STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

INVESTORS TITLE INSURANCE COMPANY,
a North Carolina corporation,

Plaintiff/Counter-Defendant,

v

File No. 05-24761-CK
HON. PHILIP E. RODGERS, JR.

LEO MAYER, an individual, and
BARBARA MAYER, an individual,

Defendants/Counter-Plaintiffs.
/

Kelli L. Baker (P49960)
Attorney for Plaintiff/Counter-Defendant

Norman K. Droste (P35665)
Attorney for Defendants/Counter-Plaintiffs

DECISION AND ORDER GRANTING
PLAINTIFF INVESTORS TITLE INSURANCE
COMPANY'S MOTION FOR SUMMARY JUDGMENT

Investors Title Insurance Company ("Investors") filed this action seeking reimbursement from the Defendants Leo Mayer and Barbara Mayer (the "Mayers") for attorneys' fees and costs incurred defending an underlying construction lien foreclosure action. Investors also seeks attorneys' fees and costs incurred in prosecuting the present action and claims that the Mayers are contractually responsible for the fees and costs by virtue of an Indemnity Agreement entered into by the Mayers. Investors brings its motion for summary judgment pursuant to MCL 2.116(C)(9) because the Mayers failed to state a valid defense to Investors' claims for attorneys' fees and costs.

Investors also seeks summary disposition, pursuant to MCR 2.116(C)(8), on the Mayers' Counterclaim for negligent disbursement of construction loan proceeds. Investors contends that the Mayers have failed to establish the existence of a legal duty owed by Investors to the Mayers. Alternatively, Investors claims that it is entitled to summary judgment pursuant to MCR 2.116(C)(10) because there is no genuine issue of material fact that Huntington Title, who

disbursed the loan proceeds, was Investors agent solely for the purpose of issuing policies of title insurance and commitments for title insurance, and not for the purpose of disbursing loan funds.

The Mayers responded to Investors' motions, claiming that the fees incurred by Investors were unnecessary and unreasonable, and that Investors failed to mitigate its damages. The Mayers further claim, that they were only required to resolve the underlying construction lien claims (which they did) and that the fees incurred by Investors were mostly related to the defense of the Mayers' Counterclaim and not to enforcement of the Indemnity Agreement. They seek judgment against Investors because of its negligent management/supervision of the construction loan disbursements which it required be made through its local agent, Huntington Title.

On February 27, 2006, the Court heard the oral arguments of counsel and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, grants summary judgment for Investors on both its Complaint and the Mayers' Counterclaim.

STANDARDS OF REVIEW

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision v Dunscombe,* 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins,* 171 Mich App 648, 651; 430 NW2d 808 (1988).

MCR 2.116(C)(9)

Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim. *Nicita v Detroit (After Remand)*, 216 Mich App 746, 750; 550 NW2d 269 (1996). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Lepp v Cheboygan Area Schools*, 190 Mich

App 726, 730; 476 NW2d 506 (1991). If the defenses are "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery," then summary disposition under this rule is proper. *Id*, quoting *Domako v Rowe*, 184 Mich App 137, 142; 457 NW2d 107 (1990).

MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
> >
> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material

factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

I.

Pursuant to the Indemnity Agreement which the Mayers entered into in order to be able to secure title insurance so they could obtain their end financing, the Mayers agreed as follows:

> "to well and sufficiently save, defend, keep harmless, and indemnify [Investors], its successors and assigns of and from all loss, damage, costs, charge, liability or expense, including court costs and attorneys' fees, which it may sustain, suffer, or be put to under this policy or policies of title insurance or otherwise on account of the omission or deletion of, or affirmative insurance in connection with, the [outstanding lien claims], and in the event any claims or liens in connection with the [outstanding lien claims] are filed of record shall cause same to be paid and discharged of record without delay."

This contractual language is unambiguous and obligates the Mayers to pay the reasonable attorneys' fees and costs incurred by Investors in defending the underlying construction lien claims.

The Mayers claim, however, that the Indemnity Agreement only required them to resolve the underlying lien claims, which they did. This is a strained reading of the Indemnity Agreement which is inconsistent with the contracts clear and unambiguous terms.

In addition, the Mayers claim that Investors did not mitigate its damages because, pursuant to paragraph 5, it could have paid off the liens at any time. Paragraph 3 of the Agreement, however, expressly provides that:

> "[Investors] shall not have to pay, incur or sustain monetary loss in any amount before being entitled to so apply the collateral deposited hereunder or to call upon [the Mayers] to provide [it] with additional funds necessary to pay, satisfy, compromise or do any other act necessary to obtain a release or discharge of the [underlying liens]."

While the Mayers escrowed sufficient funds to pay off the face value of the construction liens, they refused to pay the attorneys' fees and costs that Investors incurred in the underlying litigation. Therefore, Investors had to initiate this lawsuit. Of course, this litigation has added substantially to the attorneys' fees and costs sought by Investors.

After reviewing the Mayers' Answer to the Complaint filed by Investors, it is evident that the Mayers have not alleged a valid defense to the claim of Investors Title for attorneys' fees and costs incurred by it in defending the underlying construction lien foreclosure action.

