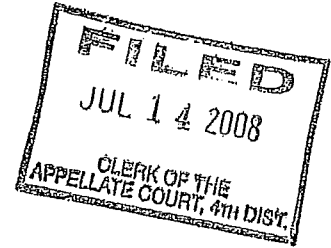


NO. 4-07-0871
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT



CRITES TITLE COMPANY, INC., d/b/a DOTY)	Appeal from
TITLE COMPANY,)	Circuit Court of
Plaintiff-Appellee,)	Coles County
v.)	No. 07MR37
FIRST MID-ILLINOIS BANK AND TRUST,)	
N.A., and ANDREAS O. KERTSCHER)	
Defendants-Appellants,)	
and)	Honorable
12 CRAEB, L.L.C.,)	Teresa K. Righter,
Defendant-Appellee.)	Judge Presiding.

ORDER

In March 2007, plaintiff, Crites Title Company, d/b/a Doty Title Company (Crites Title), filed a complaint for interpleader against defendants, First Mid-Illinois Bank and Trust, N.A. (Bank), and Andreas O. Kertscher (Kertscher), seeking a judgment determining to whom and in what amount plaintiff Crites Title should pay a \$69,350 fund it held in its capacity as a closing agent on four real-estate transactions. On March 15, 2006, Crites Title amended its complaint to include defendant 12 Craeb, L.L.C. (12 Craeb), the purchaser in the real-estate transactions. On November 21, 2007, the trial court heard arguments on all three defendants' motions for summary judgment. The trial court entered summary judgment in favor of 12 Craeb. Defendants Bank and Kertscher appeal. We reverse and remand.

I. BACKGROUND

This case centers around four real-estate transactions brokered by Robert Taylor (Taylor) and his business Century 21

Bear Real Estate regarding property located in Charleston, Illinois. On March 8, 2007, a closing took place in which documents relating to the four transactions were signed but no money changed hands. On March 9, 2007, the transactions were completed when funds were sent by wire to Crites Title. Crites Title paid out half the commission totaling \$69,350 to Gemini Investment & Realty Corporation. Crites Title retained the other half of the commission because on March 8, 2007, defendant Kertscher served it with a non-wage-garnishment notice, non-wage-garnishment summons, and non-wage-garnishment affidavit. On March 9, 2007, defendant Bank served Crites Title with a "Notice to Make Payment for Benefit of Secured Party Pursuant to 810 ILCS 5/9-607."

The seller and purchaser to the transactions used Taylor's services as a broker and escrow agent. Defendant 12 Craeb, through one of its related entities, 5M Investment Group, L.L.C., was a purchaser. During the executory period of the contracts, Taylor received \$103,000 in earnest money to be deposited into the Century 21 Bear Real Estate escrow account. Prior to March 9, 2007, 12 Craeb made arrangements for LandAmerica Title to handle the disbursement of funds for closing of the contracts. The contracts provided the broker commission was to be paid to Taylor upon closing. The \$103,000 in escrow funds were to be forwarded from the Century 21 Bear Real Estate escrow account to LandAmerica Title and credited to 12 Craeb at the March 9 closing. Only \$3,000 reached LandAmerica. On March 12,

2007, 12 Craeb discovered Taylor had taken the balance of the escrow funds outside of closing for his own benefit.

On March 13, 2007, Crites Title filed the underlying interpleader complaint with the trial court to determine which defendant was entitled to the \$69,350 commission and in what proportion. Both the Bank and Kertscher were named as defendants. On March 14, 2007, Crites Title's attorney received a letter from 12 Craeb demanding Crites Title revise the settlement statements in each transaction and pay the \$69,350 to 12 Craeb. On March 15, 2007, Crites Title amended its interpleader complaint by adding 12 Craeb as a party. Each of the three defendants filed a motion for summary judgment and a hearing was held August 3, 2007.

On August 21, 2007, the trial court issued an opinion in favor of 12 Craeb, stating:

"It is undisputed, that if Mr. Taylor had performed what was required of him under the contracts at issue and as the holder of escrow funds, Mr. Taylor would be entitled to the funds held by the plaintiff. If the funds held by the plaintiff were Mr. Taylor's, then First Mid's Motion to Make Payment for Benefit of Secured Party Pursuant to [section 9-607 of the Uniform Commercial Code (810 ILCS 5/9-607 (West 2006))] would have a priority claim up to the amount due and owing

and Mr. Kertscher's non-wage garnishment would apply to the remaining balance.

Mr. Taylor, however, did not do what was required of him under the contract and as the holder of funds in escrow. The \$103,000 paid by the purchaser into the Century 21 Bear escrow account was not Mr. Taylor's and his creditors could not make a claim against those funds. The \$103,000 held in escrow was to be credited against the purchase price at closing. Mr. Taylor forwarded only \$3,000 of the \$103,000. The purchaser, through its lender, came up with the funds needed to close the four contracts. Under this fact situation, Mr. Taylor never became entitled to the funds held by the plaintiff. The source of the funds held was the purchaser 12 Craeb, though its lender."

II. ANALYSIS

The Bank argues the trial court erred by determining 12 Craeb has a right to the \$69,350 in Crites Title's possession superior to the Bank's perfected security interest. Settlement statements were prepared by Crites Title in each transaction outlining how the funds received by Crites Title would be disbursed. Each settlement statement outlined the amount of commission to be paid to Century 21 Bear Real Estate. Three of the

four settlement statements were signed on behalf of 12 Craeb. 12 Craeb waited until the closings were completed and Taylor's receivables came into existence and then demanded the closing statements be revised. 12 Craeb claimed the \$69,350 in commissions to be paid Taylor out of the closing funds was an over-deposit by 12 Craeb. Taylor signed an affidavit on March 14, 2007, claiming he had been paid his commissions as of March 13, 2007, from funds in his possession deposited with him by 12 Craeb.

The Bank points to three problems with 12 Craeb's argument that Taylor was paid out of the escrow account. First, 12 Craeb did not have any knowledge Taylor would take the actions he did in relation to the escrow account until March 12, 2007. 12 Craeb could not have given Taylor permission to pay himself with the escrow funds before the four transactions were completed and the receivables existed. Second, Taylor paid himself out of an escrow fund which monies were to be delivered to the obligees in the transaction at the closing. Under Illinois law, an escrow "'is deposited by the grantor, promisor[,] or obligor, or his agent with a stranger or third party, to be kept by the depository until the performance of a condition or the happening of a certain event and then to be delivered over to the grantee, promisee[,] or obligee.'" Garvey v. Parrish, 84 Ill. App. 3d 578, 584, 405 N.E.2d 1105, 1111 (1980), quoting Rinehart v. Rinehart, 14 Ill. App. 2d 116, 123, 143 N.E.2d 398, 402 (1957). Finally, each of the sellers were supposed to pay a broker's

commission "in cash only upon final closing and consummation of the transaction contemplated herein." The Bank contends no record evidence shows the transactions were modified to allow Taylor to pay himself out of an escrow account with funds not made part of the final closing and consummation of the transactions.

The Bank argues Taylor converted the \$100,000 from the escrow account. 12 Craeb had a right in the property by virtue of being the obligor in the escrow relationship. Once the fully funded closings were completed, 12 Craeb had an unconditional right to the return of the \$103,000 in escrow. Taylor's appropriation of the escrow funds was done without authorization from 12 Craeb. The Bank contends the \$69,350 being held by Crites Title was a commission due Taylor and the \$100,000 was funds Taylor converted, and holding otherwise would undermine Illinois' adoption of article 9 of the Uniform Commercial Code (UCC) (810 ILCS 5/9-101 through 9-9902 (West 2006)). 12 Craeb failed to stop the disbursement of Taylor's commission to him prior to disbursement of the closing proceeds in each transaction. According to the Bank, its perfected security interest became enforceable against the commissions due Taylor when Crites Title was authorized to distribute the closing funds. On March 14, 2007, 12 Craeb was too late when it tried to stop the disbursement of Taylor's commissions because the Bank already had a secured and perfected interest in those receivables which had been enforceable for approximately five days.

Article 9 of the UCC "is meant to protect creditors by providing them with greater security than they had under pre-Code laws." Midwest Decks, Inc. v. Butler & Baretz Acquisitions, Inc., 272 Ill. App. 3d 370, 376, 649 N.E.2d 511, 515 (1995). Taylor likely knew or should have known he was not going to receive his commissions from Crites Title because of claims by both the Bank and Kertscher. The Bank concludes Taylor and 12 Craeb labeled stolen funds as commissions so the Bank's lien may be avoided for the benefit of Taylor and an unsecured creditor, 12 Craeb.

The Bank argues the trial court failed to address this issue by finding Taylor was not entitled to receive commission at all because he failed to turn over the funds in the escrow account. The issue of whether Taylor was entitled to his commissions was not properly an issue between Taylor, 12 Craeb, the Bank, or Kertscher. Under Illinois law, "[w]hen construing a contract, the contractual terms are given their plain and ordinary meaning." Reaver v. Rubloff-Sterling, L.P., 303 Ill. App. 3d 578, 581, 708 N.E.2d 559, 561 (1999). The seller in each transaction was responsible for paying the broker's commission to Taylor; 12 Craeb was a purchaser.

12 Craeb argues the trial court did not err because Taylor never became entitled to the \$69,350 commission. Taylor did not fulfill his obligations and is not entitled to the benefits of the contracts. If Taylor was not entitled to the benefits of the contracts, the Bank and Kertscher's interests cannot attach to the \$69,350 fund held by Crites Title. If the

court does not return the funds to 12 Craeb, Taylor will receive the benefit of his real-estate commission twice, that is, one payment of the appropriated \$100,000 and a second payment resulting in reducing his outstanding debts to the Bank and Kertscher.

One purpose of an escrow account is to protect 12 Craeb's interest in the funds deposited in them. "'The ordinary function of an escrow *** is to give security to both parties to an existing transaction.'" (Emphasis omitted.) Hakala v. Illinois Dodge City Corp., 64 Ill. App. 3d 114, 121, 380 N.E.2d 1177, 1182 (1978), quoting Corbin on Contracts §249 (1952). 12 Craeb argues as a matter of public policy the \$69,350 should go to 12 Craeb because as a purchaser 12 Craeb did not receive the benefit of its bargain. 12 Craeb contends the Bank and Kertscher are asking the court to find Taylor is entitled to commissions despite Taylor's breach of his obligations by using funds in excess of his commission outside of closing and in violation of the contract.

12 Craeb further argues under Illinois agency law Taylor lost any rights to commission from any source when he misappropriated funds.

"[A]n attempt to make a personal gain by receiving a higher commission *** is strictly prohibited in this [s]tate because it violates an agent's duty of honesty and loyalty towards his principal. *** [A]n agent who deals independently of the interests of his

principal breaches his fiduciary duty and is therefore barred from any recovery for his services." Jeffrey Allen Industries, Inc. v. Sheldon F. Good & Co., 153 Ill. App. 3d 120, 124, 505 N.E.2d 1104, 1107 (1987) (First District).

12 Craeb agrees Taylor did not have permission to take the escrow funds. It reiterates if the Bank and Kertscher prevail, Taylor benefits from his fraudulent actions by receiving twice the commissions in direct opposition to Illinois law.

By its reply brief, the Bank maintains 12 Craeb muddles the two funds. The \$100,000 is not and cannot be considered a commission. The only right Taylor had in the escrow funds was to hold the funds until the closing of the four transactions. Taylor would not get double recovery of his commissions if a portion of the \$69,350 sufficient to satisfy the Banks's lien were distributed to the Bank. 12 Craeb could still bring suit against Taylor to recover the \$100,000 it deposited in escrow. Such a suit would address 12 Craeb's concerns about Taylor receiving \$169,350 in commissions instead of the \$69,350 he would have received if not for the actions of the Bank and Kertscher.

12 Craeb further argues in order for Taylor to be entitled to commission he had to satisfy his brokerage and escrow obligations. Taylor's obligations included depositing the escrow funds with LandAmerica and waiting until closing to get his commission. Taylor failed to do this and breached the contracts.

As a result, Taylor ceased to have a right to receive any funds related to the transaction and had no rights to the funds at the time the Bank and Kertscher asserted their interests in the Crites Title fund. "A party who materially breaches a contract cannot take advantage of the terms of the contract which benefit him, nor can he recover damages from the other party to the contract." Goldstein v. Lustig, 154 Ill. App. 3d 595, 599, 507 N.E.2d 164, 168 (1987). Taylor cannot enforce his rights without also fulfilling his obligations, and he did not do so. The Bank and Kertscher cannot prove Taylor fulfilled all his brokerage and escrow obligations arising from the contracts. The Bank and Kertscher stand in Taylor's shoes with respect to the funds held by Crites Title and therefore cannot enforce Taylor's commission.

Kertscher argues the trial court erred when it ordered Crites Title to turn over the funds to 12 Craeb. Kertscher states the contracts all include identical paragraphs entitled, "brokerage commission," which state: "Seller agrees to pay broker's commission *** the commission shall be split equally between Gemini Investment & Realty Corp. and Bob Taylor of Century 21 Bear Real Estate, as brokers, in cash, upon final closing and consummation of the transaction contemplated herein." According to Kertscher, the plain language of the contracts indicated Taylor was due the commissions upon the consummation of the transactions. The money held by Crites Title is a debt due Taylor pursuant to the contracts. Kertscher contends the contracts were not voided and remain applicable.-

Kertscher highlights William Smart's affidavit. Smart is the general counsel of Gemini Development Group, L.L.C., an affiliate of 12 Craeb. Smart stated the contracts stated the broker's commissions would be paid at closing and LandAmerica would handle the March 9 disbursements at the closing related to the contracts. Taylor could not pay himself any way he saw fit when clear contract provisions addressed his payment. Taylor did not have authority to alter the brokerage-commission provisions. 12 Craeb had no knowledge Taylor converted funds to which it had a right when 12 Craeb directed Crites Title to withhold funds for the payment of Taylor's commission. 12 Craeb later became aware of Taylor's conversion of the \$100,000 earnest money but had no claim on the properly garnished \$69,350 held by Crites Title. Taylor's conversion cannot properly be characterized as Taylor having received the benefit of his commission. Taylor had no right to avoid payment of a judgment by misappropriating the escrow fund and this action cannot be construed as receiving his commission. According to Kertscher, while 12 Craeb has a claim against Taylor for the converted money, it must get in line behind others who have a judgment against Taylor.

We note the issue of summary judgment was not specifically or adequately raised in the parties' briefs and is therefore forfeited. See 210 Ill. 2d R. 341(h)(7) ("[p]oints not argued are waived"). However, "[forfeiture] is customarily considered an admonition to the parties and not a hindrance to a reviewing court's ability to address issues of law." Caparos v.

Morton, 364 Ill. App. 3d 159, 180, 845 N.E.2d 773, 791 (2006). We are not constrained to address the issues at bar in the same manner as framed by the parties.

"Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." General Casualty Insurance Co. v. Lacey, 199 Ill. 2d 281, 284, 769 N.E.2d 18, 20 (2002). "Summary judgment is to be encouraged as an expeditious method of disposing of a lawsuit, but it is a drastic measure that should only be allowed when the right of the moving party to judgment is free and clear from doubt." Ranger v. Ranger, 379 Ill. App. 3d 752, 756, 883 N.E.2d 750, 754 (2008). We review de novo whether summary judgment was appropriate in this matter. State Farm Mutual Automobile Insurance Co. v. Illinois Farmers Insurance Co., 226 Ill. 2d 395, 400, 875 N.E.2d 1096, 1099 (2007). The reviewing court will reverse a grant of summary judgment if it determines that genuine issues of material fact remain. First of America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165, 176, 651 N.E.2d 1105, 1110 (1995).

In our review of the record, we conclude the trial court erred because we find material questions of fact do remain. For example, the record lacks a listing agreement showing whom Taylor represented as realtor. The record also lacks a separate escrow agreement. Whether a duty flowed from Taylor to 12 Craeb

as a realtor or only as an escrow agent has a bearing on disbursing the commission money. If Taylor represented 12 Craeb or was acting as a dual agent, then he would owe a broker-realtor duty to 12 Craeb as well as his separate duty as escrowee. Then, the escrow and commission money would be so intertwined the commission money could be paid to 12 Craeb. However, if Taylor owed 12 Craeb the duty only of an escrowee, 12 Craeb should seek recovery of the \$100,000 from Taylor, but it may have no right to the \$69,000 before the Bank and Kertscher recover. The contracts show the commission money was paid by the sellors upon closing and does not belong to 12 Craeb absent a duty flowing from Taylor to 12 Craeb other than as escrowee.

III. CONCLUSION

For the reasons stated, we reverse the trial court's judgment and remand the cause to the trial court for further proceedings in conformance with this order.

Reversed and remanded.

KNECHT, J., with APPLETON, P.J., and McCULLOUGH, J., concurring.