

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ANISSA WHITE,

Plaintiff,

v.

AAMG CONSTRUCTION LENDING CENTER,  
CROWN MORTGAGE/CROWN BANK, WHITE  
FAMILY PROPERTIES, LLC, STEPHEN L.  
WHITE, II, INDIVIDUALLY, ALLIED HOME  
MORTGAGE CAPITAL CORPORATION, and  
ABN AMRO MORTGAGE GROUP, INC.,

Defendants.

Civil Action No. 09-C-82  
(Judge Stucky)

CLERK OF COURT  
KANAWHA CO. CIRCUIT COURT

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**ORDER GRANTING SUMMARY JUDGMENT**

On a previous day came before the Court Defendant Fifth Third Bank, NA (hereinafter "Fifth Third Bank" or "the Bank"), successor in interest to R&G Crown Mortgage Corporation and R-G Crown Bank FSB, by counsel, Kenneth E. Tawney and Jackson Kelly PLLC, and Plaintiff, Anissa White (hereinafter "Plaintiff"), by counsel, Paul M. Stroebel, upon Fifth Third Bank's motion for summary judgment with regard to the claims raised in Plaintiff's complaint. Defendants Stephen L. White II (hereinafter "White") and White Family Properties (hereinafter "WFP") appeared by counsel, Josef M. Horter, and Defendant ABN AMRO Mortgage Group, Inc. (hereinafter, "ABN AMRO") appeared by counsel, Xavier Staggs. The hearing on the Bank's motion for summary judgment regarding the cross-claim filed by WFP was postponed by agreement of counsel pending a ruling on the motion for summary judgment regarding Plaintiff's claims.

Upon due consideration of the pleadings, the briefs submitted in support of and in opposition to the motion, and the arguments of counsel, the Court makes the following findings of fact, conclusions of law, and adjudications:

### **FINDINGS OF FACT**

1. On August 2, 2004, Plaintiff acquired a parcel of land in Lincoln County, West Virginia, at a cost of \$40,000. On August 16, 2004, Plaintiff entered into a building contract with WFP to build a house on the property for \$193,500. The contract provided for five draws upon 20%, 25%, 25%, 20% completion, respectively, and the final 10% would be paid upon completion.

2. On December 9, 2004, Plaintiff hired loan broker Allied Home Mortgage Capital Corporation (hereinafter, "Allied") to help her obtain a loan to build the house. On January 28, 2005, Plaintiff entered into a construction loan agreement for \$150,000 with ABN AMRO. The loan provided that disbursements would be made for "work in place only". Plaintiff was not to make any material changes to the project without the prior written approval of Lender. "Work in place" was defined to permit Lender to withhold payments if, upon inspection, the work in place is not consistent with the draw schedule.

3. The Agreement specifically provided that Plaintiff is not entitled to rely on inspections and that inspections are not made for the benefit of Plaintiff; inspections are solely for the benefit of Lender. Inspections are made only to apprise the Lender of the apparent progress of construction. "Consequently, Borrower hereby exonerates, excuses and releases Lender from any and all claims of loss or damage that may be suffered by Borrower, which relate in any way to the quality of construction or lack thereof."

4. White received a check from Plaintiff for \$43,500 to start the job. Work on the house finally commenced in late spring of 2005. On June 14, 2005, ABN AMRO assigned the construction loan to R-G Crown Bank FSB, predecessor of Fifth Third Bank.

5. On July 18, 2005, Plaintiff and White signed and submitted a construction draw request for a draw in the amount of \$48,375. White just "filled in some blanks" on the form until the total reached 25% because that is what the Allied employee told him to do. That same day, Plaintiff also admittedly signed a disbursement authorization form to allow the Bank to disburse the draw proceeds directly to the builder.

6. Plaintiff also admittedly signed a notarized disbursement hold harmless agreement on July 18, 2005, appointing White as her duly authorized agent for requesting inspections and receiving draws under the construction loan agreement and permitting disbursement of construction loan proceeds directly to WFP. The authorization was subject to cancellation only by written notice sent by certified mail. Plaintiff also waived any claim for damages for disbursement of funds without her joinder.

7. On July 18, 2005, Plaintiff and White also admittedly signed a "Project Status of Equity & Construction Draw Request" (hereinafter, "Draw Request") form showing amounts requested for specific work completed, certifying that the work was completed, and certifying that "[n]o changes, alterations or modifications have been made to the final, lender approved plans and specifications." On July 25, 2005, the Bank paid \$48,375 to Plaintiff. The inspection report showed 30% completion.

8. In August of 2005, Plaintiff and White agreed to make several changes to the house, including extending the kitchen into the garage area and adding a bonus room instead

of dormers, but did not put any of these agreements in writing, nor did either party advise the Bank as Plaintiff was required to do under the contract.

9. On September 22, 2005, another Draw Request for a draw in the amount of \$48,395 was submitted. The Draw Request, ostensibly signed by White and Plaintiff, certified that the work was completed and that “[n]o changes, alterations or modifications have been made to the final, lender approved plans and specifications.”<sup>[1]</sup> WFP also submitted with the draw request another disbursement authorization agreement ostensibly signed by Plaintiff and White.

10. Granite Loan Management<sup>[2]</sup> sent a notice to Plaintiff stating that the draw request for \$48,395 had been received, that an inspection had been ordered, and that payment would be made to her or to WFP. The inspection report showed 55% completion. On September 26, 2005, \$48,395 was wired to WFP.

11. On November 8, 2005, WFP submitted a Draw Request for \$34,393, containing the same certifications that there had been no changes in Plans. WFP also submitted with the draw request another disbursement authorization agreement ostensibly signed by Plaintiff and White. That same day, the Bank sent a notice stating that the Draw Request for \$34,393 had been received, that an inspection had been ordered, and that payment would be made to Plaintiff or to WFP. The inspection report showed 65% completion.

12. The Bank then sent a Notification of Draw Amendment stating that a negative adjustment of \$6,125 had been made to the \$34,393 requested because of an issue with work billed but not completed. The adjusted amount approved for payment was \$28,268. Then,

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<sup>[1]</sup> While there is a disputed issue of fact regarding whether Plaintiff signed documents submitted to the lender after July 18, 2005, the Court finds that the factual dispute is not germane to the ruling on the motion for summary judgment.

<sup>[2]</sup> Granite Loan Management was the servicer of the loan for R-G Crown Bank. For convenience, Granite Loan Management will also be referred to as the Bank.

on November 11, 2005, the Bank sent another Notice of Draw Amendment to Plaintiff showing additional inspection variances of \$27,693 and further reducing the draw request to \$575. The inspector's variances were listed and described as "Work Complete Does Not Support Requested Amount." Later, on November 15, 2005, \$5,477 was approved to advance and only \$5,477 was wire-transferred to WFP. White admitted that he was requesting payment for work not completed; he was merely plugging in numbers to get the percentages to work out to equal his draw request. The Bank told him that it would not work like that; payments could only be made for work completed.

13. During this time, there were also "overages" for money spent by Plaintiff on certain items that exceeded the allowances (e.g., wood flooring instead of carpeting). There were, in fact, also changes to the house plans. At some point, Plaintiff and WFP orally agreed to construct a new "bonus room." Similarly, Plaintiff and WFP agreed to extend the kitchen into the garage area because Plaintiff wanted a bigger kitchen. White calculated the overages to be \$35,584.87, with credits of \$1,033.06 for net overages of \$34,551.81.<sup>[3]</sup> This is when Plaintiff and White began to have difficulties. Plaintiff stated that the problems began on Thanksgiving evening with a call from White stating (according to Plaintiff) that the Bank owed him a lot of money and that he could not make payroll.

14. On November 28, 2005 and November 30, 2005, Plaintiff gave WFP two (2) cashiers' checks in the amounts of \$3,000 and \$18,000, respectively, in order to keep WFP working. After crediting these checks, White claims that Plaintiff still owed him \$13,551.81 for overages. On November 28, 2005, the Draw Request for a draw of \$34,393 was resubmitted

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<sup>[3]</sup> Plaintiff and White dispute the amounts of the overages and credits, but that factual dispute is not germane to the claims against the Bank. The point is that Plaintiff changed the plans and did not tell the Bank in violation of the construction loan agreement. Plus, the dispute regarding overages ultimately resulted in the job not being finished and, eventually, this law suit.

with the same inaccurate certifications that there had been no changes in the plans and specifications. The Draw Request was not paid.

15. On December 28, 2005, another Draw Request was submitted, ostensibly signed by WFP and Plaintiff, with the same inaccurate certifications regarding no changes in the plans and specifications. The request was originally for a draw of \$34,393 and then changed to \$32,650. The accompanying Draw Request contained the same inaccurate certifications of no changes in Plans. WFP also submitted with the draw request another disbursement authorization agreement ostensibly signed by Plaintiff and White.

16. On December 29, 2005, Granite sent a Draw Request confirmation letter of \$32,650 and advised that an inspection was scheduled. The inspection report showed 80% completion. On January 5, 2006, an Advance Approval/Sign-Off was issued by Granite approving \$32,650 for payment and that amount was wire-transferred to WFP.

17. White testified that 90% of the work was completed and conceded that the Bank paid him everything except the 10% that was not due until the job was completed. Notwithstanding payment of 90% of the loan amount, Plaintiff and WFP continued to have difficulties. Plaintiff said that she was concerned about having enough money to finish the job. White admitted that he was in a financial bind on the job. Plaintiff and White met on January 23, 2006, at which time he gave her the list of overages totaling \$35,584.87. No work was done between January 23 and February 17, 2006. Plaintiff then forced White to leave or White quit the job on February 17, 2006. In either event, construction ceased.

18. On March 15, 2006, the Bank notified Plaintiff that her loan was in default because the completion date, September 6, 2005, had passed. Construction draw privileges were suspended. By that time, the Bank had paid WFP \$134,897 of the \$150,000 loan amount, and

Plaintiff had paid WFP another \$64,500. In total, WFP was paid a combined total of \$199,397 by Plaintiff and the Bank.

### CONCLUSIONS OF LAW

1. Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, a party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue<sup>[4]</sup> as to any material facts<sup>[5]</sup> and that the moving party is entitled to judgment as a matter of law.” W. Va. R. Civ. P. 56(c) (1998); Painter v. Peavey, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). It is well-settled in West Virginia that the underlying purpose of the rule is to “effect a prompt disposition of controversies on their merit without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved.” Hanks v. Beckley Newspapers, Corp., 153 W. Va. 834, 172 S.E.2d 816 (1970).

2. The party opposing summary judgment “must satisfy the burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” Lovell v. State Farm Mut. Ins. Co., 213 W. Va. 697, 703, 584 S.E.2d 553, 559 (2003). Stated differently, “[t]he nonmoving party must offer some concrete evidence from which a reasonable finder of fact could return a verdict in his/her favor or other significant probative evidence tending to support his/her case.” Id.

3. The Supreme Court of Appeals has encouraged the use of summary judgment as an appropriate vehicle to dispose of both issues and entire matters. See, e.g., Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995) (holding that “to the

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<sup>[4]</sup> A “genuine issue” for purposes of summary judgment “does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party.” Syl. pt. 2, Fayette County Nat’l Bank v. Lilly, 199 W. Va. 349, 350, 484 S.E.2d 232, 233 (1997).

<sup>[5]</sup> A “material fact” is “one that has the capacity to sway the outcome of the litigation under the applicable law.” Id.

extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message, hereby, is modified"). Similarly, "[w]hile the application of law to facts may be complicated or even difficult at times, this is not a bar to a summary judgment." Johnson v. F&M Bank, 180 W. Va. 702, 379 S.E.2d 752 (1989).

4. The Court finds that the essential facts upon which this order is based are undisputed.

5. In applying the foregoing principles, and for the reasons set forth below, summary judgment should be granted in favor of Defendant Fifth Third Bank in this case.

#### **NEGLIGENCE AND SPECIAL RELATIONSHIP CLAIMS**

6. Count I of Plaintiff's Complaint, entitled "Negligent/Reckless Conduct," alleges that Fifth Third Bank had a duty to Plaintiff to insure that her home was at a certain stage of completion before disbursing payments to the contractor, that the Bank negligently or recklessly failed to properly inspect the construction prior to disbursing funds and/or draws, and that the Bank negligently failed to determine that Plaintiff did not sign disbursement authorization forms. Plaintiff does not allege physical injury or property damage.

7. Fifth Third Bank moved for summary judgment on the grounds that Count I is a tort action barred by the economic loss doctrine. Fifth Third Bank states that this action is, at best, a contract action based upon a construction loan agreement. Plaintiff responded that Fifth Third Bank was negligent in additional ways not averred in the Complaint and asserted that there was a special relationship between Plaintiff and the Bank. Fifth Third Bank countered that the claim of a "special relationship" was not pled in the Complaint and that, in any event, Plaintiff still had made no showing that a special relationship was established.

8. The Court notes that all of Plaintiff's negligence claims, including the new asserted claims, have their origin in contract: failure to conduct proper inspections, failure to disburse monies properly, failure to inspect, failure to provide contingent loan money, and forwarding draw request confirmations to the wrong address.

9. The "economic loss doctrine" (sometimes referred to as the "gist of the action doctrine") draws a line between tort and contract and bars an attempt to recover tort damages in a contract action. 1 James J. White & Robert S. Summers, Uniform Commercial Code § 10-5, at 581 (4<sup>th</sup> ed. 1995). Plaintiff sustained only economic loss but sued for both breach of contract and negligence. Separate claims for breach of contract and tortious breach of duty can coexist, *but only if the duty tortiously or negligently breached is a common law duty, not one existing between the parties solely by virtue of the contract.* McKesson Medical-Surgical, Inc. v. A. T. Kearney, 271 F. Supp. 2d 827 (E.D. Va. 2003) (internal quotes and citations omitted) (emphasis added). See also, La Barte v. Seneca Res., 285 A.D.2d 974, 728 N.Y.S.2d 618 (2001) (clear weight of authority is that a separate cause of action for fraud is not stated where the alleged fraud relates to a breach of contract); Williams v. Hilton Group, 93 Fed. Appx. 384 (3d Cir. 2004) ("gist of the action" doctrine precludes recasting of ordinary breach of contract claims into tort claims); Penn City Invs., Inc. v. Soltech, Inc., 2003 WL 22844210 (Pa. Sup. 2003) (gist of the action doctrine barred fraudulent inducement claim).

10. West Virginia jurisprudence is consistent with this philosophy. See, e.g., Basham v. General Shale, 180 W. Va. 526, 377 S.E.2d 830, 834 (1988) ("while a strict liability tort claim may arise when a defective product causes injury, a party who suffers mere economic loss as a result of a defective product must turn to the Uniform Commercial Code to seek relief"). "Contract law has been traditionally concerned with the fulfillment of reasonable

economic expectations.” Star Furniture Co. v. Pulaski Furniture Co., 171 W. Va. 79, 297 S.E.2d 854, 858 (1982). “[T]ort law is not designed to provide relief to those who have suffered purely economic losses.” Wright and Nicholas, The Collision of Tort and Contract in the Construction Industry, 21 U.Rich.L.Rev. 457, 467 (1987) (cited approvingly in Basham, 377 S.E.2d at 834).

11. Upon close analysis, it is clear that Count I of Plaintiff’s Complaint and the new allegations raised in Plaintiff’s brief allege breach of duties arising, if at all, solely out of the contract. There is no separate common law duty to inspect construction or to not disburse money until after an inspection. Those duties must arise, if at all, under a contract. Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988) (Bank had no separate common law duty to inspect or supervise the construction of a home. Plaintiff entered into a contract, and the parties’ rights and duties were defined by the contract). See also, Nat’l Steel Erection v. J.A. Jones Constr. Co., 899 F. Supp. 268, 272–74 (N.D. W. Va. 1995) (“The parties involved in a . . . project resort to contracts and contract law to protect their expectations. Their respective rights and duties are defined by the various contracts they enter”) and Silk v. Flat Top Constr., Inc., 192 W. Va. 522, 453 S.E.2d 356 (1994) (fair interpretation of the complaint shows a breach of only those duties owed to the Plaintiffs under the terms of the supervisory consultant agreement. However, the appellants contend that they could nevertheless be held liable under a common law duty of care to supervise the construction of the home, as this Court created in Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988). “We disagree. Therefore, we find the damages claimed herein have their origin solely in contract.” Silk, 453 S.E.2d at 360.) Therefore, the premise in Count I — that the Bank had common law duties regarding inspection or disbursement — fails as a matter of law. Any duty to Plaintiff existed solely by virtue of the contract. McKesson Medical-Surgical, *supra*.

12. Plaintiff also alleges in her brief (although not in the Complaint) that the Bank negligently failed to ascertain that the Draw Requests and Disbursement Authorizations after July 2005 were not signed by Plaintiff. Again, the claim arises, if at all, only because the parties entered into a contract. The parties' rights and duties are defined by the contract, not by common law. Plaintiff has cited no authority for the proposition that the Bank had a common law, contractual or statutory duty to investigate and discover alleged fraudulent signatures by Plaintiff's designated agent to make draw requests and receive payment. This claim of negligence is also barred by the economic loss doctrine.

13. The Court further observes that Plaintiff alleges only economic harm, not personal injury or property damage. Under Sewell, Plaintiff's alleged economic damages must be recovered in a contract action. Lockhart v. Airco Heating & Cooling, Inc., 211 W. Va. 609, 567 S.E.2d 619, 624 (2002) ([E]ven if contractor contractually agreed to take precautions to avoid causing any harm to health, *plaintiff cannot maintain an action in tort for an alleged breach of a contractual duty*; "[i]n the matters of negligence, liability attaches to a wrongdoer, not because of a breach of a contractual relationship, but because of a *breach of duty which results in an injury to others*;" Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. *An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract.*) (Emphasis added.) There is no common law duty with regard to inspections or disbursement of funds independent of the contract. This is a classic case of inappropriate tort claims based upon alleged breaches of contractual duties.

14. Plaintiff asserts for the first time in her brief that a “special relationship” existed between Plaintiff and the Bank and that, as a consequence, the Bank owed a common law duty of care to the Plaintiff. Fifth Third Bank objected because (a) no claim of a special relationship was pleaded in the Complaint, and (b) in any event, Plaintiff failed to present any facts to support her allegation sufficient to withstand a motion for summary judgment because she had only three limited contacts with the Bank.

15. “[I]t is well settled that evidence beyond the pleadings is inadmissible if objected to and may be admitted and considered only after permission to amend the pleadings is requested and granted.... Timely objection coupled with the failure to move for an amendment of the pleadings is fatal to an issue not raised by the pleadings.” Tillman v. Malmay, 577 So.2d 828 (3<sup>rd</sup> Cir. 1991) (citations omitted). See also Miller v. City of Morgantown, 158 W. Va. 104, 108, 208 S.E.2d 780, 783 (1974) (plaintiffs not permitted to try case on legal theory “which was not raised in the pleading and no attempt was made at any time to amend the pleading....”); 61B Am. Jur. 2d Pleading § 918 (“While a party should be permitted to prove every fact alleged by him not inconsistent with admissions express or implied, ordinarily he will be precluded from proving any fact not alleged, for however full and convincing the proof may be as to any essential fact, that alone is insufficient unless the fact is averred. Evidence of matters which are outside the issues as made by the pleadings is irrelevant and inadmissible.... The reason for the rule is that the opposite party shall be specifically advised of what he is called upon to answer, so that he may be enabled to properly make out his case, and that he may not be taken by surprise in the testimony at the trial, for proof without pleadings is as impotent as pleadings without proof.”). The Court concludes that special relationship had to be pleaded as a separate cause of action even under the liberal “notice pleading” standards of this State. The specific allegations in

the Complaint related to negligent inspections and disbursements of funds. There is nothing in those allegations to apprise the defendants that Plaintiff also claimed that a special relationship had been formed. It is too late at this time for Plaintiff to amend her complaint on the eve of trial when discovery has been closed and trial preparations have been made.

16. Even if Plaintiff were permitted to amend her Complaint, the Court finds that she has not presented any facts to support her allegations. The idea of a “special relationship” and consequent duty to use care is set forth in Glascoock v. City National Bank of West Virginia, 213 W. Va. 61, 576 S.E.2d 540(2002). The Court in Glascoock made clear that unique circumstances, such as those illustrated by the facts under Glascoock, must be shown to establish a “special relationship” between a lender and borrower. Plaintiff has not made any showing that would rise to that level. Plaintiff asserts that she paid for the inspections but that the Bank kept them from her.

17. In Glascoock, the borrowers had a dispute with the builder. The bank stepped in, met with both the builder and the borrower, and ordered a structural inspection. The bank wrote a memo that no further work was to be completed and that no draws would be disbursed until all three parties agreed. The structural report was provided to both the borrowers and the bank. The first contractor was replaced. Borrowers began having their own inspections performed by their own inspectors. The borrowers fired the second contractor because of problems with construction and hired a third. Then, the bank had another inspection performed by its inspector; it showed numerous problems. However, the Bank failed to share that inspection report with the borrowers. The bank and the borrowers converted the loan to a permanent loan. The borrowers then sued, claiming that the bank should have disclosed the report. Glascoock v. City National Bank of West Virginia, 213 W. Va. 61, 62-64, 576 S.E.2d 540, 541-43 (2002).

18. The Court noted that the bank “was significantly involved in the construction of the Glascock home.” The bank “possessed information of no interest to society in general but of great interest to the Glascocks.” The bank had reason to know of the potential consequences of withholding the information. It was foreseeable that withholding the information would harm the Glascocks. *Id.* at 66, 576 S.E.2d at 545. The Court’s specific holding was:

In conclusion, we find that, where a lender making a construction loan to a borrower *creates a special relationship* with the borrower by maintaining oversight of, or intervening in, the construction process, that relationship brings with it a duty to disclose any information that would be critical to the integrity of the construction project.

*Id.* at 67, 576 S.E.2d at 546 (emphasis added).

19. In this case, Plaintiff has made no showing that Fifth Third Bank had information in the inspection reports that should have been disclosed to Plaintiff. Plaintiff made no attempt to show what the inspections would have told her had they been provided. She relies only on the fact that they were not provided and asserts that such failure is sufficient to prove a violation of a special relationship under Glascock. Such an expansive reading of Glascock is unwarranted. Plaintiff must first establish that a special relationship existed; contrary to Plaintiff’s assertions, Glascock does not create an automatic duty to disclose inspections. Plaintiff had three conversations with the Bank—one when the Bank called Plaintiff to say that it had bought the loan from ABN AMRO, one when Plaintiff allegedly told the Bank orally not to disburse any more money, and one when she requested a copy of her file (which the Bank furnished). Her factual allegations to support a claim of a special relationship (other than the unexercised power of attorney claim) are that Plaintiff paid for inspections, and that the Bank

assumed that duty “when it required that Plaintiff use its inspector and required that the inspector report to the Bank and not to the Plaintiff.”<sup>[7]</sup>

20. In order to pursue a cause of action for not sharing inspection reports, Plaintiff must first establish that a special relationship existed. “The party claiming a confidential relationship must show... that a special trust or confidence was in fact reposed, that its reposition was justifiable, and that the other party either invited or ostensibly accepted the trust imposed.” Alpine Bank v. Hubbell, 550 F. 3d 274 (10<sup>th</sup> Cir., No. 07-1190, Dec. 31, 2008) (to be published) (citations omitted). Plaintiff failed to show that she satisfied any of these preconditions. Instead, she merely assumed that Glasco created a duty of disclosure. As the Court in Alpine Bank determined, once Plaintiff signed the loan documents, she was clearly on notice that the Bank had not accepted any position of trust and that she could not rely on inspections performed by the Bank.

21. Plaintiff further asserted that she was required to sign a power of attorney which permitted the lender to complete the project and that this requirement, in and of itself, created a special relationship. Plaintiff presented no facts to show that the Bank ever exercised any rights under the power of attorney. Indeed, in the same paragraph, Plaintiff acknowledges that the house was never completed. Plaintiff cites no precedent supporting its claim. The Court determines that the mere fact that Plaintiff signed a power of attorney, without proof that the Bank exercised any rights granted thereunder, is insufficient to create a special relationship.

22. Plaintiff must show facts to defeat a motion for summary judgment. Petros v. Kellas, 146 W. Va. 619, 122 S.E.2d 177 (1961) (“It is well settled that to resist a motion for summary judgment the party against whom it is made must present some evidence to indicate that the facts are in dispute when the evidence of the ensuing party shows no disputed

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<sup>[7]</sup> Plaintiff cites no evidence to support that allegation. Therefore, the Court does not consider it. See Petros, supra.

facts, and that the mere contention that the issue is disputable is not sufficient.”). It is undisputed that Plaintiff had to pay for the cost of inspections – just as she had to pay for the title examinations associated with the property. But that does not create a “special relationship” – particularly in the face of specific contract provisions stating that the inspections were being performed for the sole benefit of the Bank.

23. Furthermore, unlike Glasco, Plaintiff did not show a single instance where the Bank shared an inspection report. Instead, the inspections were performed for the Bank only, consistent with the Construction Loan Agreement. Plaintiff has not made the necessary factual showing to support a claim of a “special relationship” even if it had been pleaded properly in her Complaint. The Bank did not step outside the four corners of the contract and assume duties or create a relationship like the situation in Glasco. The instant facts demonstrate only that the Bank acted consistently with the clear provisions of the construction loan agreement by obtaining inspections solely for its own use and Plaintiff was not entitled to rely on them. There is no genuine issue of material fact and summary judgment in favor of the Bank is, therefore, appropriate on this issue.

