document issued by a duly authorized title insurer offering to issue a title insurance policy upon performance of the conditions set forth in the document." As stated in *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 409; 646 NW2d 170 (2002):

> Thus, a commitment is an agreement between an insurance company and a potential insured that, if the potential insured meets certain conditions, the insurance company will issue a policy. Such conditions are ones that the insured must meet before the insurer is obligated to fulfill his contractual duty under the commitment to issue a policy. In other words, such conditions relate to whether the insurer must issue a policy to the insured. Accordingly, such conditions do not serve as conditions precedent to the *effectiveness* of a policy; rather, they serve as conditions precedent to the insurance company's *obligation to issue* a policy.

It is the title insurance policy, not the commitment, which provides actual insurance:

> (c) "Title insurance policy" means any policy or contract insuring, guaranteeing, or indemnifying against loss or damage suffered by owners of real estate or by other persons interested in the real estate by reason of liens, encumbrances upon, defects in, or the unmarketability of the title to the real estate, or other matters affecting the title to real estate or the right to the use and enjoyment of the real estate, and insuring, guaranteeing, or indemnifying the condition of the title to real estate or the status of any lien on the real estate.
> MCL 500.7301

Here, the commitment provided by Ticor sets forth several requirements for the issuance of a title insurance policy with respect to the property at issue, including the discharge of certain specified mortgages on the home. The commitment also specifically provided, "[f]ailure to meet requirements will result in non-issuance of title insurance policy." There is no dispute that at least one of the mortgages identified in the commitment were not discharged, albeit through no fault of plaintiff. Thus, no title insurance policy, under which plaintiff could make a claim of loss, was issued. The above being true, and plaintiff having identified no other contract upon which to base its breach of contract claim against Ticor, the trial court properly dismissed the breach of contract claim.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood