STATE OF MICHIGAN

COURT OF APPEALS

THOMAS LEWIS, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 17, 2004
v	No. 230089 Kent Circuit Court
FIRST ALLIANCE MORTGAGE COMPANY, Defendant-Appellant/Cross-Appellee.	LC No. 99-000814-CP

Before: Gage, P.J. and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant, First Alliance Mortgage Company, appeals by leave granted from an order denying its motion for summary disposition. Plaintiff, Thomas Lewis, cross-appeals from the same order, which additionally denied his motion for summary disposition. Both parties argue that judgment should be entered in their favor on all of the pleaded claims. We reverse the trial court's denial of defendant's motion for summary disposition, affirm the trial court's denial of summary disposition for plaintiff, and remand for entry of an order granting defendant summary disposition on all claims.

Defendant operates as both a mortgage lender, offering fixed and variable rate mortgage loans, and a mortgage broker. As a lender, defendant generally charges several fees in conjunction with its residential mortgage loans. In 1997, these fees included a $300 processing fee, a $140 wire fee, a $200 underwriting fee on subprime loans, a $200 document preparation fee, a $30 messenger fee, a $30 flood certification fee, and an $11 assignment fee. The fees were based on what competitors in the mortgage loan market charged for similar services.

In March 1997, plaintiff approached defendant about a mortgage loan and signed numerous documents, including a written mortgage loan application, a broker disclosure agreement, and a good faith estimate of fees and settlement charges to be paid at closing. While defendant was required to sign the broker disclosure agreement as part of the application process, it is undisputed that defendant did not ultimately act as a mortgage broker with respect to plaintiff's loan. It functioned as a lender, and we note that both parties anticipated at the beginning of their dealings that defendant would be the lender. In late April 1997, plaintiff's loan was conditionally approved. At the time of closing on May 23, 1997, plaintiff signed a note and mortgage; a typed loan application; a final estimate of settlement charges, which listed all of

defendant's standard fees; and a notice of his right to cancel the transaction. Plaintiff did not read any of the closing documents before, or after, signing them.

Plaintiff filed a complaint on his own behalf and that of a class of similarly situated individuals, who obtained mortgage loans from defendant in the six-year period before January 27, 1999, the date of the filing of the complaint. Plaintiff alleged claims for replevin, unjust enrichment, innocent misrepresentation, negligent misrepresentation, and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Plaintiff later amended his complaint to add a claim for breach of contract. After discovery, both plaintiff and defendant moved for summary disposition on all claims. The trial court denied the motions, concluding that valid claims were pleaded and that genuine issues of material fact existed for the jury.

Defendant's application for leave to appeal was granted, and plaintiff filed a cross-appeal.[1] The appeals were held in abeyance pending our Supreme Court's resolution of *Dressel v Ameribank*, 468 Mich 557; 664 NW2d 151 (2003). In *Dressel*, the Court held that a bank does not engage in the unauthorized practice of law by completing mortgage documents and charging a fee. *Id.* at 569. After the release of the opinion in *Dressel*, the unauthorized practice of law issues raised by plaintiff and defendant on appeal were dismissed by order of this Court.

We review de novo the trial court's denial of a motion for summary disposition. *Mahnick v Bell Co*, 256 Mich App 154, 157; 662 NW2d 830 (2003). In reviewing a motion under MCR 2.116(C)(10), this court considers the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties. *Id.* Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to summary disposition as a matter of law.

I

Defendant was entitled to summary disposition on plaintiff's breach of contract claim. Plaintiff alleged that, by way of the broker disclosure agreement, defendant agreed to limit its compensation and that, when defendant charged, collected and kept fees in addition to those specified in the broker disclosure agreement, it breached the contract.

Where there are several agreements relating to the same subject matter, the parties' intentions must be gleaned from all of the agreements. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346-347; 561 NW2d 138 (1997), citing *Culver v Castro*, 126 Mich App 824, 827; 338 NW2d 232 (1983).

> If parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot

[1] In his cross-appeal, plaintiff does not raise any additional issues but argues that summary disposition should be granted in his favor as a matter of law.

stand together, the later document supersedes and rescinds the earlier agreement. [*Omnicom, supra* at 347.]

