STATE OF MICHIGAN

COURT OF APPEALS

MODERN LIVING, LLC,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

RONALD WHEATLEY and TAMARA WHEATLEY,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants/Cross-Appellees,

and

ROBERT D. FOSTER, DENNIS J. FOSTER, and WILLIAM SCHULER,[1]

Third-Party Defendants.

UNPUBLISHED
October 30, 2007

No. 270102
Saginaw Circuit Court
LC No. 03-046973-CK

Before: Smolenski, P.J., and Whitbeck, C.J., and Kelly, J.

PER CURIAM.

In this breach of contract case arising from the construction of a modular home, defendants Ronald and Tamara Wheatley appeal as of right the trial court's order granting plaintiff Modern Living, LLC's motion for summary disposition. Plaintiff cross-appeals the trial court's order denying its request for case evaluation sanctions. We reverse in part the trial court's order granting summary disposition in plaintiff's favor, vacate the judgment against defendants, and remand for further proceedings.

[1] The trial court dismissed with prejudice the third-party claims against Robert D. Foster, Dennis J. Foster, and William Schuler; thus, these third-party defendants are not party to this appeal.

I. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Although defendants requested summary disposition under both MCR 2.116(C)(8) and (10), the trial court considered evidence beyond the pleadings and, therefore, granted the motion pursuant to MCR 2.116(C)(10). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

II. MCPA

Defendants assert that the trial court erred in ruling that plaintiff, a residential home builder, was exempt from the MCPA. Recently, in *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 206; 732 NW2d 514 (2007), our Supreme Court held that "under MCL 445.904(1)(a), residential home builders are exempt from the [Michigan Consumer Protection Act, MCL 445.901 *et seq*.] because the general transaction of residential home building, including contracting to perform such transaction, is 'specifically authorized' by the Michigan Occupational Code (MOC), MCL 339.101 *et seq*." Accordingly, the trial court did not err in ruling that plaintiff was exempt from the MCPA and granting summary disposition in plaintiff's favor on this claim.

III. Breach of Contract

Defendants also contend that the trial court erred in granting summary disposition in plaintiff's favor on the parties' respective breach of contract actions because there were genuine questions of material fact as to whether (1) the parties had orally modified the contract to agree that defendants could withhold the final payment until the house was completed to their satisfaction, (2) whether the house was completed to their satisfaction, and, regardless of the modification, (3) whether defects remained that plaintiff was responsible for repairing. We agree.

Defendants rely solely on Ronald Wheatley's deposition to demonstrate that the parties had orally modified their written agreement. In his deposition, Ronald Wheatley stated:

> Mr. Schuler[2] told us to hold back five thousand dollars when we initially met with them and he said it's called good faith money and when the house is to your satisfaction, then you pay the rest of the loan or the rest of the amount due. So that's where we got that from.

Although this portion of the deposition testimony was attached to defendants' response to plaintiff's motion for summary disposition, defendants did not present this argument in their

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[2] At the time this conversation allegedly occurred, William Schuler was one of plaintiff's two owners. The other owner was Robert Foster.

brief or oral argument to the trial court. Therefore, it is not properly preserved for this Court's review. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 n 23 (1993). "This Court will not review a case on a theory different from that on which it was tried." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110; 593 NW2d 595 (1999). Nonetheless, we address this argument for the sake of judicial economy because we are remanding this case.

A contract, including a written contract, may be modified orally or in writing. *Chatham Super Markets, Inc v Ajax Asphalt Paving, Inc*, 370 Mich 334, 339; 121 NW2d 836 (1963). The modification must be by mutual consent. *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005). "The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373; 666 NW2d 251 (2003).[3]

We have reviewed the record evidence to determine whether Ronald Wheatley's testimony was contradicted or corroborated. Schuler was not questioned about the alleged oral modification in his deposition and offered no testimony in this regard. The portion of Robert Foster's deposition testimony provided by defendants contains no reference to the oral modification. Dennis Foster, Robert Foster's brother who worked as a licensed builder for plaintiff, testified in his deposition as follows:

> *Q*. Did you ever talk to the Wheatleys about them holding back some of the money of the purchase price if Modern Living – until these repairs were taken care of?
>
> *A*. I –before they decided to do it, they had told me they were going to hold back – there was so much money left over that Bill [Schuler] had not collected from them and they told me that they would – were not going to pay Bob [Foster] until they fixed their house.
>
> *Q*. Okay. Did you know if they ever had?

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[3] Defendants make a cursory suggestion that the parol evidence rule does not apply in this case. This assertion is correct. This Court has noted that

> [t]he parol evidence rule may be summarized as follows: "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." [*Hamade v Sunoco, Inc*, 271 Mich App 145, 165-166; 721 NW2d 233 (2006) (citations omitted).]

Because the alleged modification did not occur prior to or contemporaneous with to the written contract, the parol evidence rule does not apply in this case.

A. I agreed with them and said that that would be – probably would be the best way to handle it.

Q. Do you have any knowledge of whether Mr. Schuler had a discussion about that?

A. No, I don't have any knowledge of Mr. Schuler having a discussion about that.

Thus, Ronald Wheatley's testimony demonstrates that an oral modification occurred, Dennis Foster's testimony demonstrates that defendants told him that they were going to hold back the last payment, and plaintiffs have not offered any evidence that the modification did not occur. On this record, we conclude there was at least a genuine issue of material fact as to whether the parties had orally modified their agreement to allow defendants to withhold the final payment until they were satisfied with the repairs.

But regardless whether the parties orally modified their contract, the written contract, signed by Dennis Foster for plaintiff, provided in part:

> We propose hereby to furnish materials and labor-complete with above specifications. All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard building practices.

The question remains whether, at the time of plaintiff's motion, the evidence presented to the trial court demonstrated a genuine issue of material fact as to whether plaintiff breached these promises.

Defendants alleged 29 defects in their home. Ronald Wheatley offered deposition testimony about each of these defects, submitted a photograph of some of the defects including loose siding on the garage and house, and submitted an affidavit explaining the defects including details regarding the portions that have already been repaired. Ronald Wheatley's testimony also demonstrates that he had ongoing contact with plaintiff regarding the defects, some of which plaintiff addressed, or partially addressed and some of which have not been addressed. With regard to some of the defects, Ronald Wheatley admitted that he was not sure whether plaintiff was responsible for them.

Defendants also submitted Dennis Foster's deposition testimony. Dennis Foster testified that after defendants provided a list of defects, he proceeded to make repairs, but was instructed by Robert Foster to stop. Dennis Foster testified that he felt it was his responsibility to make the repairs because he was plaintiff's licensed builder. But when he insisted on making the repairs, Robert Foster fired him. Dennis Foster testified about the defects in defendants' home, the repairs that he made, and the defects that remained.

On appeal, plaintiff submits the comments of "Mr. Foreman" from the Michigan Department of Consumer and Industry Services, which were written following an on-site inspection of defendants' home. With regard to each of the 29 alleged defects in defendants' home, Mr. Foreman noted whether and to what extent the defects had been repaired or, if the defects remained, a description of the remaining defect. While this evidence demonstrates that

some of the defects were in fact repaired, it also demonstrates that some were not. For example, Mr. Foreman noted, (1) "There are several nails or screws popping through the linoleum, in area of 8th tile square from front of sink," (2) "Siding on entire house appears to be loose," (3) "The square tile pattern runs on an angle to the wall. In my opinion, either the wall is not square or the linoleum was not laid square with the wall," (4) "Drywall is flaking . . . bulging," (5) "There appears to be a loose section of underlayment [under the carpet]," etc. This evidence, the comments of an unbiased state inspector, supports defendants' assertions concerning the remaining defects.

Plaintiff also submitted the affidavit of Robert Foster, in which he attested that plaintiff made some repairs in response to defendants' complaints, what the industry standard required regarding some of the alleged defects, that defendants asked him to leave the property when he attempted to fix the siding, that the linoleum was laid improperly, that plaintiff was not responsible for some of the defects, and that other alleged defects were not defects at all, but rather, properly installed products. Plaintiff also submitted a letter from an inspector stating that the furnace and air-conditioning were properly installed in compliance with the manufacturer's specifications and International Mechanical code. Plaintiff also cited Ronald Wheatley's testimony detailing the defects that had already been repaired.

In response to defendants' arguments on appeal, plaintiff asserts that defendants "failed to mitigate their damages" by, at some point, asking plaintiff to leave the premises of their home. This assertion was supported by Robert Foster's affidavit, wherein he stated that after having made some siding repairs, Tamara Wheatley asked him to leave the property and not return because defendants were pursuing a legal action. Even with this evidence, however, there was a question of fact as to when this occurred and whether defendants had given plaintiff ample opportunity to make repairs.

Plaintiff also asserts that it was unable to complete construction because defendants moved into the home too soon. This assertion is supported by the deposition testimony of Robert Foster who stated that defendants moved in before plaintiff "could get things finished." However, even with this evidence, there are questions of fact regarding whether and to what extent defendants' occupancy hindered plaintiff's attempts to make repairs. Furthermore, Robert Foster's assertion that things were not finished supports defendants' allegations that the house was not properly finished.

In sum, the record evidence demonstrates genuine issues of material fact as to 1) which of the 29 alleged defects remain unaddressed in defendants' home and 2) the extent to which plaintiff is responsible for repairing the remaining defects. With the exception of some photographs and Mr. Foreman's notes, this case is based on testimonial evidence, affidavits, and letters, all subject to credibility determinations, which are not properly resolved by the trial court in a motion for summary disposition. *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). The trial court erred in granting summary disposition in plaintiff's favor on the breach of contract claims when there were genuine issues of material fact.

We reverse in part the trial court's order granting summary disposition in plaintiff's favor, vacate the judgment against defendants and remand for further proceedings. We do not retain jurisdiction.[4]

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

[4] Because we conclude that the trial court erred in granting summary disposition, it is unnecessary to address the remaining issues on appeal, which relate to matters that arose after that motion was granted.