

STATE OF MICHIGAN
COURT OF APPEALS

BORIS BRODSKY,

Plaintiff-Appellant,

v

SAMUEL T. SANOM,

Defendant-Appellee.

UNPUBLISHED

September 24, 1999

No. 204320

Wayne Circuit Court

LC No. 97-706679 CZ

Before: Gribbs, P.J., and O'Connell and R.B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition and dismissing plaintiff's claims for deceit, fraud, and gross negligence. We affirm.

Plaintiff's claims are based on allegedly false assertions made by defendant while acting as an attorney in a prior action against plaintiff. Defendant's clients brought an action against plaintiff and others, and defendant averred that Emerald Construction Company, of which plaintiff was the president and sole shareholder, had not filed annual reports for the years 1991, 1992, and 1993, and that the corporation was therefore stripped of its status as a legal entity, leaving plaintiff personally liable for any acts of the corporation. A judgment based on an arbitration award was ultimately entered in that action, holding plaintiff personally liable. Plaintiff argues that defendant's assertions regarding the filing of annual reports were deceitful, fraudulent, and grossly negligent, causing plaintiff to be erroneously held personally liable.

We review the trial court's order granting defendant's motion for summary disposition de novo to determine whether defendant was entitled to judgment as a matter of law. *Republic Bank v Modular One LLC*, 232 Mich App 444, 447; 591 NW2d 335 (1998). Although the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (8), we will review the decision as though it were granted pursuant to MCR 2.116(C)(10). Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiff's claim was barred by prior judgment, but the trial court did not hold that plaintiff's claim was so barred. Additionally, in

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

deciding a motion for summary disposition pursuant to MCR 2.116(C)(8), the trial court may consider only the pleadings and may not consider documentary evidence. MCR 2.116(G)(5). Because the trial court specifically referred to documentary evidence in granting defendant's motion, summary disposition under MCR 2.116(C)(8) was not appropriate. "If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subrule." *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996). Because documentary evidence is considered in deciding whether to grant summary disposition under MCR 2.116(C)(10), we will address this issue under that rule. We must therefore determine whether any genuine issue of material fact exists that would prevent entering judgment for defendant as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

The elements of fraud or misrepresentation are well-settled. A plaintiff must prove the following in order to recover for fraud:

(1) that the defendant made a material misrepresentation, (2) that the representation was false, (3) that when the defendant made the representation, the defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity, (4) that the defendant made it with the intent that the plaintiff would act on it, (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff suffered injury. [*Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). See also *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992).]

Therefore, a plaintiff cannot recover for fraud unless the plaintiff relied on the misrepresentation. *A & A Asphalt Paving Co v Pontiac Speedway, Inc*, 363 Mich 634, 639; 110 NW2d 601 (1961). "Knowledge of the falsity of representations is inconsistent with reliance thereon." *McIntyre v Lyon*, 325 Mich 167, 174; 37 NW2d 903 (1949).

Even assuming that defendant's statement that Emerald Construction failed to file annual reports for 1991, 1992 and 1993 was a material misrepresentation that defendant knew was false when he made it, there is no indication that plaintiff acted in reliance on the misrepresentation or suffered damage as a result of it. Plaintiff, as president and sole shareholder of the corporation, had access to knowledge regarding whether the annual reports were filed and thus would have known that any misrepresentation by defendant regarding the annual reports was false. Therefore, plaintiff could not have relied on defendant's representations regarding the annual reports. Moreover, plaintiff failed to demonstrate that he suffered any injury from the alleged misrepresentations. A review of both the arbitration award from the prior action and the affidavit of the arbitrator reveals that the alleged misrepresentation regarding the failure to file annual reports was not a factor in the decision to hold plaintiff personally liable. Rather, the arbitrator stated that plaintiff, the president and sole shareholder of the corporation, acted fraudulently regarding an agreement to repair defendant's clients' fire-damaged home. Where a corporation is merely an instrumentality of an individual, and the individual uses the corporate entity to commit a fraud, the individual may be held personally liable for any loss suffered as a result of the fraud. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456-457; 559 NW2d 379 (1996). Therefore, plaintiff

has failed to demonstrate that he relied on the alleged misrepresentation or that he suffered any injury from it. Therefore, the trial court did not err in granting summary disposition to defendant.

Plaintiff also claims that the trial court erred in granting defendant's motion for summary disposition on his gross-negligence claim. The trial court held that defendant did not owe a duty to plaintiff and that no proximate cause existed. We find no error in these conclusions of the trial court.

To establish a prima facie case of negligence, a plaintiff must prove "that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated that legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Whether a duty was owed is a question for the court to decide as a matter of law. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). Plaintiff cites *Mieras v DeBona*, 204 Mich App 703; 516 NW2d 154 (1994), rev'd 452 Mich 278 (1996) for the proposition that an attorney owes a duty to third parties who may foreseeably rely on the attorney's performance of professional duties. However, that case imposed a duty on an attorney to the intended beneficiaries of a will the attorney drafted. *Id.* at 708-709. Additionally, the Supreme Court, in reversing the judgment of this Court, specifically limited the context in which a duty is imposed to a third-party beneficiary context, holding that named beneficiaries in a will could maintain an action against the drafting attorney "for negligent breach of the standard of care owed to the beneficiary by nature of the beneficiary's third-party beneficiary status." *Mieras v DeBona*, 452 Mich 278, 308; 550 NW2d 202 (1996). A case more applicable to the instant one is *Schunk v Zeff & Zeff, PC*, 109 Mich App 163; 311 NW2d 322 (1981), where this Court held that an adversarial party to an attorney's client could not maintain a cause of action against the attorney for negligence for failing to investigate the client's case to discover its lack of merit. *Id.* at 166-167. We find no error in the trial court's holding that no duty was owed to plaintiff.

Moreover, the trial court correctly held that the alleged misrepresentation was not the proximate cause of any injury to plaintiff. Although the issue of proximate cause is generally one of fact for the jury to decide, the court should decide the issue as a matter of law where reasonable minds could not differ regarding whether proximate cause exists. *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). We conclude that reasonable minds could not differ in finding that the alleged misrepresentation did not proximately cause any injury to plaintiff. As noted above, the arbitration award holding plaintiff personally liable was not based on the alleged misrepresentation; rather, it was based on plaintiff's fraudulent conduct. Therefore, the trial court was correct to conclude as a matter of law that no proximate cause existed.

Affirmed.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns