

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA J. FISHER,

Plaintiff-Appellant,

v

NEAL WINNIE, DORE H. MCGOWAN,
RICHARD P. MCGOWAN, and AAMES
FUNDING d/b/a AAMES HOME LOAN,

Defendants-Appellees.

UNPUBLISHED

March 25, 2004

No. 243369

St. Clair Circuit Court

LC No. 00-003067

Before: Kelly, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Aames Funding, a directed verdict granted in favor of defendant Richard McGowan, and a judgment of no cause of action entered in favor of defendants Neal Winnie and Dore McGowan following a bench trial. We affirm.

I. OVERVIEW

This action concerns plaintiff's assignment of a land contract and claims of fraud resulting in a sheriff's sale of the property previously subject to the land contract. Plaintiff asserted that the individual defendants conspired to defraud her of the equity she had in a parcel of real estate, including a house located thereon, which plaintiff had originally purchased on land contract, and which land contract was subsequently assigned to defendant Dore McGowan, a mortgage broker. The assignment was made as part of an agreement between plaintiff, plaintiff's son, Winnie, and Dore McGowan, whereby McGowan would obtain a mortgage to pay off the land contract vendors Michael and Patricia Weber. Plaintiff¹ and her adult son John Fisher, who lived in the house with his family, were not qualified for a loan to pay the balance of the land contract, and they were behind in payments to the Webers with whom there was an ongoing dispute over an occupancy permit for the home.

¹ Plaintiff did not reside in the home at issue; she lived with her husband at a different residence.

Plaintiff maintained that Dore McGowan, after obtaining a loan and mortgage and paying the land contract balance in full, was to sell the property to John Fisher on a new land contract. However, after McGowan obtained legal ownership of the house through a loan and mortgage from Aames Funding, payments were not made on the loan, and Aames invoked the power of sale provision in the mortgage, all the while John Fisher resided in the house. Winnie, a loan officer and manager with Zenith Mortgage Group and an acquaintance of John Fisher, initiated the plan involving the assignment along with John and plaintiff. Winnie is the son of the McGowans, all three of whom are involved in operating Zenith Mortgage, a mortgage brokering company.

II. BASIC FACTS and PROCEDURAL HISTORY

A. The Complaint

Count I of plaintiff's complaint requested equitable relief, and particularly, a preliminary injunction to prevent defendant Aames from selling at a sheriff's sale the property in which plaintiff claimed an interest. The count also made reference to a request for a declaratory judgment to determine "the nature of Aames involvement, if any, with the first three named defendants." Plaintiff further asserted that Aames knew or should have known of the individual defendants' involvement in the financing business and of plaintiff's rights in the property at issue.

Count II asserted a cause of action for fraud and deceit as to all defendants except Aames, alleging that the McGowans (husband and wife) and Winnie "proceeded deliberately to deal entirely behind plaintiff's back with her land contract vendors" The count further alleged that these defendants obtained a mortgage on the property in the amount of \$147,500 of which, at most, \$107,000 was paid to the Webers in final satisfaction of the land contract, with most of the remainder being fraudulently pocketed by defendants.

B. Preliminary Injunction

A hearing was scheduled for defendants to show cause why a preliminary injunction should not be granted enjoining the sheriff's sale. An order was entered following the hearing, in which the trial court ruled that "no foreclosure sale in regard to the property . . . will take place for sixty (60) days from the date of entry of this Order to allow the Plaintiff and Defendant title holders to the property, time to have the property appraised and listed with a real estate agent for sale."² Although not reflected in the order, Aames asserted in its subsequent motion for summary disposition that, at the show cause hearing, the parties agreed that if the home was sold the proceeds would first be used to pay off the mortgage held by Aames and any remaining proceeds would be turned over to plaintiff.³

² The order was entered on April 5, 2001.

³ The record on appeal does not contain a transcript of the show cause hearing. And we recognize that a court speaks through its orders. Nonetheless, the parties do not appear to dispute
(continued...)

C. Summary Disposition and Defendant Aames

Following expiration of the sixty-day period referenced in the order on the preliminary injunction request, Aames filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing, in a cursory manner, that “the property is still for sale and the foreclosure sale has taken place.”⁴ Plaintiff responded that summary disposition was premature because the facts were still unknown as to Aames’ involvement with the other three defendants. Plaintiff further argued that Aames’ rights in the loan were tainted and should be diminished to inure to plaintiff’s benefit. Neither party submitted documentary evidence in support of their respective positions.

The trial court, ruling from the bench, granted Aames’ motion for summary disposition, stating:

[T]he previous order of the Court in this case gave the parties 60 days to have the property appraised and sold. That time period has now lapsed with no change in the status of the property. Neither Plaintiff nor the title holder Defendants have come forward with any evidence that Defendant Aames does not hold a valid mortgage or does not have a right to foreclosure. Accordingly, there exists no genuine issue as to foreclosure, and Defendant Aames['] motion for summary disposition is granted.

Plaintiff filed a motion for reconsideration, arguing that “Aames knew that it was not lending money to a bona fide purchaser of the property, but rather, to none other than their very own mortgage broker (Zenith Mortgage Company) who became mortgagor to their very own principal (defendant Aames Funding).” Plaintiff further maintained, again, that summary disposition was premature because discovery needed to proceed in order for a determination to be made regarding Aames’ involvement with the other defendants. Plaintiff also argued, for a second time, that the loan was tainted by fraud thereby affecting Aames’ right to recover the loan proceeds. No documentary evidence was provided. The trial court denied the motion for failure to show that a palpable error had been made, and the court stated that plaintiff “failed to present evidence that the mortgage held by Aames was invalid or not ripe for foreclosure.” Our review of the pretrial statement indicates that approximately three months of discovery remained available to the parties at the time summary disposition was granted.