By virtue of the same Indemnity Agreement, Investors is also entitled to attorneys' fees and expenses incurred in pursuing this action to enforce the Indemnity Agreement. Paragraph 10 provides that the Mayers "shall be liable for and shall pay promptly to [Investors] all costs, expenses and attorneys' fees incurred by [Investors] in enforcing its rights hereunder." Therefore, summary judgment should issue in favor of Investors on its Complaint for attorneys' fees and expenses incurred in the underlying construction lien foreclosure action and on its request for attorneys' fees and expenses for having to pursue this action to enforce the Indemnity Agreement.

II.

As for the Mayers' Counterclaim, the Mayers contend that Investors was negligent in disbursing the construction loan funds and that its negligence resulted in the filing of the construction lien claims.

To establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002).

The Mayers claim that Investors owed them a duty to disburse the construction loan proceeds in "a careful and prudent manner precluding lien claims and/or embezzlement." They further claim that Huntington Title, who actually disbursed the loan proceeds, did so as the agent of Investors.

In *Stratton-Cheeseman Management Co v Dep't of Treasury*, 159 Mich App 719, 726-727; 407 NW2d 398 (1987) the Court of Appeals discussed the definition of "agency." It quoted the following definitions:

> 'Agent' was defined by our Supreme Court in *Stephenson v Golden*, 279 Mich 710, 734-735; 276 NW 849 (1937), as follows:
>
> > An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal. Bowstead on Agency (4th ed), p 1.
> >
> > An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of

> the latter, and to render an account of it. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do. 2 CJS p 1025.
>
> The term 'agent' includes factors, brokers, etc. 2 CJS p 1025.

As set forth in *Saums v Parfet*, 270 Mich 165 [171-172; 258 NW 235 (1935)]:

> 'Agency' in its broadest sense includes every relation in which one person acts for or represents another by his authority. 2 CJ p 419.
>
> Whether an agency has been created is to be determined by the relations of the parties as they in fact exist under their agreements or acts. 21 RCL p. 819.
>
> The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons. To the proper performance of his functions, therefore, it is absolutely essential that there shall be third persons in contemplation between whom and the principal legal obligations are to be thus created, modified, or otherwise affected by the acts of the agent. 1 Mechem on Agency (2d ed), p 21.

Investors was the underwriter for the policy of title insurance issued by Huntington Title for the benefit of Huntington Mortgage. The agency relationship between Investors and Huntington Title is governed by their Agency Agreement. Pursuant to that Agreement, Huntington Title was Investors agent "to issue policies of title insurance upon properties in the States of Michigan and Indiana in the name of [Investors]." This agency was limited by Investors' appointment of Huntington Title "only for the purposes and in the manner specifically set forth in this Agreement and for no other purpose and in no other manner whatsoever." Under the Agreement, Huntington Title's duties included "accept[ing] applications for the issuance of commitments of title insurance and title policies", dating, countersigning and delivering policies of title insurance and title insurance commitments, and collecting premiums on behalf of [Investors]. The Agreement expressly provides that Huntington Title "maintain a separate real estate closing or escrow account in connection with the collection and disbursement of funds entrusted to it by others in real estate transactions. . ."

Because of the nature of the relationship between Investors and Huntington Title, Huntington Title was not, as a matter of law, acting as an agent of Investors when it disbursed the construction loan funds. Therefore, the Mayers' claim that Investors was negligent must fail. Investors is entitled to summary judgment in its favor on the Mayers' Counterclaim.

III.

In their response to these motions, the Mayers attack the reasonableness of the attorneys' fees and whether those fees were incurred by Investors' enforcing the Indemnity Agreement or defending against the Mayers' Counterclaim.

It is for the Court to determine the reasonableness of the attorneys' fees. Where the amount of attorneys' fees is in dispute each case must be reviewed in light of its own particular facts. There is no precise formula for computing the reasonableness of an attorney's fee. However, the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973).

As for whether the fees were incurred pursuing its Complaint or defending against the Mayers' Counterclaim appears to be a hollow distinction. All of the disputes between Investors and the Mayers arose out of the construction lien claims. By signing the Indemnity Agreement, the Mayers agreed to indemnify Investors for "any loss, damage, costs, charge, liability or expense . . . it may sustain, suffer, or be put to under this policy or policies of title insurance or otherwise on account of the omission or deletion of, or affirmative insurance in connection with, the [outstanding lien claims] . . ." Therefore, the Mayers indemnified Investors against the loss Investors seeks to recover in this action as well as any loss the Mayers allege to have incurred.

CONCLUSION

Investors is entitled to summary judgment in its favor on its Complaint for reasonable attorneys' fees and costs incurred in defending the underlying construction lien foreclosure action. In addition, Investors is entitled to summary judgment in its favor on the Mayers'

Counterclaim and to reasonable attorneys' fees and expenses incurred in enforcing the Indemnity Agreement and defending against the Mayers' Counterclaim.

The attorneys for Investors shall within 14 days of the date of this decision and order file and serve an accounting of their fees and the expenses incurred, along with an affidavit of the reasonableness of the fees and that they were necessarily incurred. The Mayers shall within 21 days of the date of this decision and order file and serve specific objections to the accounting. The Court will then decide the reasonableness of the fees and award fees and expenses accordingly.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 4/17/06