In this case, plaintiff's claim for breach of contract fails to recognize the import of the subsequent mortgage loan contract entered into by the parties. When plaintiff closed on his mortgage loan, numerous weeks after applying for the loan and signing the broker disclosure agreement, he contemporaneously signed a mortgage, note, settlement statement, and other documents. The settlement statement identified the costs and fees to be paid in conjunction with the loan. The broker disclosure agreement and the subsequent mortgage loan agreements covered the same subject, specifically plaintiff's mortgage loan and defendant's role, including fees to be paid, with respect to that loan. The mortgage loan documents dated May 23, 1997 are comprehensive and detailed. They make clear that defendant is acting as the mortgage lender and they specify the exact fees to be paid to defendant. The broker disclosure agreement did not contemplate defendant acting as a mortgage lender and did not specify the fees that defendant would collect if it acted as a lender. We find that the broker disclosure agreement was superseded by the May 23, 1997, contract between the parties. In reaching our conclusion, we note that the fact that the broker disclosure agreement contained an integration clause does not affect our analysis. An integration clause nullifies all *antecedent* agreements. *UAW-GM Human Resource Center v KSL Recreation Corp,* 228 Mich App 486, 502; 579 NW2d 411 (1998). Because the broker disclosure agreement was superseded by the mortgage loan contract, plaintiff cannot maintain his breach of contract action. Defendant is entitled to summary disposition on that claim.

II

Defendant next challenges the trial court's denial of summary disposition on plaintiff's claims of innocent and negligent misrepresentation. We agree that the trial court erred when it failed to grant defendant summary disposition on these claims.

To succeed on a misrepresentation claim, there must be proof that the defendant made a material representation, that the representation was false, that the defendant made it with the intent that the plaintiff would act upon it, that the plaintiff acted in reliance upon it, and that the plaintiff suffered damages. *Mitchell v Dahlberg,* 215 Mich App 718, 723; 547 NW2d 74 (1996). For claims of innocent misrepresentation, the person making the representation does not need to know that the representation was false when made. *Id.* For claims of negligent misrepresentation, the representation must have been made without reasonable care by a person who owed the relying party a duty of care. *Law Offices of Lawrence J Stockler, PC v Rose,* 174 Mich App 14, 30; 436 NW2d 70 (1989). When a moving party can show either that an essential element of the nonmoving party's case is missing or that the nonmoving party's evidence is insufficient to establish an element of its claim, summary disposition is proper. *Latham v National Car Rental Systems, Inc,* 239 Mich App 330, 340; 608 NW2d 66 (2000).

Summary disposition on both the negligent and innocent misrepresentation claims was appropriate because there is a complete absence of evidence to support the element of reliance. Plaintiff admits that he signed both the loan application and loan contract documents without reading them. The evidence does not support that he depended on any of the signed documents or oral representations about the fees to be charged. Nothing in the record suggests that plaintiff considered the amount of fees when applying for, and accepting, the loan. Because evidence of

the essential element of reliance was missing, summary disposition in favor of defendant was proper. *Latham, supra.*

III

Both plaintiff and defendant next argue the viability of plaintiff's claims under the MCPA. We find that the trial court erred when it failed to grant summary disposition for defendant on plaintiff's MCPA claims.

Transactions or conduct "specifically authorized under the laws administered by a regulatory board or officer acting under statutory authority of this state or the United States" are exempt from the MCPA. MCL 445.904(1)(a).[2] In determining if a transaction or conduct is "specifically authorized," the relevant inquiry focuses on whether the general transaction, not the specific misconduct alleged, is authorized by law. *Smith v Globe Life Ins Co,* 460 Mich 446, 465; 597 NW2d 28 (1999); *Kraft v Detroit Entertainment, LLC,* ___ Mich App ___; ___ NW2d ___ (Docket No. 241405, issued April 13, 2004). In *Newton v Bank West,* ___ Mich App ___; ___ NW2d ___ (Docket No. 228903, issued 2004), we recently held that residential mortgage loan transactions by a bank were exempt from the MCPA. In this case, we are called upon to decide whether residential mortgage loan transactions by a licensed or registered mortgage lender are transactions that are similarly exempt from the provisions of the MCPA. We find that they are exempt.

Plaintiff concedes that defendant is a "regulatory loan licensee" and is subject to the Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA), MCL 445.1651 e*t seq.* Under the MBLSLA, a licensee is specifically permitted to "act as a mortgage broker, mortgage lender, or mortgage servicer." MCL 445.1653. Defendant is authorized by statute to collect charges in connection with the making of mortgage loans, MCL 445.1673, and mortgage loans under the Act are subject to all applicable state laws. MCL 445.1676. The MBLSLA outlines conduct that is prohibited or considered violative of the Act. MCL 445.1672; MCL 445.1677; MCL 445.1679. The Commissioner of the Officer of Financial and Insurance Services has general supervision and control over mortgage brokers, lenders and servicers doing business in Michigan. MCL 445.1651a(b); MCL 445.1661(1). The commissioner has numerous powers with respect to the enforcement of the Act. MCL 445.1661(2). Further, statutes govern the suspension or revocation of licenses under the Act, MCL 445.1662; the filing of complaints with, or by, the commissioner alleging violations of the Act, MCL 445.1663; investigations of violations of the Act, MCL 445.1664; summary suspensions of licenses or registrations under the Act, MCL 445.1665; and the issuance of cease and desist orders, MCL 445.1666. Based on our review of the MBLSLA, we hold that defendant's residential mortgage loan transactions are "specifically authorized" under laws administered by an officer acting with statutory authority of this state. Therefore, the residential mortgage loan transactions are exempt from the MCPA. MCL 445.904(1)(a). Because the MCPA does not apply to the mortgage loan transaction made

[2] Certain exceptions to the exemption are set forth in MCL 445.904(2). The exceptions outlined in § 4(2) are not at issue in this case.

by defendant, the trial court erred in denying defendant's motion for summary disposition on the MCPA claims.

IV

The trial court additionally erred when it failed to grant summary disposition for defendant on plaintiff's unjust enrichment claim.

In *Michigan Educational Employees Mutual Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999), citing *Hoyt v Paw Paw Grape Juice Co*, 158 Mich 619, 626; 123 NW 529 (1909), the Court ruled that the right to bring an unjust enrichment action exists when a person has in his possession money which in equity and good conscience belongs to the plaintiff. Unjust enrichment is an equitable doctrine that requires a person who has been unjustly enriched at the expense of another to make restitution to the other. *Id.* The equitable doctrine presupposes, however, that no contract exists between the parties. In *Barber v SMH(US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993), this Court ruled:

> The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. In such instances, the law operates to imply a contract in order to prevent unjust enrichment. However, *a contract will be implied only if there is no express contract covering the same subject matter.* [Citations omitted, emphasis added.]

See also *King v Ford Motor Credit Co*, 257 Mich App 303, 327; 668 NW2d 357 (2003) (a contract will not be implied under the doctrine of unjust enrichment where a written agreement governs the parties' transaction). In *Noel v Fleet Finance, Inc*, 971 F Supp 1102, 1113-1114 (ED Mich, 1997), the plaintiffs alleged a claim for unjust enrichment based on the defendant's receipt of certain premiums in loan transactions. Because the plaintiffs entered into express loan contracts, which contained the terms of the loan, the unjust enrichment claim could not be maintained. *Id.* "There cannot be an express and implied contract covering the same subject matter at the same time." *Id.*

In this case, plaintiff alleged that defendant was unjustly enriched by charging fees in addition to those it had agreed to accept and by illegally charging more than its actual costs with respect to certain fees.[3] Plaintiff and defendant entered into an express mortgage loan contract, which specified the fees to be paid. Because the transaction was governed by a written agreement, plaintiff cannot rely on a claim of unjust enrichment. *King, supra; Noel, supra.*

V

[3] Plaintiff also alleged that defendant was unjustly enriched by charging for document preparation when that service constituted the unauthorized practice of law. The claim premised on this assertion necessarily fails because defendant did not engage in the unauthorized practice of law. *Dressel, supra.*

Finally, the trial court erred in denying summary disposition for defendant on plaintiff's claim for replevin. Replevin facilitates recovery of the possession of goods unlawfully obtained or seized. *John J Gamalski Hardware, Inc v Baird,* 298 Mich 662, 667; 299 NW 757 (1941); *Brewster Loud Lumber Co v General Builders' Supply Co*, 233 Mich 633, 637; 208 NW 28 (1926). Money is not generally the subject of a claim for replevin unless it is capable of specific identification. See 66 Am Jur 2d, Replevin, § 9, pp 504-505. Currency, which is commingled with similar money, is not the proper subject of a replevin action, but an action in replevin might be maintained for specific bills and coins that are identifiable due to serial numbers or special markings or for bills and coins that are "uncommingled" within an identifiable container or at a specific place. *Id.* In Michigan, there is no authority to support that a claim for replevin will lie where money is the subject of the action. In fact, the action of "replevin" is currently codified as an action for "claim and delivery." *Whitcraft v Wolfe*, 148 Mich App 40, 44 n 1; 384 NW2d 400 (1985). MCL 600.2920(1) provides that a civil action for "claim and delivery" may be brought to recover possession of any goods or chattels that have been unlawfully taken or unlawfully detained and to recover damages attendant to the unlawful taking or detention. The statute does not provide that money may be the subject of an action for claim and delivery.

In this case, even if we accepted that money may be the subject of a cause of action for replevin, plaintiff did not plead for the return of specifically identified money, and the record does not demonstrate that the challenged fees are capable of specific identification. Thus, plaintiff's cause of action fails. Defendant is entitled to summary disposition on the replevin claim as a matter of law.

We reverse the trial court's order denying summary disposition for defendant, affirm the trial court's order denying summary disposition for plaintiff, and remand for entry of an order granting defendant summary disposition on all claims. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra