STATE OF MICHIGAN

COURT OF APPEALS

TRANSNATION TITLE INSURANCE COMPANY, an Arizona corporation, for itself, and as subrogee of JANET MULLOY, MARTIN MULLOY, DEAN LIVINGSTON, and CAREN OKINS,

Plaintiff/Counterdefendant-Appellee,

v

BRIAN LIVINGSTON and JOAN LIVINGSTON,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
February 3, 2004

No. 243509
Wayne Circuit Court
LC No. 01-120784-CZ

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendants appeal as of right the trial courts' grant of summary disposition in favor of plaintiff under MCR 2.116(C)(10) and dismissal of defendants' countercomplaint in this breach of contract and fraud action. We affirm.

Defendants contend that summary disposition was inappropriate because questions of fact existed pertaining to plaintiff's status as a holder in due course and defendants' claim of negligence. We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Defendants claim that they presented a genuine material issue of fact regarding their fraud claim. We disagree. A claim of common law fraud is comprised of the following elements: (a) a material representation by the defendant, (b) the representation was false, (c) when the defendant made the representation, he knew it was false or made it recklessly, without knowledge of its truth as a positive assertion, (d) the defendant made the representation with the

intention the plaintiff would act on it, (e) the plaintiff acted in reliance on it, and (f) the plaintiff suffered damages. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003). Fraud may also exist when facts and truth were suppressed as well as where a party made false assertions. A legal duty to disclose arises in situations where a plaintiff makes inquiry into a matter but the defendant replies incompletely with answers that are truthful but which omit material information. *Hord v Environmental Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000).

Plaintiff has sufficiently complied with the requirements of MCR 2.116(G)(4). Defendants do not deny the second mortgage was not paid, rendering defendant's claim of negligence moot. Defendants have not met their burden of demonstrating that a genuine issue of material fact exists regarding fraud. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

While a claim of fraud must be established by clear and convincing evidence and cannot be presumed, fraud may be established by circumstantial evidence. Fraudulent conduct may be inferred from other evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-458; 559 NW2d 379 (1996). In light of this standard, the retention and expenditure of monies by defendants that should have been used to discharge the second mortgage, coupled with defendants' unpersuasive arguments that they were uninformed or mistaken regarding their own financial obligations, are sufficient to establish fraud. Plaintiff has also adequately pleaded a claim for innocent misrepresentation.

Plaintiff's claims of fraud and innocent misrepresentation are alternative theories of liability. Although the trial court erred finding in favor of plaintiff on both the fraud and innocent misrepresentation claims, the error is harmless because the court did not provide for separate damage recovery under both theories. MCR 2.613(A). The trial court's correct result is affirmed, despite its failure to properly delineate the basis for its ruling. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 42; 620 NW2d 657 (2000).

Defendants next argue that the trial court exceeded its authority in dismissing their countercomplaint. A trial court has broad authority to resolve all issues before it. Pursuant to MCR 2.116(I)(1), a court need not specify the ground on which the motion for summary disposition is granted. *Yakowich v Dep't of Consumer & Industry Services*, 239 Mich App 506, 510 n 6; 608 NW2d 110 (2000). The documentary evidence comprised a sufficient basis for the court's determination that summary disposition was appropriate. It was not error for the trial court to consider defendants' claims, as contained in their countercomplaint, even if not raised by plaintiff's motion for summary disposition. In this instance, resolution of the primary issue of defendants' liability to plaintiff renders the need to address the remaining issues raised unnecessary. *Zander v Ogihara Corp*, 213 Mich App 438, 446; 540 NW2d 702 (1995), citing *McFadden v Imus*, 192 Mich App 629, 634; 481 NW2d 812 (1992).

Defendants next contend the trial court failed to address their claim that plaintiff is not a holder in due course. While we agree plaintiff was not a holder in due course, defendants' asserted defenses are insufficient to raise genuine issues of material fact necessary to overcome plaintiff's right to summary disposition. Plaintiff acknowledges it acquired the assignment of the note and mortgage only after defendants defaulted on payment. *Thomas v State Mortgage, Inc*, 176 Mich App 157, 161-164; 439 NW2d 299 (1989). If plaintiff is not a holder in due course, it

is not insulated from defenses raised to the instrument by defendants. MCL 440.9206; *Cessna Finance Corp v Warmus*, 159 Mich App 706, 710-711; 407 NW2d 66 (1987).

However, not all defenses raised were related to the instrument from which plaintiff's status as an assignee arose, and thus, they were not impacted by whether plaintiff attained the status of a holder in due course. Defendants allege that plaintiff was negligent in undertaking a title search that did not reveal the recorded second mortgage. Notice of existence of the mortgage relieves the title company of any duty they may have had to inform defendants that a second mortgage existed. Given that defendants were the grantors of the second mortgage, it is disingenuous to suggest they were damaged by the failure of plaintiff to warn them of its existence. Moreover, the insurer undertook only to insure the properties and did not undertake to list all encumbrances on the subject properties.

Defendants also claim that defendant Joan Livingston is relieved of liability because plaintiff violated the Equal Credit Opportunity Act, 12 CFR 202.7. With reference to the promissory note and second mortgage, there is no violation of the act. Joan Livingston had substantial rights and interests in the properties as both a homestead and for purposes of dower. The promissory note and mortgage signed by the parties conveyed an interest in properties owned by both defendants. Pursuant to the requirements of and legislative intent behind MCL 566.108, all owners of jointly held property must sign a contract conveying an interest in the property. Absence of the co-owner's signature renders the contract void. *Forge v Smith*, 458 Mich 198, 206; 580 NW2d 876 (1998). This is also applicable to Joan Livingston's dower because her husband cannot bargain away her dower interest. *Slater Management Corp v Nash*, 212 Mich App 30, 33; 536 NW2d 843 (1995). Joan Livingston's signature was not required for purposes of establishing creditworthiness in violation of 12 CFR 202.7(d)(1). Rather, the signature of Joan Livingston was mandated by statute to create a valid contract conveying her interest.

Defendants also contend that plaintiffs defamed them by accusing them of fraud and that the defamation has negatively impacted defendants' relationship with their bank and others. First and foremost, a determination by the lower court that defendants engaged in fraud precludes defendants from proceeding on this claim. "Substantial truth is an absolute defense to a defamation claim." *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001). In any event, defendants have not identified any statements by plaintiff that impaired their relationship with their bank. It is equally probable that defendants' default on the second mortgage was the source of impairment of their credit.

Defendants also make vague allegations that statements by plaintiff have negatively impacted defendant Brian Livingston's reputation in business. However, defendants failed to come forward with any proof thereof, aside from broad allegations that any negative business impact experienced is attributable to plaintiff. While defendants are not required to plead slander with great particularity, they cannot merely rest on broad allegations and must support their assertions by documentary evidence. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000). Defendants have failed to demonstrate damage to reputation. Given the court's determination that defendants' actions were fraudulent, coupled with the insufficiency of defendants' own pleadings, the court did not clearly err in dismissing the countercomplaint.

Defendants next argue that the trial court erred in holding Joan Livingston liable to plaintiff despite her purported lack of knowledge regarding the status of any liens on the marital homestead and for the acts and representations of her husband, who acted as her attorney-in-fact. Joan Livingston contends she cannot be liable for misrepresentations pertaining to the sale of the properties because she had no knowledge or involvement in the transactions, other than to sign, without questioning, whatever documents were presented to her. Quite simply, Joan Livingston asserts her purposeful ignorance of the facts shields her from any liability and that her lack of knowledge made her incapable of making false representations because she could not have possessed the requisite intent. It is well-established that a party who signs a contract cannot avoid its enforcement because she failed to read or understand the terms. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999). Thus, liability may be imposed based on breach of contract.

Joan Livingston further asserts she did not involve herself in the transactions and had no knowledge to make any representations, let alone representations that were fraudulent. Joan Livingston does not claim she was precluded from obtaining information pertaining to the transactions or that the information she received was deceptive. Rather, she elected to remain ignorant. Again, it is well settled that a mistake of law or ignorance of the law is no defense. *Young v Young*, 211 Mich App 446, 448; 536 NW2d 254 (1995). Joan Livingston's failure to affirmatively take steps to make certain she was properly informed regarding the documents she was signing does not excuse her from liability. Although Joan Livingston asserts she had no duty and ignores she was a direct beneficiary of the transactions, she had a contractual relationship with and duty to the bank based on signing the note securing the second mortgage. "It is well established that those who undertake particular activities or enter into special relationships assume a distinctive duty to procure knowledge and experience regarding that activity, person, or thing." *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993). Joan Livingston cannot avoid liability on the contract based on her election to remain ignorant, particularly when she received a monetary benefit.

Joan Livingston also contends that if her attorney-in-fact exceeded his authority, she cannot be liable for his actions. Her argument ignores the fact that her liability arose when she personally signed the note securing the second mortgage.

Joan Livingston had only a dower interest in one of the properties sold. A dower right is "entitled to protection as well before as after it has become vested, and no act of the husband alone can prejudice this right." *Bonfoey v Bonfoey*, 100 Mich 82, 85; 58 NW 620 (1894). Nonetheless, the power of attorney executed by Joan Livingston was a broad grant of authority and power and was unambiguous in granting authority to do all acts necessary to convey her interest in the subject property. Joan Livingston retained the monetary benefit from her attorney-in-fact's exercise of authority and never disclaimed his actions. In the law of agency, the "adverse interest exception" is not applicable when an agent acts both for himself and the principal. *Hoekzema v Van Haften*, 313 Mich 417, 426; 21 NW2d 183 (1946). The adverse interest exception is not applied if the agent is acting at least in part on behalf of the principal's interest. *Id*. Thus, we reject Joan's assertion that her husband acted outside his authority.

The final issue is whether the trial court erred in granting plaintiff summary disposition on both breach of contract and unjust enrichment theories of recovery. A breach of contract claim and a claim for unjust enrichment are inconsistent claims as a contract will only be implied

under a theory of unjust enrichment if no express contract covering the same matter or issue exists. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). Although the trial court erred in finding in favor of plaintiff on both the unjust enrichment and breach of contract claims, the error is harmless because the court did not provide for separate damage recovery under both theories.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello