

STATE OF MICHIGAN
COURT OF APPEALS

BARK RIVER CULVERT & EQUIPMENT
COMPANY,

UNPUBLISHED
October 29, 1999

Plaintiff/Counterdefendant-Appellee,

v

No. 206511
Delta Circuit Court
LC No. 94-012452 CK

NORTHERN LAND & LUMBER COMPANY,

Defendant/Counterplaintiff/Third-Party
Plaintiff-Appellant,

v

MORBARK SALES CORPORATION,

Third-Party Defendant-Appellee.

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

This case involves a sawmill that was sold by appellee Morbark Sales Corporation (Morbark) to appellee Bark River Culvert & Equipment Company (Bark River), which, in turn, sold the sawmill to appellant, Northern Land & Lumber Company. Bark River originally sued appellant to collect the balance due on their sales contract. Appellant subsequently filed a countercomplaint against Bark River and third-party complaint against Morbark. Appellant and Bark River reached a settlement after the trial court granted Bark River's motion for summary disposition, but gave appellant an opportunity to file an amended complaint raising any new claims that were not disposed of by its decision. The trial court dismissed the case between Bark River and appellant, with prejudice, based on the parties' written stipulation. Appellant thereafter filed an amended complaint against Morbark, alleging only an express warranty count. The trial court granted Morbark's motion for summary disposition on the express warranty count and subsequently denied appellant's motion for reconsideration. As part of the order denying reconsideration, the trial court also refused to set aside the settlement and order of dismissal involving Bark River. Appellant appeals as of right. We affirm.

First, we reject appellant's contention that the trial court erred in denying appellant's motion for reconsideration of the order granting summary disposition in favor of Morbark. We review an order denying reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). Generally, to be entitled to relief under MCR 2.119(F)(3), the "moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

Here, the trial court's grant of summary disposition on the express warranty count against Morbark was based on the lack of privity of contract between appellant and Morbark. However, appellant has established no basis for disturbing the trial court's decision to deny reconsideration relative to that ruling. Although appellant contends that principles of fairness should justify allowing it to proceed against Morbark for breach of an express warranty, appellant cites no authority in support of its position. A party may not leave it to a reviewing court to discover and rationalize the basis of a claim. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Next, with regard to the trial court's ruling relative to Bark River, we note that appellant incorrectly relies on the applicable standard for reviewing a motion under MCR 2.116(C)(10). We find that appellant's reliance on this standard is misplaced because the material question before us is whether the trial court's refusal to set aside the settlement and vacate the order of dismissal should be reversed. Despite appellant's characterization of its motion as one for reconsideration, we decline to review the motion as such under MCR 2.119(F). Because appellant sought this relief in a motion filed after entry of the final order adjudicating all the parties' rights was entered, i.e., the order granting summary disposition in favor of Morbark, it was necessary that appellant establish entitlement to post-judgment relief under MCR 2.612(C). See MCR 2.119(F)(1), which provides that unless another rule provides a different procedure for reconsideration, e.g., MCR 2.604(A) or MCR 2.612, "a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion."

Although neither appellant's motion nor the trial court's decision specified the court rule forming the basis of the motion relative to Bark River, we will examine the trial court's decision in the context of MCR 2.612(C). See *Flanders Industries, Inc v Michigan*, 203 Mich App 15, 18 n 1; 512 NW2d 328 (1993) (failure of trial court to specify the court rule forming the basis of decision is not fatal under general principle that "mislabeling of motion does not preclude review where the lower court record otherwise permits it"). The trial court's decision on a motion for relief from a judgment or order pursuant to MCR 2.612(C) will not be disturbed absent an abuse of discretion. *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997).

Upon reviewing the record, we conclude that appellant has not demonstrated an abuse of discretion. Appellant's contention that the settlement agreement was based on a mutual mistake of fact is not properly before us because it was not presented to the trial court. Absent unusual circumstances, issues not raised below may not be raised on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Here, the record suggests that appellant's attorney may have had a unilateral misunderstanding of the legal consequences of the trial court's ruling to grant Bark River's motion for summary disposition (e.g., he incorrectly argued that the law of the case doctrine

applied when opposing Morbark's motion for summary disposition). However, the applicable rule, MCR 2.612(C)(1)(a), which provides that the court may relieve a party from a final judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, was "not designed to relieve counsel of ill-advised or careless decisions." *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 393; 573 NW2d 336 (1997), quoting *Lark v Detroit Edison Co*, 99 Mich App 280, 283; 297 NW2d 653 (1980).

We reject appellant's contention that it was "fundamentally unfair" for the trial court to hold that the warranty passed from Bark River to Morbark, and then hold that the warranty is unenforceable against Morbark because there was no privity of contract. We are not persuaded that the trial court abused its discretion in refusing to set aside the voluntary settlement and order of dismissal based on its determination that there was no sufficient legal reason to do so. Assuming that appellant was attempting to show entitlement to relief under the "any other reason" provision of MCR 2.612(C)(1)(f), its argument fails because extraordinary circumstances warranting relief have not been shown. *Limbach, supra* at 393. "Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992).

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Michael R. Smolenski