STATE OF MICHIGAN

COURT OF APPEALS

JOHN and KATHLEEN OMILION

Plaintiffs-Appellees,

v

ROBERT M. and PENNY A. TURNER,

Defendants-Third Party
Plaintiffs-Appellants,

and

ROBERT SHOOLTZ, individually and d/b/a
COLDWELL BANKER-SHOOLTZ REALTY
and JAMES UPTHEGROVE,

Third-Party Defendants-
Appellees.

UNPUBLISHED
January 10, 1997

No. 188103
Oakland County
LC No. 94-480483

JOHN and KATHLEEN OMILION,

Plaintiffs-Appellants,

v

ROBERT M. and PENNY A. TURNER,

Defendants-Third-Party
Plaintiffs-Appellees,

and

No. 188558
LC No. 94-480483

ROBERT SHOOLTZ, individually and d/b/a
COLDWELL BANK-SHOOLTZ REALTY
and JAMES UPTHEGROVE,

Third-Party Defendants.

Before: McDonald, P.J., and Murphy and J. D. Payant*, JJ.

PER CURIAM.

In this consolidated appeal, defendants appeal as of right the trial court's orders granting third-party defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and granting plaintiffs' motion for partial summary disposition pursuant to MCR 2.116(C)(10).[1] Plaintiffs also appeal as of right the trial court's order denying their request for incidental monetary damages. As to defendants' appeal, we affirm. As to plaintiffs' appeal, we reverse and remand this matter to the trial court for an evidentiary hearing on the issue of incidental monetary damages.

In 1990, defendants owned five contiguous lots located at 656 Pontiac Road in Orion Township. Lots 41, 42, and 43 were identified with Sidwell number 09-11-337-061, and lots 44 and 45 were identified with Sidwell number 09-11-337-025. On or about February 14, 1990, defendants combined lots 41-45 on county records and the new parcel was given Sidwell number 09-11-337-063. The new parcel measured 150 feet by 120 feet. Defendants then applied for and obtained a building permit for the purpose of building a single-family house on the combined parcel.

Defendants entered into a listing agreement with third-party defendants to sell the house they constructed. The listing agreement stated that the house was situated on lots 44 and 45, Sidwell number 09-11-337-025, which was the original Sidwell identification for lots 44 and 45. However, the listing agreement provided that the size of the lot on which defendants' house was situated measured 150 feet by 120 feet, the measurement of combined lots 41-45.

On or about September 29, 1990, plaintiffs executed a purchase agreement to buy the house for $97,000. This contract provided that plaintiffs agreed to purchase the house located at 656 Pontiac, lots 44 and 45, Sidwell number 09-11-337-025. On or about October 31, 1990, plaintiffs executed a land contract to purchase land described as lots 44 and 45, Sidwell number 09-11-337-063, the tax identification number of combined lots 41-45. On September 24, 1991, defendants executed a warranty deed by which they conveyed lots 44 and 45 to plaintiffs. When plaintiffs conducted a land survey in conjunction with their attempt to sell the house in May 1994, they discovered that their residence was located on lots 42, 43 and 44. Defendants subsequently refused to convey title to lots 41, 42, and 43 to plaintiffs.

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* Circuit judge, sitting on the Court of Appeals by assignment.

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Plaintiffs then filed suit against defendants, bringing claims for breach of contract, unjust enrichment, fraudulent misrepresentation, and mutual mistake. Plaintiffs petitioned the trial court to enter an order declaring that defendants held lots 41, 42, and 43 in constructive trust for their benefit and requiring defendants to convey the lots to plaintiffs by warranty deed. Plaintiffs also sought incidental monetary damages for defendants' failure to convey the lots. In turn, defendants filed a third-party complaint against third-party defendants, alleging that third-party defendants negligently failed to determine the location of the house they contracted to sell.

The trial court granted plaintiffs' motion for partial summary disposition pursuant to MCR 2.116(C)(10) on the basis that the parties had entertained a mutual mistake as to the description of the property to be sold when they engaged in the transfer of the property. Accordingly, the trial court entered an order requiring defendants to execute a warranty deed conveying lots 41, 42, and 43 to plaintiffs. The trial court also granted third-party defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) upon concluding that third-party defendants owed no duty to defendants to conduct a survey to ascertain the location of the house to be sold or determine the correct description of the property. Lastly, the trial court denied plaintiffs' request for monetary damages resulting from defendants' failure to timely transfer lots 41, 42, and 43 because it determined that the award of such damages, coupled with the previous grant of specific performance, would result in a double recovery for plaintiffs.

I. Docket No. 188103

On appeal, defendants argue that the trial court erred in granting plaintiffs' (C)(10) motion for partial summary disposition because it improperly made findings of fact in reaching its decision. We disagree.

MCR 2.116(C)(10) permits summary disposition when "[e]xcept 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." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114; 532 NW2d 866 (1995). When deciding a motion for summary disposition, a court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994). The grant of summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo. *Jackhill*, *supra*.

Upon reviewing the evidence submitted to the trial court and granting the benefit of any reasonable doubt to defendants, we find that the trial court did not err in granting plaintiffs' motion for partial summary disposition on the basis that the parties labored under a mutual mistake when they undertook to transfer the property. Plaintiffs presented documentary evidence to clearly support their argument that the parties made a mutual mistake in failing to transfer
interest in lots 41-45 when they executed the warranty deed. Defendants were constrained to submit

documentary evidence to the trial court to establish the existence of genuine issues for trial and oppose plaintiffs' motion for partial summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). Since defendants failed to do so, the trial court was correct in granting summary disposition as to the issue of whether the parties had entertained a mutual mistake when they executed the sales contract, land contract, and warranty deed covering only lots 44 and 45. See MCR 2.116(G)(4); *International Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437; 543 NW2d 25 (1995); see also *Dingeman v Reffitt*, 152 Mich App 350; 393 NW2d 632 1986.

Upon deciding that the parties made a mutual mistake in executing their contracts of sale and, ultimately, the warranty deed, the trial court granted plaintiffs the remedy of reforming the parties' contract of sale in order to carry out their true agreement. In order to properly reform a contract, a court must determine what the parties actually intended when they entered into it, because a court cannot fashion a new contract for the parties. *Dingeman, supra*. While questions of intent are factual issues which are rarely properly resolved on summary disposition, *SSC Assoc Limited Partnership v General Retirement System of Detroit*, 192 Mich App 360; 480 NW2d 275 (1991), we determine that the trial court properly resolved the question of the parties' intent on summary disposition. The trial court was presented with unrebutted evidence that defendants combined lots 41 through 45 in order to construct a house on the parcel. Defendants' real estate listing agreement described the property to be sold as lots 41 through 45, measuring 150 feet by 120 feet. Finally, the land sale contract executed by the parties identified the parcel to be sold with Sidwell number 09-11-337-063, the identification number of the combined parcel. From this evidence and defendant's inability to produce documentary evidence to oppose plaintiffs' motion for summary disposition, we conclude that the trial court properly determined that there was no genuine issue of material fact concerning whether defendants intended to convey lots 41 through 45 to plaintiffs. Accordingly, we affirm the trial court's grant of plaintiffs' motion for partial summary disposition pursuant to MCR 2.116(C)(10).

Next, defendants argue that the trial court erred in disposing of its negligence claim against third-party defendants pursuant to granting third-party defendants' (C)(10) motion for summary disposition. Defendants argue that the trial court mistakenly concluded that real estate agents do not owe a duty to their customers to conduct a survey of, or otherwise ascertain the true dimensions, location, and description of the property to be sold. We do not agree.

In order to establish that third-party defendants were negligent in performing their function as real estate agents, defendants were required to submit documentary evidence to show four elements: (1) a duty owed by third-party defendants to defendants; (2) a breach of that duty; (3) causation; and (4) damages. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432; 542 NW2d 612 (1995). Whether third-party defendants owed defendants a legal duty is a question of law for the trial court to decide. *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995).

We conclude that the trial court was correct in finding that third-party defendants owed defendants no duty to conduct a survey of their property or otherwise determine the proper description and location of the property to be sold. Real estate brokers are the agents of the seller and therefore

owe a fiduciary duty to the seller, which has been characterized as including the duty to disclose fully and fairly the material terms of any offers to purchase the seller's property. *Andrie v Chrystal-Anderson & Associates Realtors, Inc*, 187 Mich App 333; 466 NW2d 393 (1991). We are not cognizant of any existing law which would obligate a real estate agent to conduct a survey of the property to be sold or otherwise determine whether the seller is selling the "correct" parcel of land, especially where, as here, the realtor would have had no reason to know or suspect that defendants made a mistake in determining the size and location of the lots upon which they built their house.[2] Since there was no duty imposed by law which obligated third-party defendants to ascertain the location and size of the land upon which defendants' house was located, the trial court did not err when it granted third-party defendants' motion for summary disposition. See *Simko, supra*.

II. Docket No. 188558

Plaintiffs argue that the trial court erred in refusing to grant their request for incidental monetary damages for defendants' failure to timely transfer lots 41, 42 and 43. Although we reach no conclusion regarding the extent of plaintiffs' incidental damages, we determine that the trial court erred in holding that plaintiff was not entitled to incidental monetary damages without holding an evidentiary hearing on the subject.

Along with granting plaintiffs' motion for partial summary disposition pursuant to MCR 2.116(C)(10), the trial court issued an order stating that "an evidentiary hearing shall be scheduled to determine the amount of monetary damages, costs and sanctions, if any, to be assessed against Defendants and in favor of Plaintiffs." The trial court never conducted such a hearing. On June 30, 1995, the trial court held a hearing on "Plaintiff's [sic] Motion for Monetary Damages." Plaintiff never actually moved for monetary damages. In all likelihood, this was the evidentiary hearing the trial court intended to conduct. However, prior to this proceeding, the trial court apparently instructed the parties to prepare and submit memoranda on the legal question of whether plaintiff was entitled to monetary damages as well as specific performance. The parties did so, but did not submit evidence on the subject of plaintiffs' actual incidental damages. Nevertheless, without this information, the trial court determined that the equities of the parties had been adequately sorted out when it ordered defendants to convey the remaining lots to plaintiffs. The trial court further determined that plaintiffs would receive a "windfall and double recovery" if it were to award them incidental damages as well as specific performance. Accordingly, the trial court entered an order denying monetary damages to plaintiffs. The order also disposed of plaintiffs' remaining claims for breach of contract, unjust enrichment, and fraudulent misrepresentation.

Where, as here, the proceeding was equitable in nature, we review the trial court's ultimate determination de novo and review for clear error the findings of fact supporting that determination. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636; 534 NW2d 217 (1995). A trial court's findings are clearly erroneous only where this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

In granting specific performance, a trial court may award such additional or incidental relief as is necessary to adequately sort out the equities of the parties, and should endeavor to put the parties as nearly as possible in the position that they would have occupied had the conveyance of the real property occurred as required by the contract. *Giannetti v Cornillie (On Remand)*, 209 Mich App 96; 530 NW2d 121 (1995); see also *Godwin v Lindbert*, 101 Mich App 754; 300 NW2d 514 (1980). The trial court must, however, prevent the prevailing party from receiving a double recovery. *Godwin*, *supra*.

Although the trial court concluded that plaintiffs would receive a double recovery if it awarded incidental damages, the record does not support this conclusion. Indeed, the trial court was never presented with evidence of plaintiffs' damages. In light of the fact that the trial court never considered this evidence, we are left with a definite and firm conviction that the trial court was mistaken when it concluded, without proof, that plaintiffs would receive a double recovery if they were awarded incidental damages. Therefore, we reverse the trial court's order denying plaintiffs' request for incidental monetary damages. In this situation, the most equitable course is to remand this matter to the trial court for an evidentiary hearing to determine the amount of plaintiffs' incidental damages. See *Giannetti*, *supra*.

Plaintiffs also argue that the trial court erred in dismissing their claims against defendants for breach of contract, undue enrichment, and fraudulent misrepresentation. We conclude that further consideration of the merits of these claims is unnecessary, because the damages sought for each individual claim would approximate the damages plaintiffs allegedly incurred due to defendants' failure to timely convey lots 41, 42, and 43. To allow plaintiff both incidental monetary damages for defendants' delay in transferring title and damages for breach of contract, undue enrichment, and fraudulent misrepresentation would result in a double recovery for plaintiffs, which is improper. *Godwin*, *supra*. Therefore, the trial court was correct in dismissing plaintiffs' remaining claims against defendants.

Remanded for further proceedings consistent with this opinion.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant

[1] Plaintiffs actually motioned for partial summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). Since the trial court relied on documentary materials outside of the parties' pleadings when it decided plaintiffs' motion for partial summary disposition, the trial court granted plaintiffs' motion on the basis of MCR 2.116(C)(10). See MCR 2.116(G)(2). Therefore, we treat plaintiffs' motion as one brought pursuant to MCR 2.116(C)(10).

[2] Although defendants claim that the affidavit of Charles Olsson, a purported expert, is admissible to establish the existence of an industry-wide standard of care for real estate agents encompassing a duty to ascertain the correct size and location of a parcel of land involved in a transaction, we refuse to consider this affidavit on appeal, since it was not before the trial court when it ruled on third-party

defendants' (C)(10) motion for summary disposition. *Harkins v Department of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994).