

STATE OF MICHIGAN
COURT OF APPEALS

LAURA DOCHENETZ,

Plaintiff-Appellant/Cross Appellee,

v

ELLIOT LEVELING, INC., d/b/a
A-1 CONCRETE LEVELING,

Defendant-Appellee/Cross
Appellant.

UNPUBLISHED
December 20, 2005

No. 257057
Oakland Circuit Court
LC No. 2004-057799-CK

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant summary disposition under MCR 2.116(C)(8). Defendant cross-appeals the court's denial of summary disposition under MCR 2.116(C)(7). This case arises out of plaintiff's purchase of a home in purported reliance on defendant's proposal to perform certain repairs. We affirm.

The Maria M. Hirt Revocable Trust offered a house for sale. The house was constructed in part on a concrete slab that over time had experienced differential settlement and was no longer level. Plaintiff expressed interest in purchasing the house subject to confirmation that the slab could be repaired. The Trust's agent hired defendant to investigate the slab and its condition, and to furnish a proposal for correction of the defect. Relying on defendant's proposal, the Trust and its agent represented to plaintiff that the slab could be repaired. A copy of the proposal indicating the cost of repair as \$3,400 was provided. In purported reliance on the proposal, plaintiff agreed to purchase the home. After closing, she contacted defendant to perform the work of leveling the concrete slab. A representative of defendant came to the home, but after conducting further investigation, he declined to conduct the necessary corrective work. The representative explained that the slab was excessively thick.

Plaintiff hired a soils engineer and a grouting contractor to assess the slab. They disclosed that the slab and its supporting structure were materially defective. More specifically, the soil beneath the slab lacked the requisite strength, cohesiveness, and stability, and was not suitable to support the slab. Further, the slab was experiencing ongoing differential settlement, and the drains and other equipment beneath the slab were damaged as a result of the settlement. According to the soils engineer and grouting contractor, the thickness of the slab had increased by successive additions of concrete to compensate for the continued and excessive differential

settlement. Some areas of the concrete were four inches deep while others were more than two feet deep. The consultants told plaintiff that the slab would continue to settle, the soil beneath the slab would require grouting for stabilization and leveling, and that other repairs would have to be made to the interior of the house, including complete demolition and reconstruction of a bathroom and adjacent hallway. Plaintiff made the required repairs at a cost in excess of \$25,000.

Plaintiff first brought a claim against the Trust and its agents alleging fraud and misrepresentation, negligent misrepresentation, breach of implied warranty, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* The trial court dismissed plaintiff's action on summary disposition. Plaintiff then filed a five-count complaint against defendant, alleging fraud and misrepresentation, negligence, violation of the MCPA, breach of contract, and promissory estoppel. Defendant moved for summary disposition under MCR 2.116(C)(7) and (8), arguing that plaintiff's first three counts were barred by the doctrine of defensive collateral estoppel and that plaintiff failed to state any claims for which relief could be granted.

The trial court first concluded that collateral estoppel did not bar any of plaintiff's claims. The court noted that the prior judgment did mention the proposal, but the court found that those statements were mere dicta and not essential to the prior judgment. Turning to each of plaintiff's claims, the court concluded that plaintiff offered no proof in support of her fraud claim that defendant knew of any misrepresentation or acted recklessly. The court next concluded that defendant owed no duty to plaintiff, noting that the document on which plaintiff relied was merely a proposal. The court also dismissed plaintiff's MCPA claims based on its prior finding of lack of fraud or misrepresentation. The court then found that plaintiff's breach of contract claim was not supported because there was no contract created between defendant and plaintiff; again, it was merely a proposal and it was provided to the Trust's agent, not plaintiff. Moreover, the court noted, plaintiff paid no consideration for performance of a contract. Last, the court found that defendant made no promise to plaintiff on which she could reasonably have relied. Thus, the court granted defendant's motion and dismissed all of plaintiff's claims for failure to state any claims on which relief could be granted.

We first address defendant's cross-appeal because it disposes in part of plaintiff's claims on appeal. Defendant argues that the trial court erred in concluding that plaintiff's claims for fraud, negligence, and violation of the MCPA were not barred under the doctrine of collateral estoppel. We agree in part and disagree in part. We review *de novo* a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of collateral estoppel is also a question of law that is reviewed *de novo*. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004); see, also, Restatement, Judgments, 2d, § 27, p 250. Mutuality of estoppel exists if the party seeking to prevent relitigation of an issue was a party, or in privity with a party, in the first action. *Monat*, *supra* at 684-685. However, there are some exceptions to the mutuality requirement, including

the defensive use of estoppel against a party who has already had a full and fair opportunity to litigate the issue. *Id.* at 680-681, 691, 694-695. Here, there appears to be no dispute that mutuality was not required in this case where defendant is asserting collateral estoppel as a defense to plaintiff's present claims, which she had an opportunity to litigate in the prior action. The question is whether the effect of the proposal was actually litigated and essential to determination of the prior final judgment.

While we agree that plaintiff's claims for negligence and violation of the MCPA are not collaterally estopped, we conclude that plaintiff's fraud claim was barred by collateral estoppel. Collateral estoppel does not bar plaintiff's negligence claim because it is not identical to the negligent misrepresentation issue involved in the first action. See *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). In the prior suit plaintiff alleged negligent misrepresentation. Here, plaintiff is alleging negligence for defendant's failure to conduct a proper investigation before preparing the proposal. Further, collateral estoppel does not bar plaintiff's MCPA claims because although the previous judgment indicated that the proposal did not support plaintiff's claim for violation of the MCPA, the court actually resolved the MCPA claim on the grounds of the exemption provision, MCL 445.901(1)(a).

However, plaintiff's fraud claim is collaterally estopped by the prior judgment. Plaintiff's fraud allegations in her complaint appear to rely solely on a disclosure statement, but she expanded the scope of her claim in her brief in response to the defendant's motion for summary disposition. In that brief, plaintiff expressly argued with respect to her claims of fraud that the representations in the proposal were false and that she reasonably relied on those misrepresentations by virtue of the real estate agent's reliance on the proposal. Therefore, collateral estoppel does bar plaintiff's fraud claim because the effect of the proposal was essential to the prior fraud judgment. The prior dismissal of the fraud claim depended on the court's finding concerning the effect of the proposal as it related to the element of reliance. Although the trial court erred in concluding that plaintiff's fraud claim was not barred by collateral estoppel we will not reverse the lower court when the court reaches the correct result albeit for a wrong reason. See, e.g., *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). Having resolved this issue in defendant's favor, we need not address plaintiff's claim that the court erred in dismissing her fraud claim for failure to state a claim.

Turning to the remainder of plaintiff's issues on appeal, we first address plaintiff's argument that the court erred in dismissing plaintiff's claim of negligence under MCR 2.116(C)(8) for failure to state a claim. We disagree.

Plaintiff is essentially arguing that defendant undertook a duty to perform a more extensive investigation before preparing the proposal and the benefit of this duty ran to plaintiff because defendant's failure to perform its duty could have been foreseeably expected to cause harm to plaintiff. However, tort actions based on a contract and brought by someone not a party to that contract should be analyzed by using a "separate and distinct" mode of analysis. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). "Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id.* at 467. Here, defendant's alleged duty – to perform a more extensive investigation – was based solely on the proposal agreement. Plaintiff does not allege that defendant had any duty to her outside of creation of the proposal. Therefore, plaintiff

failed to satisfy the threshold requirement of establishing that defendant owed a duty to her that was separate and distinct from defendant's contractual obligations. Accordingly, the trial court properly dismissed plaintiff's negligence claim under MCR 2.116(C)(8) for failure to state a claim.

Plaintiff next argues that the trial court erred in concluding that she failed to state a claim under the MCPA. We disagree. "[T]he great majority of the specific prohibited practices enumerated in the [MCPA] . . . involve fraud." *Mayhall v AH Pond Co*, 129 Mich App 178, 182; 341 NW2d 268 (1983), citing MCL 445.903(1)(a)-(cc). Plaintiff failed to properly allege any fraud by failing to sufficiently plead the material misrepresentation and knowledge of falsity elements. Further, other than quoting the text of the provisions, plaintiff does not allege how defendant violated the stated provisions. Thus, plaintiff has waived this issue by giving it cursory treatment on appeal. See *Badiee v Brighton Area Schools*, 265 Mich App 343, 359; 695 NW2d 521 (2005).

Next, plaintiff argues that the trial court erred in concluding that she failed to state a claim of breach of contract. We disagree. Even assuming that the proposal was an offer to perform the job at the stated price, plaintiff was not the party that solicited the proposal, and she was not capable of accepting its performance. While not specifically alleged, it appears that plaintiff is attempting to argue that she was a third-party beneficiary of the proposal, but "a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation 'directly' to or for the person." *Brunsell v Zeeland*, 467 Mich 293, 296-297; 651 NW2d 388 (2002), quoting *Koenig v South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999) (Taylor, J.); see, also, MCL 600.1405. While an individual need not be referred to specifically by name in a contract, it is necessary to limit third-party beneficiaries to a designated class of persons. *Brunsell*, *supra* at 297. An objective standard is used to ascertain from the contract itself whether a promisor undertook an obligation directly for the plaintiff. *Id.* Here, there is nothing in the proposal that objectively indicates that defendant breached an obligation undertaken directly to or for plaintiff. First, plaintiff was not specifically named in the contract. And second, there was no allegation that plaintiff was within a class of persons sufficiently described or designated in the contract. The trial court properly dismissed plaintiff's breach of contract claim under MCR 2.116(C)(8) for failure to state a claim.

Last, plaintiff argues that the trial court erred in concluding that plaintiff failed to state a claim of promissory estoppel. We disagree. The doctrine of promissory estoppel is defined as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. [*State Bank of Standish v Curry*, 442 Mich 76, 83; 500 NW2d 104 (1993), quoting 1 Restatement Contracts, 2d, § 90, p 242.]

The reliance requirement must be reasonable reliance, which is defined as reliance induced by an actual promise. *Curry*, *supra* at 84. Even assuming that defendant expected plaintiff to rely on the proposal, her reliance was not reasonable in light of the cancellation clause in the proposal.

The trial court properly dismissed plaintiff's promissory estoppel claim under MCR 2.116(C)(8) for failure to state a claim.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jessica R. Cooper

/s/ Pat M. Donofrio