D. Trial Testimony, Documentary Evidence, and Directed Verdict

Plaintiff was first to testify, and she stated that she purchased the property in question for her son John Fisher, who lived in the home with his family. The property was purchased from the Webers pursuant to a land contract executed in December 1996. Plaintiff testified that she put \$35,000 down on the land contract, and that her son had put another \$25,000 into the home by way of improvements. With the \$35,000 down payment, the remaining balance was

(...continued)

the matter, and ultimately it does not have a bearing on our ruling.

⁴ An affidavit of auctioneer, admitted at trial, indicates that Aames purchased the property at the sheriff’s sale on July 6, 2001.

\$102,000, and the land contract required a balloon payment after three years. John Fisher was to pay \$895 per month in rent to plaintiff, and plaintiff used these funds to make the monthly land contract payment to the Webers.⁵ Plaintiff testified that her son would fall behind in payments at times, and, at some point in 1999 up to the balloon date of January 2000, he fell behind nine months in his rent payments, which caused a nine-month arrearage in plaintiff's land contract payments. John Fisher's business was doing poorly and this explained why he could not pay according to plaintiff. John Fisher also had an ongoing dispute with the Webers over their failure to obtain an occupancy permit from the local municipality due to deficiencies in items such as the electrical wiring, plumbing, and foundation.⁶ Although not entirely clear from her testimony, plaintiff suggested some payments during the nine-month arrearage period were withheld because of the occupancy permit issue.

Plaintiff met defendant Winnie through her son, and she testified that her husband had been a friend of Winnie's father years earlier. Winnie came to her home, not the home at issue, and he presented himself as the owner of Zenith Mortgage. The purpose of Winnie's visit was to see if the Fishers could obtain a loan and mortgage to purchase the house from the Webers. Winnie opined that plaintiff, who did not work, and her son would not qualify for the necessary loan. Winnie proposed that he would find a lender to issue a loan for the property, and that "he in turn would give us [Fishers] a land contract so that after the mortgage was obtained we could pay back the monies by a land contract." Winnie represented and assured plaintiff that the monthly payments on the proposed new land contract would not exceed \$1,200. Plaintiff testified that Winnie asked her to assign the land contract to Dore McGowan to facilitate the plan. In exchange, \$105,000 would be paid to cover the balance owing on the Weber land contract.

The assignment of land contract was executed at a second meeting with Winnie in January 1999, and present were plaintiff and plaintiff's son and husband. Plaintiff acknowledged signing the assignment and that her husband signed as a witness. An exhibit was entered into evidence which, according to plaintiff, reflected the document given to plaintiff at the meeting, and this document, an assignment, simply had /S/ placed on plaintiff's and her husband's signature lines.⁷ Plaintiff testified that there was no notary present when she and her husband executed the assignment. Another exhibit entered into evidence was virtually the same assignment document, except that it now included the actual signatures of plaintiff, her husband, Dore McGowan, and David Winnie, as a second witness, and the assignment was notarized by

⁵ Defendants had the land contract itself, as opposed to the memorandum of land contract, admitted into evidence. It indicates that the sale price was \$137,000, with \$35,000 down, a balance of \$102,000, an interest rate of 10%, monthly payments of \$895 beginning January 12, 1997, and a balloon payment in three years – January 2000. The document was executed on December 12, 1996.

⁶ Apparently, the house was built on an old foundation.

⁷ The document indicates that an assignment was being made by plaintiff to Dore McGowan for consideration of \$105. There is no signature by Dore McGowan, no indication of a second witness, and the document is not notarized.

David Winnie. The exhibit also now reflected that the consideration for the assignment was \$105,000. Plaintiff testified that David Winnie and Dore McGowan were not present when she and her husband executed the assignment.

Plaintiff further testified that Winnie reiterated that he was going to find financing, and that when a mortgage was obtained, a land contract would be given to her. Winnie was hopeful that it could all be accomplished within six months. Plaintiff called Winnie three months after she executed the assignment, and he indicated that he was still trying to find a lender. Subsequently, two documents were faxed to plaintiff and/or her son by Winnie-Zenith Mortgage Group. The first, directed to "Barbara/John Fisher – Transfer," and dated January 9, 2000, indicated that they were approved for a new mortgage with a maximum limit of \$160,000. The second, directed to "Mr. John Fischer [sic]" and titled "BREAKDOWN OF FUNDS," indicated that the loan amount was \$140,000 with proposed disbursements of \$108,000 to the Webers, \$6,300 for back taxes, \$1,200 for sales tax transfer, \$3,800 for a lender fee, \$12,200 for a broker fee, and \$8,500 cash to John Fisher. The second document also indicated that monthly payments would be \$1,440. Neither document references Dore McGowan. We note that plaintiff and John Fisher never received any funds from a closing on the mortgage that subsequently occurred. Plaintiff testified that she had no foreknowledge of any closing, and that she never had any further contact with Winnie or Zenith.

Plaintiff testified that she never received any notice to make a mortgage or land contract payment arising out of the plan, but a notice was sent to the home addressed to Dore McGowan. When questioned why she did not make the Dore McGowan mortgage payment, plaintiff responded:

It wasn't paid because we had no knowledge of what had happened. We had no knowledge of what funds were disbursed, how they were disbursed. And also because the land – the promised land contract was never proffered.

Plaintiff claimed that, because of defendants' actions, she and her son lost all of the equity in the home. Details of the actual loan and mortgage and corresponding disbursements will be discussed below in connection with the testimony of the closing agent from the title company.

On cross-examination, plaintiff could not explain why the land contract between her and the Webers indicated that she was a single woman when she was in fact married. She further testified that there was no certificate of occupancy when she purchased the house, and that the land contract was silent in regard to any monetary credit that might be received for future work completed on the home, although it was understood that there "were things that needed to be finished." According to plaintiff, these additional items needed to be completed to obtain the certificate of occupancy. Plaintiff acknowledged that she signed the assignment of land contract in January 1999, despite the fact that the assignment is dated January 1998. She testified that the land contract payments were about three months in arrears when she executed the assignment. Plaintiff indicated that she made no payments on the Dore McGowan loan and mortgage, and that her son lived in the house through December 2000 without paying any more rent.

Regarding the discussions between plaintiff and Winnie, plaintiff testified as follows:

Q. [W]hy [would] Mrs. McGowan . . . extend credit to you?

A. The understanding was that Mr. Winnie felt that it was – he could most easily secure a loan on the house if it was done through his mother’s name.

Q. Because you couldn’t get a loan yourself?

A. That was understood, I think, yes.

Q. And John couldn’t get a loan himself?

A. Correct. But Mr. Winnie never indicated that there would be any particular fee beyond his own fee for the fact that it was going – the loan was going to be granted in the name of his mother.

Plaintiff assumed that Winnie would charge them the going rate with respect to any mortgage broker fee. She also testified that Winnie represented to her that if plaintiff assigned her interest to Dore McGowan, then Zenith would obtain a mortgage on the property. Plaintiff was adamant that she never saw any of the mortgage closing documents until much later following the closing, and that she never promised to make payments on the mortgage, nor did she agree that almost \$19,000 from loan disbursements could be spent on Dore McGowan’s credit cards. Plaintiff testified that, prior to seeing the McGowans at trial, she had never met or spoken to either of them. She additionally testified that “[a]ll the representations were made through Zenith Mortgage via Neal Winnie.” Plaintiff indicated that the representations made by Winnie related to future events, and that she had expectations of what would occur after the assignment was executed.

Eric Bernhardt, who was a closing agent for Concord Title at one time, testified that he was the closing agent with respect to the closing on the loan and mortgage given to Dore McGowan by Aames. The closing took place on April 19, 2000. Bernhardt first indicated that a document titled “Certificate of Persons Conducting Business Under Assumed Name” reflected that Dore McGowan conducted business as Zenith Mortgage Group. Bernhardt then testified in regard to the settlement statement. The settlement statement provided that the loan was for \$140,250 (the mortgage also so reflects), that \$103,806 was to be disbursed to pay off the Weber land contract, that \$6,271 was to be paid to cover settlement charges, that \$6,235 was to be paid for delinquent taxes for 1997-1999, that \$19,117 was to be paid for other adjustments, and that \$4,821 was to be paid to the borrower. The other adjustments, \$19,117, covered payment on outstanding balances on numerous credit cards and other debts owed by Dore McGowan. Bernhardt testified that the credit card or consumer debts needed to be paid out of the loan proceeds as a requirement by Aames in granting the loan.

Bernhardt further testified that, according to documentation, including copies of checks that were admitted at trial, it appeared that Dore McGowan was actually paid \$3,635 out of closing proceeds, and that Zenith Mortgage Group was paid \$5,475. The check to the Webers to pay off the land contract was in the amount of \$105,035. The disbursement checks for other adjustments, or in other words, various outstanding debts of Dore McGowan, equaled about \$19,117, which is consistent with the settlement statement. No checks were disbursed to plaintiff or her son. The names listed on the mortgage as the mortgagors are “Dore H.

McGowan A/K/A Dore Hood McGowan and Richard F. McGowan, wife and husband.” And they both executed the mortgage. Additionally, they both signed an assumption rider which provided, with certain conditions and qualifications, that the lender, Aames, “shall permit the one-time assumption of all of Borrower’s liabilities and obligations under the Security Instrument.” Bernhardt testified that Dore McGowan alone was named on the promissory note.⁸ No disbursement was made specifically to Richard McGowan. A warranty deed transferring the property from the Webers to Dore McGowan is contained in the record. Zenith Mortgage Group is not named on the promissory note, mortgage, or deed. Bernhardt testified that the closing transaction could not have occurred had there been no assignment of land contract because it was necessary for purposes of the chain of title. He also testified that Dore McGowan alone was obligated with respect to the loan from Aames.

Next to testify was William Fisher (hereinafter “Fisher”), plaintiff’s husband, a semi-retired attorney, and appellate counsel for plaintiff in this appeal. Fisher testified that he practiced law at one time with Winnie’s father. On Winnie’s first visit to the Fishers in December 1998, Fisher discovered the father-son relationship, so he “then . . . just left . . . Winnie and John and Barbara to, to do whatever business they were handling.” Despite the date on the assignment, January 15, 1998, Fisher testified that it was actually executed on January 15, 1999, which was the date of the second meeting with Winnie. The only people present when the assignment was executed were plaintiff, Winnie, and Fisher, and the only people who executed the document were plaintiff and Fisher. Fisher was not aware of the changes or additions subsequently made to the assignment, nor was he a witness to those changes and additions.

Fisher testified:

Q. After this second meeting, . . . [w]hat did Mr. Winnie say he was going to do at the second meeting when this document [assignment] was signed?

A. Preliminary to getting this signed, Mr. Winnie had promised that he was going to get refinancing for my wife through his mother. She was going to take out a mortgage and give back a land contract to [plaintiff] so that she could make payments to Dore Hood McGowan on a land contract.

Q. Did he do what he promised?

A. No, he didn’t.

Fisher stated that although the maximum monthly payment on the proposed land contract was to be \$1,200, it was represented that it would actually be in an amount close to that being paid to the Webers. Fisher stated that Winnie effectively dropped out of sight after the assignment was executed, and Fisher regularly called Winnie’s office leaving messages without

⁸ Bernhardt acknowledged that Richard McGowan was on the mortgage as a requirement of either the title company or mortgage company to protect their interests and allow foreclosure if it became necessary.

any response. Eventually, Winnie faxed the two documents referenced earlier in this opinion. Fisher testified that payments were not made on the loan and mortgage procured by Dore McGowan because the payments were higher than agreed and not affordable, and regardless, because there was no land contract given by McGowan, there would have been “no equitable ownership to support the payments.” Fisher indicated that eventually the house was foreclosed on, and a sheriff’s deed transferred the house to Aames. Fisher stated that the house was appraised at \$165,000.

Fisher testified in reference to a property transfer affidavit that was entered into evidence. The transfer affidavit is signed by plaintiff and dated January 15, 1998, however, the affidavit was apparently executed on January 15, 1999, when the assignment was executed. The buyer/transferee is listed as Dore McGowan, and the document provides that the transfer was to “establish or release a security interest (collateral).”

John Fisher (hereinafter “John”) next testified. Much of John’s testimony was consistent with that of plaintiff; however, there were some contradictions. John testified that he and his now ex-wife and five children moved into the house purchased by plaintiff in 1996, and they moved out of the home around March 2000. Thereafter, John would go to the home on occasion to take care of basic maintenance such as lawn mowing because he hoped to receive some of the equity in the home, but he was no longer living at the location. John testified that the home was sold at a sheriff’s sale in July 2001. He provided the money to plaintiff to put down on the home under the land contract, and the home was not directly sold to John because the Webers were not comfortable making a sale to him. John testified that there was no occupancy permit for the home because there were a number of structural, electrical, and plumbing defects that the city demanded be addressed; a temporary occupancy permit had been in place. He further indicated that an occupancy permit was required to obtain any financing. John obtained estimates on all of the work needed to be completed in order for the city to issue a permit, and the estimates totaled about \$24,000. He did not testify that he had any of the work performed, and he did not do any of the necessary work himself. John stated that he withheld payments to the Webers as leverage in the dispute over the occupancy certificate.

John met Winnie while doing some work at Winnie’s home. John was an asphalt contractor. At the first meeting between plaintiff, John, and Winnie, Winnie represented that he would help obtain financing, and Winnie’s charge for doing so would be \$6,000. Winnie indicated that after he obtained financing, the property would be transferred back to John pursuant to a new land contract. The payments on the new proposed land contract would be between \$1,100 and \$1,200 per month. According to John, the whole premise of the deal was to get his mother, plaintiff, untangled from any connection to the home, obtain financing, have the property then sold back to him on land contract, and subsequently have him obtain his own mortgage on the property. The plan included John receiving cash, specifically through disbursements on the Dore McGowan loan, in an amount comparable to about twelve monthly payments under the discussed new land contract. John stated that originally he was to receive around \$20,000 out of the McGowan loan proceeds, but it then was reduced to about \$14,000, and subsequently reduced to \$8,300, with which he was not in agreement. However, nothing was actually received. This proposed payment was to help him get situated and put him in the position to eventually obtain his own mortgage. John had been in bankruptcy. He further

testified that there was no mention that Dore McGowan would have her credit card debts or any other debts paid for with monies from the loan.

After the meetings with Winnie, it became impossible, despite repeated efforts, to reach Winnie to find out what was going on. The people answering Winnie's phone made up numerous excuses such as: he is not around; we do not know where he is at; business is bad; and we are going bankrupt. It was not until two faxed documents were received around March 2000 (see plaintiff's testimony above) that they heard from Winnie. John testified that Winnie had promised that at the closing on the mortgage, an offset would be worked out with the Webers to address the occupancy permit issue. John could only recall that this promise by Winnie was made sometime in 2000. Winnie told John that if any appraisers from Aames came looking at the house, he should not tell them that there was no certificate of occupancy because it could derail any financing. John never saw any appraisers before moving out of the residence.

John did not witness plaintiff or his father executing the assignment of land contract. He was at the meeting where the assignment was signed, but he left just before it was executed. John stated that neither Dore McGowan nor David Winnie (notary and second witness) were present at the meetings with Winnie. John was not made aware of any closing on the Dore McGowan loan and mortgage.

On cross-examination, John indicated that it was his understanding that the assignment executed by his parents was a preliminary document, not meant to be finalized until later because Winnie was still vague on various matters. He stated that when he moved out in March 2000, he had not attempted to sell the house, because he did not own it.

Derrick Harper took the stand after John, and Harper testified, after an initial dispute as to whether his testimony was proper or relevant, with respect to a transaction handled by Zenith Mortgage and Winnie regarding another piece of property.⁹ Harper owned property on which he sought refinancing through Zenith. Harper testified in regard to a warranty deed which appeared to have been executed by him and his wife as vendors concerning the property. The deed reflects that they transferred the property to Winnie for \$28,000, and David Winnie signed as the notary and a Trevor Winnie and Andre Moore signed as witnesses. Harper testified that he and his wife only signed a loan application, not a deed, and that David and Trevor Winnie were not present, nor was Andre Moore. Harper indicated that his and his wife's purported signatures on the deed appeared to be the signatures they placed on the loan application.

With the conclusion of Harper's testimony, plaintiff rested. Defendant Richard McGowan moved for a directed verdict on the basis that no proofs were presented concerning his involvement in any alleged fraudulent action. Plaintiff argued that Richard McGowan was liable "under basic agency law[.]" in relation to Zenith Mortgage, and that the mortgage transaction could not have been completed without Richard's signature on the mortgage. The trial court ruled:

⁹ The Fishers had no involvement with this property.

There has been no competent evidence presented to the Court in any form or fashion to show that Mr. McGowan has been part of any wrongdoing that has been presented to the Court. Case against him is dismissed.

The Court rejected any attempt to dismiss the remaining defendants, ruling that factual issues existed.

Winnie testified on behalf of the remaining defendants. He asserted that he was a manager with Zenith Mortgage, and that he was the keeper of records, handled operations, and was involved in sending loan requests out to lenders. According to Winnie, Zenith Mortgage was simply in the business of brokering mortgages. Winnie met with plaintiff, John, and Fisher a short time after John blacktopped Winnie's driveway, at which time John told him about his housing predicament. At the meeting, plaintiff and John indicated that they would not be able to get credit as they had no jobs, and Winnie suggested that they find a relative to work through with respect to obtaining financing. Plaintiff and John stated that no relative was able to do so. Winnie testified that plaintiff and John then asked if Winnie could finance the house, and he responded that maybe his mother, Dore McGowan, would be interested. Winnie obtained a survey and appraisal of the home. Winnie then presented the matter to his mother who was very resistant to taking on such a responsibility, but he was able to eventually convince her to take part in the plan. With respect to the plan, Winnie testified:

[M]y mother . . . would finance the property and that we would then do an assumable mortgage where we would either give a land contract or show 12 months of paid-on-time history from John Fisher and then Mr. Fisher would have to take it out of my mother's name.

Winnie further clarified that the agreement was that his mother would obtain an assumable mortgage and after receiving a year of payments from John, he could assume the loan. Winnie described the plan as "a Good Samaritan loan to help them out of a very tight situation." There was never any intention of taking possession of the property. Winnie went through the house, and he noticed that it was not in the best condition with exposed wires, broken windows, and things of that nature. Winnie decided to help the Fishers out because another one of the Fishers' sons lived in his neighborhood, John was likeable and aggressively pursued assistance from Winnie, and because he and Zenith would receive a brokering fee. Additionally, John indicated that he could make the payments, and that he was behind with the Webers because of their dispute over the occupancy permit. With regard to the prior relationship of his father and William Fisher, Winnie testified that his father represented Fisher in a case in Romeo.

At the second meeting between the parties, Winnie brought two forms of the assignment of land contract; one was typed up with the wrong consideration amount, \$105, and one was corrected to reflect the \$105,000 price. Winnie had them sign the assignment with the \$105,000 amount, and left them the document with the \$105 amount so that "they knew what I was doing, because I didn't want them signing something that they didn't have a record of." Winnie asserted that everyone was of the understanding that the consideration was \$105,000, reflecting an approximation of the balance on the Weber land contract. Winnie acknowledged that he subsequently took the assignment and, outside the presence of the Fishers, had Dore McGowan and his brother David Winnie sign it. He stated that he did not meet with plaintiff or William Fisher thereafter, but he did talk to all of the Fishers by phone. William Fisher called his office a

few times, plaintiff once or twice, and John called constantly. Winnie maintained that it took some time to arrange for financing because it was a difficult loan, and that Aames was the third lender that he approached about the loan.

The closing took place in the offices of Zenith Mortgage, and Concord Title prepared the documents. Although Winnie was aware that the Fishers were unhappy with the Webers, he was unaware of any request for a \$25,000 credit to come from the Webers. Regarding the taxes, the property was in arrears because tax payments were never made the entire time plaintiff held the land contract.¹⁰ Winnie testified in reference to the various dollar amounts on the settlement statement, check copies, and other closing documents. With respect to the adjustments, i.e., loan disbursements to pay for Dore McGowan's debts, those payments were required by Aames to be made as a prerequisite for tendering the loan, or, in other words, for purposes of Aames' loan qualification standards. Winnie testified that the debt payments had to be made otherwise his mother would not qualify for the loan, and he asserted that this was fully explained to the Fishers.¹¹

On questioning from the trial court, Winnie indicated that John would become obligated for \$140,000 on any new land contract, and this amount included that portion of the Aames' loan that went to pay Dore McGowan's debts. Winnie insisted that the Fishers knew that the amount they would have to pay was the full \$140,000, and this necessarily included whatever needed to be done to obtain the financing. Winnie indicated that Zenith made a number of payments related to the mortgage closing, such as covering the insurance binder.

Regarding the two documents faxed to the Fishers before the actual closing, Winnie testified that those were preliminary estimations. Winnie further testified that when he told the Fishers that the monthly payments would be \$1,400, they emphatically declared that they would not pay, calling Winnie and the Webers crooks. Winnie indicated that John resided in the house for fourteen months after the closing on the mortgage, and that John absolutely refused Winnie's attempt to give him a land contract. Winnie stated that as a result of the Fishers' failure to pay, Dore McGowan's credit was shot in light of the fact that the mortgage was in McGowan's name. Winnie testified that not one penny was paid by any of the Fishers after the mortgage closing.

Winnie next testified in regard to the allegations made by Harper. Winnie stated that Zenith had a department involved in the buying and selling of houses, which matters were handled by Andre Moore. Harper came to Zenith indicating that he had numerous properties to sell. Harper executed a deed to Winnie, and thereafter, when attempting to file the deed, Winnie discovered that Harper did not own the property, but rather the state held title, and Winnie had to pay \$7,000 in taxes to receive the property. Winnie insisted that Harper was fully aware of all these facts. According to Winnie, Harper was a squatter at the time of the attempted transfer. Winnie did not pay Harper \$28,000 for the property because it was not Harper's to sell. Winnie

¹⁰ The land contract reflects that plaintiff was obligated to cover tax payments.

¹¹ Winnie's testimony does not indicate when he told the Fishers about the disbursements for his mother's debts.

testified that Harper lied to the trial court, and that Harper and his wife signed the deed in front of everyone. Within three days of closing on the “Harper” property, the home was burned. The deed was recorded, but Winnie maintained that the city recorded the deed, for whatever reason, after he paid the delinquent tax bill.

On cross-examination, Winnie again conceded that the notary and second witness, David Winnie, and Dore McGowan, all of whom signed the assignment, were not present when plaintiff and her husband executed the assignment. Winnie did state that the Fishers were told over the phone that the remainder of the assignment was subsequently executed. Winnie further acknowledged that none of the Fishers were present at the mortgage closing. But he also testified that he did not ask them to the closing because plaintiff no longer had any interest in the property in light of the assignment. Winnie conceded that a prior judgment for fraud had been entered against him. Winnie also testified that he was just an employee of Zenith, and that his mother was the owner.

William Fisher was asked one question on rebuttal, and he testified that Winnie never informed him that the assignment would be notarized and witnessed outside of Fisher’s presence.

On the basis of the trial testimony and documentary evidence, it was established that the assignment of land contract was actually executed in January 1999, that the Dore McGowan loan and mortgage was closed in April 2000, that a notice of default on the mortgage occurred in September 2000, that plaintiff filed this suit in October 2000, that the preliminary injunction was issued in April 2001, and that the property was sold at a sheriff’s sale in July 2001.

E. Trial Court’s Ruling

After proofs were concluded and following the parties’ closing arguments, the trial court rendered a ruling from the bench. The trial court found that plaintiff purchased the home from the Webers for her son in December 1996 on land contract for \$137,000 with \$35,000 down, monthly payments of \$895, a balloon payment after three years, and an interest rate of ten percent. The trial court further found that plaintiff’s son was supposed to pay around \$800 a month for rent, that plaintiff was a sophisticated real estate purchaser, that plaintiff was consistently behind in payments on the land contract and at one point nine months in arrears due to her son’s difficulty in making rental payments, and that the balloon payment was soon coming due when the assignment was made. Additionally, the court found that plaintiff agreed to assign, and indeed did assign, her interest in the land contract to Dore McGowan in January 1998,¹² that the agreement provided for McGowan to be responsible for a \$105,000 balance on the land contract owing to the Webers, and that there was an agreement that Dore McGowan would subsequently present a new land contract back to plaintiff with monthly payments of between \$1,200 and \$1,400.

¹² We opine that the trial court simply misspoke in referencing January 1998 because all the witnesses agreed that the assignment was executed in January 1999.

The trial court further determined that the asserted problems with the assignment of land contract, e.g., signatures not witnessed by notary, incorrect date and consideration amount, and piecemeal signatures, were not troublesome in light of plaintiff's and William Fisher's testimony that the document represented their understanding of the agreement. The court also found that plaintiff's failure to keep up with land contract payments, and the failure to pay subsequent mortgage payments after the land contract assignment and mortgage, put any equity in the home at risk for forfeiture or foreclosure. The trial court determined that the evidence showed that defendants offered the Fishers the right to redeem or have their realtor sell the property with the understanding that the Fishers would receive any equity above the amount paid to Aames to satisfy the mortgage. With respect to the issue of Dore McGowan pocketing close to \$20,000 to pay off her credit cards from the loan proceeds, the trial court found that Aames required that those debts be paid in full as a condition of obtaining the mortgage.

The trial court opined that the assignment benefited plaintiff, in that, the land contract was paid off, the back taxes on the property were paid, the Aames mortgage relieved her of any financial responsibility as to the property, and plaintiff and her son received a year of free rent and use of the property. The trial court found as moot the dispute in regard to whether plaintiff was supposed to pay \$1,200 or \$1,400 per month under the assignment agreement because she made no payment whatsoever. The trial court made clear that under any circumstance that may have potentially played out in this case, the court would have kept Dore McGowan fully responsible for any amounts received under the loan from Aames that went to pay for McGowan's personal debts. The trial court opined that, although it was understandable that plaintiff was upset over losing the home, defendants could not be held responsible where plaintiff failed to make any payments whatsoever in an effort to retain the home. The trial court then concluded:

This Court finds that the Plaintiff, Barbara Fisher, has failed to meet her burden of clear and convincing evidence in establishing fraud and deceit by the Defendants that resulted in her loss of her home. There is an old saying that he who seeks equity must do equity. And this Court finds that both the Plaintiff and the Defendant[s] lack any evidence of equity or fairness in their handling of this transaction.

Plaintiff appeals as of right.

III. ANALYSIS

After a recitation of the facts presented at trial, plaintiff's appellate brief presents broad sweeping arguments often with little detail and little legal analysis. Additionally, it is at times difficult to comprehend the argument being made to us. We shall endeavor to separately address each of the numerous arguments presented in a manner befitting the nature and specificity of the argument made.

A. No Cause of Action – Defendants Dore McGowan and Neal Winnie

Plaintiff's first argument on appeal is that the judgment must be set aside because it is null and void as a matter of law, which is the full extent of the argument. In the context of this framed argument, plaintiff presents no further explanation nor any legal analysis whatsoever.

“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority.” *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003)(citations omitted). Where an appellant fails to properly address the merits of his assertion of error, the issue is deemed abandoned. *Id.* at 339-340. Accordingly, argument one in plaintiff’s brief is deemed abandoned.

Plaintiff next argues that we must reverse the lower court judgment because its conclusion that there was no cause of action is contradictory to the trial court’s statement during its ruling that defendant Winnie “gives people in the real estate business a bad name.” Once again, this is the full extent of plaintiff’s argument, and it is deemed abandoned. Moreover, simply because the trial court opined that Winnie’s character was questionable, it did not necessarily conflict with the court’s finding that there was no actionable fraud in the case at bar.

Plaintiff next argues that the judgment of no cause of action violates the principle which mandates “preservation of the honor and integrity of the judiciary;” and it “closes the door of a court to a litigant guilty of reprehensible conduct in the matter in which he or she seeks relief.” Plaintiff argues that the “lower court illegally concealed and/or approved of manifest crime.” Plaintiff cites the Michigan Penal Code, MCL 750.281, which regards gross frauds and cheats at common law, MCL 750.248 and MCL 750.249, which concern forgery of records and other instruments, and, outside the Penal Code but yet a criminal statute, MCL 565.371, which governs prosecutions for fraudulent conveyances.

Plaintiff then focuses her argument on the claim that the assignment of land contract was a forgery and void, and the trial court should have treated it as such, where it was utilized by defendants to obtain the mortgage but was not fully executed in accordance with law.

In a bench trial, the trial court’s findings of fact are reviewed for clear error, and the court’s legal conclusions are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A factual finding is clearly erroneous where, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made after review of the entire record. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Witness credibility issues present a question for the trier of fact, and this Court defers to the trial judge in a bench trial with regard to credibility given the judge’s special opportunity to personally view and hear witnesses who appear before the court. *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

The trial court was not troubled by the fact that Dore McGowan and David Winnie, himself a second witness and notary, executed the assignment outside the presence of plaintiff and her husband. This was because the trial court found that plaintiff indeed intended to assign her interest in the land contract when she executed the document.

At the time plaintiff and her husband executed the assignment of land contract, MCL 565.8¹³ provided, in pertinent part:

Deeds executed within this state of lands, or any interest in lands, shall be executed in the presence of 2 witnesses, who shall subscribe their names to the deed as such and the persons executing the deeds may acknowledge the execution before any judge, clerk of a court of record, or notary public within the state.

On the date of assignment, MCL 565.351¹⁴ provided, in relevant part:

That contracts for the sale of land or any interest therein, shall be executed in the presence of 2 witnesses, who shall subscribe their names thereto as such, and the vendor named in such contract, and executing the same may acknowledge the execution thereof before any judge, or commissioner of a court of record or before any notary public

Michigan's Uniform Recognition of Acknowledgements Act, MCL 565.261 *et seq.*, requires the phrase "acknowledged before me" to be contained in the certificate of acknowledgement, MCL 565.265(c), and the phrase is defined as meaning "[t]hat the person acknowledging appeared before the person taking the acknowledgement[.]" MCL 565.266(a). Such phrase was included as part of the notarization in the assignment. It is clear that here the assignment of land contract was not executed in accordance with Michigan law. We conclude, however, that there was no error in the trial court's ruling.

"Deeds of real estate, to be entitled to record, must be acknowledged, but an acknowledgement is not a part of the conveyance." *Kerschensteiner v Northern Michigan Land Co*, 244 Mich 403, 417; 221 NW 322 (1928)(citations omitted). Real estate title may be transferred by conveyances not acknowledged. *Id.* In order to be recorded, deeds should be witnessed, but a deed not witnessed is good between the parties. *Id.* "This court has upon many occasions held that an acknowledgement is not necessary to give validity to a conveyance, the purpose of acknowledgement being to entitle the instrument to record." *Turner v Peoples State Bank*, 299 Mich 438, 450; 300 NW 353 (1941)(citations omitted). This is, of course, in the absence of fraud, duress, or coercion. See *id.* at 449-450.

The case law supports, and we opine that the conveyance statutes when practically applied support, the proposition that, lacking fraud on the vendee's part, if a vendor intended to make the conveyance at issue, the transaction is enforceable, and the vendor cannot escape the consequence of her actions on the basis that the conveyance did not meet the technical requirements of the recording statutes.¹⁵ Indeed, a forgery includes an act which fraudulently

¹³ MCL 565.8 was amended in 2002 and removed the two-witness requirement while maintaining the acknowledgement requirement. 2002 PA 23.

¹⁴ MCL 565.351 was amended in 2002 and removed the two-witness requirement while maintaining the acknowledgement requirement. 2002 PA 20.

¹⁵ We emphasize, however, that we are not concluding that it is proper or okay to execute
(continued...)

makes an instrument purport to be what it is not with the key being that the writing itself is a lie. *People v Hodgins*, 85 Mich App 62, 65; 270 NW2d 527 (1978). Turning to the facts of our case, there was sufficient evidence to support the trial court's conclusion that the vendor, plaintiff, intended to convey exactly what the assignment stated, i.e., an interest in the Weber land contract to Dore McGowan in exchange for payment on the land contract balance. Plaintiff herself, through trial testimony, *acknowledged* her execution of the assignment of land contract and her husband's signature, and that the assignment was designed to convey Dore McGowan an interest upon which a mortgage could be obtained.¹⁶

The question which remains is whether there was any actionable fraud arising out of the assignment transaction. To establish a cause of action predicated on fraud, a plaintiff must prove: (1) that the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, he or she knew it to be false, or made it recklessly; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). For purposes of silent fraud, a plaintiff must establish that a false or misleading representation was made in response to an inquiry that was incomplete, and that there was a legal or equitable duty to disclose. *Id.* at 30-31. "An action for fraudulent misrepresentation must be predicated on a statement relating to a past or an existing fact. Future promises are contractual and cannot constitute actionable fraud." *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997)(citations omitted). A claim of fraud must be established by clear and convincing evidence and cannot be presumed. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-458; 559 NW2d 379 (1996). However, fraud may be established by circumstantial evidence, and fraudulent or wrongful conduct can be inferred from other evidence. *Id.* at 458.

Here, the evidence indicated that, at the time of the alleged fraudulent assignment, Winnie was not making representations predicated on past or existing facts, but rather he was making promises of future conduct, i.e., in exchange for the assignment, Dore McGowan would obtain a mortgage on the property, pay off the land contract balance and delinquent taxes, pay John a sum out of the disbursements, and subsequently make a transfer back to John with John paying no more than \$1,200 per month. It was the failure of defendants to carry through their agreement as allegedly promised which more accurately describes plaintiff's complaint.

An exception to *Eerdmans* lies where a fraudulent misrepresentation is based on a promise made in bad faith without intention of performance. *Hi-Way Motor Co v Int'l Harvester*

(...continued)

documents affecting interests in real property in a manner inconsistent with law. To the contrary, the instant case magnifies the problems that can arise where documents are not properly executed.

¹⁶ Plaintiff argues that the assignment was intended only to provide Dore McGowan with a security interest and was only a preliminary document. Testimony to that effect was given by John and William Fisher but not plaintiff, the actual vendor and the relevant individual for us to focus on. Moreover, plaintiff fails to explain how legally the assignment could be viewed as granting only a security interest or what is meant by the term "preliminary document" and its legal implication.

Co, 398 Mich 330, 337-338; 247 NW2d 813 (1976). To come within this exception, the evidence of fraudulent intent must relate to conduct of the actor at the very time of making the representation, or immediately thereafter. *Id.* at 338-339. In the case *sub judice*, there was a lack of clear and convincing evidence that defendants did not intend to perform as allegedly agreed at the time the plan was hatched and the assignment executed.

A second exception lies where, although there is no proof of the promisor's intent, the facts of the case compel an inference that the promise was but a device to perpetrate fraud. *Id.* at 339. Here again, there was a lack of clear and convincing evidence to support application of the exception. True, Dore McGowan, Winnie, and Zenith financially benefited from the situation; however, Dore McGowan also placed her credit at risk and risked a deficiency judgment, and John and plaintiff would benefit by escaping a forfeiture action by the Webers, having the land contract and delinquent taxes paid off, not being placed as the responsible party under a loan and mortgage, and John having the opportunity to subsequently own the home himself and build back up his dismal credit history. The evidence shows that it was made known to plaintiff that Winnie and Zenith would receive a commission and fees, and there was a lack of evidence showing that, at the time of the transaction, defendants were aware that Dore McGowan would have to pay off existing debts from the loan proceeds to obtain a mortgage.

Michigan courts recognize a cause of action for fraud in the inducement as reflected in *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995), wherein this Court stated:

Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party. [Citations omitted.]

We reiterate that there was a lack of clear and convincing evidence showing that, at the time of and just prior to the assignment, defendants were intentionally misrepresenting the nature of the their planned future conduct in order to induce plaintiff to execute the assignment.

In regard to the documents faxed to the Fishers, we find insufficient evidence to support a claim for actionable fraud, where those documents were preliminary in nature, and where there was no evidence that they contained false statements at the time of faxing.¹⁷

¹⁷ We note that plaintiff does not raise an issue of fraud in relation to the faxed documents but rather focuses on the assignment of land contract. We opine, however, that it is appropriate to address the matter in order to issue a sound legal opinion, and we likewise deem it appropriate to frame our analysis regarding fraud as done so in this opinion despite plaintiff's failure to provide such a framework.

Overall, we conclude that the evidence was insufficient to support a finding that defendants committed actionable fraud.¹⁸ Thus, the trial court did not commit error in entering a judgment of no cause of action as to defendants Winnie and Dore McGowan.

B. Directed Verdict – Defendant Richard McGowan

An order granting or denying a motion for directed verdict is reviewed de novo by this Court. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001). In reviewing the trial court's decision on a motion for directed verdict, this Court views the evidence presented up to the time of the motion in a light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id.*

Plaintiff simply argues that the directed verdict in favor of Richard McGowan must be set aside as clearly erroneous. This is the full extent of the argument, and thus it has been waived for lack of detail, explanation, or citation to authority. *Houghton, supra* at 339-340. Regardless, the only evidence concerning Richard McGowan was that he signed the mortgage because it was required of the lender; this was woefully insufficient to establish fraud. Moreover, in light of our ruling above as to Winnie and Dore McGowan, there exists no basis to hold Richard McGowan liable.

C. Summary Disposition – Defendant Aames

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). MCR 2.116(C)(10) provides for summary disposition where 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. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the opposing party fails to present

¹⁸ Plaintiff takes issue with the trial court's finding that plaintiff lacked evidence of equity or fairness on her part in the transaction. Plaintiff argues that the trial court relied on her failure to sign the Weber land contract as a married woman in judging equity. The trial court made no such reference. Moreover, plaintiff's claim that the reference in the Weber land contract to her being a single woman was the result of a scrivener's error is not supported in any manner by the record. Additionally, based on our review of the entire record, we do not find the court's ruling regarding the equities of the case to be in error.

documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

Plaintiff vaguely argues that Aames is the principal of mortgage broker Dore McGowan, and as such, Aames is liable for the fraud of Winnie and McGowan. In the context of the motion for summary disposition under MCR 2.116(C)(10), Aames did not submit any documentary evidence in support of the position that it was free of liability for fraud as required by MCR 2.116(G)(3). Considering that fact, along with the fact that discovery was not completed and remained open for several more months, it is arguable that summary disposition was premature. However, in light of our ruling that there was insufficient evidence that Winnie and Dore McGowan engaged in actionable fraud, the issue of Aames' alleged liability on an agency theory becomes moot. Moreover, a review of the complaint suggests that fraud and deceit were only alleged in regard to the individual defendants, where count II specifically states as much.

IV. CONCLUSION

The trial court did not err in directing a verdict in favor of defendant Richard McGowan. Additionally, the trial court did not commit error in entering a judgment of no cause of action in favor of defendants Winnie and Dore McGowan. Finally, any issue concerning the summary dismissal of defendant Aames has become moot in light of our ruling regarding the individual defendants.¹⁹

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Janet T. Neff

¹⁹ Our ruling also makes it unnecessary to address plaintiff's argument that this Court should impose a constructive trust on the property and funds. Further, a request for a constructive trust is not found in plaintiff's complaint.