#### **BREACH OF CONTRACT CLAIM**

24. Count II of Plaintiff’s Complaint asserts an alleged breach of contract. Specifically, Plaintiff alleges that Fifth Third Bank “breached both a written, implied and/or verbal agreement to carry out inspections prior to disbursing funds to the Defendant Contractor.” The Bank asserts that the claim is barred by the express provisions of the contract and by the terms of a Disbursement Authorization Agreement and a Disbursement Hold Harmless Agreement signed by Plaintiff in July 2005, subsequent to the January 2005 loan documents.

25. Plaintiff responds that she was required to pay for inspections and that other provisions of the contract specifically require the Bank to only make disbursements after an inspection and certification and work is in place. She also contends that a sentence in a "Disbursement Processing Guide-Questions & Answers" specifically informed Plaintiff that she must approve any and all draw requests. Plaintiff says that, because of this Guide, "the approval requirement ...exists even if the builder is designated as her agent" and "that it cannot be disputed that defendant failed to inform plaintiff and obtain her approval for either the second or third draw requests."

26. Fifth Third Bank replies that the contract must be read *in pari materia* and that Plaintiff's construction completely reads the provisions cited by Fifth Third Bank out of the contracts and that, properly construed, the language cited by Plaintiff spells out the Bank's rights, not obligations.

27. The contract documents specifically and repeatedly provide that inspections were solely for the benefit of the lender and that Plaintiff was not entitled to rely on the inspections. The construction loan agreement, in Section 13, specifically provides:

A. Non-Reliance on Lender. Borrower has selected the General Contractor and all others furnishing services or materials for the construction of the Project, and Lender shall not have any responsibility for their selection or for the quality of their materials or workmanship. It is understood and agreed that Lender's sole function is that of lender and the only consideration passing from Lender to Borrower is the Loan proceeds. *Neither Borrower nor any other person shall have any right to rely on any procedures required by Lender herein (including but not limited to review of the Plans and Specifications, the cost breakdown of the Project or inspection of the construction of the Project), or the payment of any liens or claims, such procedures being solely for the protection of Lender as lender.* (emphasis added)

B. Inspections of Apparent Status, Not Quality of Work. All inspection services, if any, by Lender, its officers,

agents or employees, are or shall be rendered solely for the benefit of Lender, and *said inspections are not made for the benefit of, and shall not be construed to have been made for the benefit of Borrower*, any of its successors or assigns, or any subsequent owner or occupant of the Property. *Borrower acknowledges that such inspection shall not regard nature and quality of the work, but are intended only to appraise the Lender of the apparent progress thereof. Consequently, Borrower hereby exonerates, excuses and releases Lender from any and all claims or loss or damage that may be suffered by Borrower, which relate in any way to the quality of construction or lack thereof.* (emphasis added)

Similarly, the construction rider to the note and security agreement provides:

The Lender shall inspect the project in order to ascertain the status of completion and the progress of the construction of improvements. *The sole purpose for Lender's inspection is to determine the approximate amount of value of the work which has been done*, so that Lender may disburse funds for such work in place. Such inspection shall not require a review by Lender of the quality of the construction. **As Borrower, I will not rely on the Lender's inspection for any purpose whatsoever.** Rather, I will be solely responsible for the progress and quality of construction, and the discovery of all delays, defects, faults, imperfections and deviations from the Plans and Specifications shall be my sole responsibility as Borrower. (italicized emphasis added) (bold emphasis in original)

28. A contract must be considered as a whole, effect being given, if possible, to all parts of the instrument. Clayton v. Nicely, 116 W. Va. 460, 182 S.E. 569 (1935); Correct Piping Co. v. City of Elkins, 308 F. Supp. 431 (N.D. W. Va. 1970). No word or clause in a contract is to be treated as meaningless if any reasonable meaning consistent with the other parts of the contract can be given to it, and no word or clause should be discarded unless the other words used are so specific and clear in contrary meaning as to convincingly show it to be a false demonstration. Moore v. Johnson Serv. Co., 158 W. Va. 808, 219 S.E.2d 315 (1975). A part cannot be disregarded unless other terms used are specific, clear, and convincing in contrary meaning as to prove it to be a false demonstration. South Penn Oil Co. v. Knox, 68 W. Va. 362,

69 S.E. 1020 (1910). No word or paragraph can be omitted in construing a contract if it can be retained and a sensible construction given to the contract as a whole. Carnegie Natural Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S.E. 548 (1904); Ashland Coal & Coke Co. v. Hull Coal & Coke Corp., 67 W. Va. 503, 68 S.E. 124 (1910).

29. Properly interpreted, the clauses cited by Plaintiff establish that the Bank does not have an obligation to make disbursements until it determines, in its discretion, whether sufficient work has been completed to justify the next draw. That is why the inspections are done solely for the benefit of the Bank. It wants to know that property has sufficient value to cover its loan. As the Court found in In re Fordham, 130 B.R. 632 (Bkrt. D. Mass. 1991) at 642-43, similar language only spelled out a Bank's *rights*, not *obligations*. When construed in this manner, paragraph 13 is read back into the agreement. Plaintiff has not shown any reason why the Court must not simply apply that part of Section 13 stating that:

**As Borrower, I will not rely on the Lender's inspection for any purpose whatsoever. Rather, I will be solely responsible for the progress and quality of construction, and the discovery of all delays, defects, faults, imperfections and deviations from the Plans and Specifications shall be my sole responsibility as Borrower.**

30. The Court concludes that Plaintiff was not entitled to rely upon the Bank's inspections.

31. Plaintiff also contends that a sentence in a set of guidelines that she received at closing creates an ambiguity and gives her the right to approve all draws and asserts that she did not approve them because the contractor forged her name to the draw requests. Plaintiff fails to address that every one of the draw requests bear what purports to be her signature. As determined above, the Bank was under no duty to discover any alleged forgery by her contractor and designated agent to make draw requests and receive payments. Therefore,

Plaintiff can take no comfort in any perceived ambiguity and hold the Bank responsible for the contractor's allegedly fraudulent acts. She has her claim against the contractor.

32. Plaintiff signed the Disbursement Authorization Agreement designating the contractor as her duly authorized agent to request inspections and to make draws. The agreement was subject to cancellation only in writing delivered by certified mail, return receipt requested. Plaintiff never canceled the Disbursement Hold Harmless Agreement.

33. Plaintiff waived any claim for damages for disbursement of funds without her joinder when she signed the Disbursement Hold Harmless Agreement:

Borrower(s) hereby waives any claims for damages against [Bank] which might arise or could be claimed as the result of [Bank] distributing funds directly to the Builder, subcontractors, suppliers, and/or materialmen without the joinder in said request by undersigned Mortgagor(s).

34. Plaintiff also claims that she did not receive the draw request confirmation letters issued by the Bank. She speculates, without citation of record evidence, that the letters were sent to the contractor. But, even if that is true, the contractor was her agent for making draw requests and receiving disbursements. Furthermore, Plaintiff does not cite any contract provision requiring that she be sent such draw request confirmations. To the extent such confirmation letters were merely part of the Bank's internal procedures, Plaintiff was not entitled to rely upon them by the terms of the contract quoted above.

35. The Court finds that there is no disputed issue of material fact. The contract documents provide that Plaintiff was not entitled to rely on inspections by the Bank. Plaintiff appointed her contractor as her agent to make draw requests and waived any claim for damages arising from the Bank's distribution of funds to WFP. Plaintiff is bound by her contract and Count II, being diametrically opposed to a plain reading of the contract, must be dismissed.

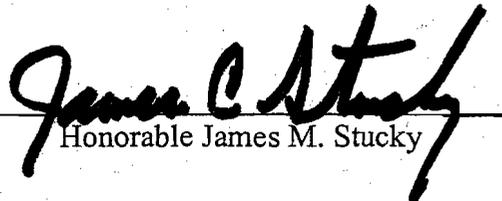
**ORDERING PARAGRAPH**

As a consequence of the foregoing findings of fact and conclusions of law, it is ORDERED that Fifth Third Bank's motion for summary judgment is GRANTED and Plaintiff's complaint against Fifth Third Bank, NA is hereby DISMISSED.

The Court notes the objection and exception of the plaintiff to the Court's ruling.

The Clerk of the Circuit Court is hereby directed to serve a true copy of this Order upon each party of record.

Entered this 21 day of February, 2009.

  
Honorable James M. Stucky

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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF February 2009  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA