STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

FIDELITY NATIONAL TITLE
INSURANCE,

Plaintiff,

vs. Case No. 2013-4954-CK

DICICCO AUTO AND TRUCK
SERVICES, INC., MARIO DICICCO,
DICICCO PROPERTIES, LLC, and
ANGELO DICICCO REVOCABLE
LIVING TRUST U/A/D DECEMBER
31, 1998, AS AMENDED AND
RESTATED JULY 26, 2007,

Defendants.
_____________________________________/

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants have filed a response and request that the motion be denied. In addition, Plaintiff has filed a reply brief in support of its motion.

Factual and Procedural History

On or about September 10, 2008, Defendant DiCicco Properties, LLC ("Defendant Properties"), entered into a loan agreement in the amount of $2,720,000.00 with Citizens Bank ("Loan"). The Loan was guaranteed by Defendants Mario DiCicco, DiCicco Auto and Truck Service Center, Inc., and Angelo DiCicco Revocable Living Trust U/A/D December 31, 1998, as Amended and Restated July 26, 2007 ("Guarantor Defendants"). The Loan was also guaranteed by non-party Steven Vaglica (guarantees

executed by Guarantor Defendants and guaranty executed by Mr. Vaglica collectively as, the "Guarantees")

As security for the Loan, DiCicco Properties, LLC granted Citizens Bank a mortgage ("Mortgage") in property commonly known as 7760 24 Mile Road and 52965 Van Dyke, Shelby Township, MI ("Subject Property").

Pursuant to the Loan documents, the Loan was conditioned upon Citizen's Bank receiving a title insurance policy. In accordance with the Loan documents, Plaintiff was retained to issue, and did issue, an insurance policy insuring that the Mortgage is the first and best lien against the Subject Property ("Policy").

In addition, Section 4.9 of the Loan provides:

> [I]n addition to any indemnity of the Bank by [Defendant Properties] set forth in the Mortgage, [Defendant Properties] and [Defendant Guarantors] hereby agree to indemnify the Bank from any claims arising from [Defendant Properties'] failure to comply with the Construction Lien Act and from all claims made against the Bank by any persons who are injured while working on the Project or present on the [Subject Property] or who have claims with respect to labor or materials furnished with respect to the Project and against any claims arising by reason of the execution of [the Loan] or consummation of the transactions contemplated hereby.
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> [Plaintiff's Exhibit A, at ¶4.9.]

Further, the guarantees executed by Defendant Guarantors, as well as the guaranty executed by Mr. Vaglica (the "Guarantees"), provided, in part:

> The undersigned Guarantors jointly and severally agree that they shall personally perform the obligations to be performed by them as set forth herein; and hereby guaranty the full and complete performance by [Defendant Properties] of all of the terms, provision and conditions of this Agreement and the truthfulness and accuracy of all representations and warranties made by [Defendant Properties]. This Agreement shall not be deemed to limit the obligations of the undersigned Guarantors under the Guarantees.
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> [Plaintiff's Exhibit A, at pg. 18.]

Additionally, Mr. Vaglica and Defendant Guarantors executed continuing Guarantees, pursuant to which they agreed, *inter alia*:

> If [Defendant Properties] fails to pay all or part of the Indebtedness when due, whether by default or maturity, the undersigned immediately upon the demand of the Bank will pay to the Bank the amount due and unpaid by the Debtor as if such amount constituted the direct and primary obligations of the undersigned….the obligation of the undersigned shall be joint and several as to all guarantors, whether the guarantees are executed together or separately, and may be enforced at the option of the Bank against each or any number of guarantor.
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> [Plaintiff's Exhibits D, E and F, at Sections 2 and 8.]

On June 27, 2011, certain mechanics lien holders instituted an action against Plaintiff's insured, Citizen Bank, and others seeking to foreclose the liens ("Lien Action"). Plaintiff, pursuant to the Policy, ultimately paid $92,823.00 to resolve the Lien action, and allegedly spent $47,852.70 defending the matter. Plaintiff has since been subrogated to the rights of Citizens Bank for the purposes of enforcing any and all contractual indemnities and guarantees made to Citizens Bank.

On December 16, 2013, Plaintiff filed its complaint in this matter alleging that Defendants have refused Plaintiff's demand for indemnification and have breached the terms of Loan and Guarantees (Count I). In the alternative, Plaintiff alleges that Defendants were unjustly enriched at Plaintiff's Expense when it paid to defend and resolve the Lien Action (Count II).

On September 26, 2014, Plaintiff filed its instant motion for summary disposition pursuant to MCR 2.116(C)(10). On November 18, 2014, Defendants filed their response requesting that the motion be denied. On December 10, 2014, Plaintiff filed its reply brief in support of its motion.

On December 15, 2014, the Court held a hearing in connection with motion and took the matter under advisement.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

While it appears undisputed that the Guarantees and Loan exist and are valid, Defendants contend that Plaintiff's subrogation claim fails because Plaintiff has unclean hands. Subrogation is an equitable cause of action and is therefore subject to equitable defenses. *Allstate Ins Co v Snarski*, 274 Mich App 148, 154-155; 435 NW2d 408 (1988). With respect to unclean hands, the Michigan Court of Appeals has held in *Attorney General v PowerPick Player's Club of Mich, LLC,* 287 Mich App 13, 52; 783 NW2d 515 (2010):

> It is well settled that one who seeks equitable relief must do so with clean hands. *McCluskey v Winisky,* 373 Mich 315, 321; 129 NW2d 400 (1964); *Berar Enterprises, Inc v Harmon,* 101 Mich App 216, 231; 300 NW2d 519 (1980).

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> Our Supreme Court has observed that a party who has "acted in violation of the law" is not "before a court of equity with clean hands," and is therefore "not in position to ask for any remedy in a court of equity." *Farrar v Lonsby Lumber & Coal Co,* 149 Mich 118, 121; 112 NW 726 (1907).
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> "Any wilful act concerning the cause of action which transgresses equitable standards of conduct is sufficient cause for the invocation of the clean hands doctrine." *Bellware v Wolffis,* 154 Mich App 715, 720; 397 NW2d 861 (1986).

In this case, Defendants contend that Plaintiff settled the Lien Action in bad faith and should therefore be barred from seeking to recoup the settlement amount and attorney fees incurred in that action. Specifically, Defendants contend that Plaintiff had reason to believe that the underlying lien was invalid, but failed to successfully have the lien removed; rather, Plaintiff settled the matter and sought recoupment from Defendants for the settlement amount.

The Loan, which was either executed by, or guaranteed, by each of the Defendants requires them to discharge any lien within 30 days of the filing of said lien. (*See* Plaintiff's Exhibit A, at ¶4.5.) Moreover, the Mortgage, which is also either executed by, or guaranteed, by each of the Defendants requires them to pay and discharge all liens. (*See* Plaintiff's Exhibit B, at ¶6.) While Plaintiff has not provided any evidence that Defendants knew about the liens underlying the Lien Action prior to that action being filed, it is clear that Defendants knew about the liens as of the date they were served with notice of that matter. Further, it appears undisputed that Defendants failed to take the actions required by the Loan.

In addition, the Loan provides for Defendants to indemnify Citizen's Bank in certain situations:

4.9 Indemnity In addition to any indemnity of the Bank by [Defendant Properties] set forth in the Mortgage, [Defendant Properties] and [Defendant Guarantors] hereby agree to indemnify the Bank from any claims arising from Borrower's failure to comply with the Construction Lien Act and from all claims made against the Bank by any persons who are injured while working on the Project or present on the [Subject Property] or who have claims with respect to labor or materials furnished with respect to the Project and against any claims arising by reason of the execution of this Agreement or consummation of the transactions contemplated hereby.

Further, the Mortgage provides, in pertinent parts:

10. Bank's Right to Perform. If [Defendant Properties] defaults in the payment of any taxes, assessments of charges (or in providing security as provided in Section 6), in procuring or maintaining insuring in maintaining the [Subject Property], or in performing any of the other obligations of this Mortgage, then the Bank may, at its option…..take any action or pay any amount required to be taken or paid by [Defendant Properties] hereunder. The cost of such action or payment by the Bank shall be immediately paid by [Defendant Properties], shall be added to the Liabilities, shall be secured hereby, and shall bear interest at the highest rate specified in the Liabilities from the date incurred by the Bank until fully paid. No such action taken or amount paid by the Bank shall constitute a waiver of any default of the Mortgagor hereunder.

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16. Reimbursement of Expenses. [Defendant Properties] shall pay or reimburse the Bank for expenses reasonably necessary or incidental to the prosecution of the lien and priority of this Mortgage and for expenses incurred by the Bank in seeking to enforce the provisions hereof and of the Liabilities (whether before or after default, through formal or informal collection actions, workout or otherwise), including but not limited to…..reasonably attorney fees….. . All such payments or reimbursement shall be paid immediately to Bank, shall be added to the Liabilities, shall be secured by this Mortgage, and shall bear interest at the highest rate specified in the Liabilities from the date incurred by the Bank until fully paid.

Accordingly, under the provisions of the Loan and Mortgage, Defendant Properties agreed to contest, and ultimately discharge, any lien filed against the Subject Property that may affect the Mortgage's priority. In addition, under the Guarantees,

Defendant Guarantors agreed to be jointly and severally liable for Defendant Properties' duties and obligations under the Loan and Mortgage. In this case, Defendants failed to contest, much less discharge, the liens forming the basis for the Lien Action. Rather, Plaintiff and Citizen's Bank negotiated the discharge of the liens via the settlement agreement. While Defendants may not agree with the manner used to discharge the liens, Defendants surrendered their opportunity to deal with the lien when they failed to take the actions required by paragraph 4.5 of the Loan within the 30 day time limit.

In their response, Defendants contend that Plaintiff and its predecessor in interest should not have settled the Lien Action because they had reason to believe that the liens were invalid. However, it is undisputed that the Med-Mar claim was settled for about 18% of its face value, and the Jeddo liens were settled for about 15% of their face value. While it may be true that the liens in question would have ultimately found invalid, the indemnity provisions of the Loan and Mortgage do not limit Plaintiff's ability to seek indemnification to situations in which the validity of the liens is resolved on the merits.

Parties to lawsuit routinely settle matters for various reasons. One primary motivation is to save the attorney fees and costs that would be incurred in connection with trying a case. In the Lien Action Plaintiff would certainly have incurred substantial attorney fees in continuing to litigate the matter, with no guarantee of prevailing on the merits. Consequently, Plaintiff decided that settling the matter best served its interests. While Defendants may not agree with that decision, the Court is convinced that the decision was not made in bad faith and may not form the basis for Defendants' asserted defenses.

A contract's unambiguous language must be enforced as written, unless it was the product of bad faith or violates public policy. *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005). In this case, the Loan, Mortgage and Guarantees unambiguously provide that Defendants are liable for the costs and attorney fees incurred in discharging a lien against the Subject Property. While Defendants may not approve of the means by which the discharges were obtained, they have failed to provide any authority that obtaining the discharges by settlement negates Plaintiff's right to indemnification. Consequently, the Court is convinced that Plaintiff's motion for summary disposition must be granted.

Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED. Plaintiff shall submit a proposed judgment to the Court within 28 days of the date of this Opinion and Order. Any objections/response to the proposed judgment shall be filed within 14 days of the date the proposed judgment is filed. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* resolves the last claim and CLOSES the case. The issue of damages remains OPEN.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: January 22, 2015

JCF/sr

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