S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RICHARD PETERS and KAREN PETERS,

Plaintiffs-Appellees,

v

DAVID J. BERMAN,

Defendant,

and

MILLER SHEA, P.C.,

Defendant-Appellant.

UNPUBLISHED
July 15, 2008

No. 277665
Sanilac Circuit Court
LC No. 05-030433-NM

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant Miller Shea appeals as of right the judgment for plaintiffs in this attorney malpractice case. We affirm.

Plaintiffs contracted with Long's Tri-County Homes (Long's) to buy a modular home. The home was ultimately delivered damaged and not to the specifications in the contract. The contract had a contractual limitations period of one year for either party to file suit on a breach of the contract. At the same time as the home was delivered, defendant David Berman, an attorney and employee of defendant Miller Shea, a law firm, was representing plaintiffs for purposes of estate planning.

Several months later, plaintiffs paid defendant Berman $1,500 (payable to defendant Miller Shea) to represent them in settlement negotiations with Long's. Those settlement talks were unfruitful and in September 2003, Long's filed suit against plaintiffs to get the remainder of the contract price on the home. At the end of that same month, defendant Berman was terminated from his employment with defendant Miller Shea, but he was allowed to continue to use his office there for at least six more weeks, with the same telephone and fax numbers. In October, plaintiffs notified defendant Berman of the Long's suit and he agreed to handle it for them. He did not tell them at that time that he was no longer with defendant Miller Shea. Miller Shea never informed plaintiffs that defendant Berman was no longer with the firm. Defendant Berman claimed that he told plaintiffs he was no longer with defendant Miller Shea at the end of

October 2003, during a court appearance. Plaintiffs claim that he did not tell them until January 2004. The trial court found plaintiffs' claimed notification date more credible.

By December 2003, defendant Berman had filed no answer in the underlying case, and the contractual one-year limitations period for bringing suit on the contract expired. A default was ultimately entered in the suit. Plaintiffs found out about the default when they visited the courthouse to check on the status of their case after having been unable to contact defendant Berman about it. Plaintiffs then hired a new attorney, John Burns, to handle the matter. Burns had the default set aside, but he was unable to file a counterclaim for the damages plaintiffs suffered from Long's alleged breach of contract because the one-year limitations period had passed. The parties ultimately settled. Plaintiffs ended up paying more than $16,000 over the original contract price.

Plaintiffs claimed in the present lawsuit that they should have not paid anything in addition to the contract price and that, in fact, they would have recovered money for the damages to the home and the incorrect construction of the home. The trial court agreed and awarded plaintiffs $23,177.38 in total damages, including $16,683.72 for the amount exceeding the original contract price and $6,493.66 for structural damages to the home. The trial court also found that defendant Berman was acting as an ostensible agent of defendant Miller Shea, so Miller Shea was also liable for the damages.

Defendant Miller Shea first argues on appeal that the trial court erred when it found that defendant Berman acted as an ostensible agent of the firm, thereby making the firm liable for defendant Berman's malpractice during the period when plaintiffs thought he still worked for them. We disagree.

"This Court reviews a trial court's findings of fact in a bench trial for clear error and reviews de novo its conclusions of law." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Id*. at 652. "Generally, a principal is responsible for the negligence of its agent." *Little v Howard Johnson Co*, 183 Mich App 675, 679; 455 NW2d 390 (1990).

The only conflicting evidence was plaintiffs' and defendant Berman's respective testimonial statements of when Berman told plaintiffs that he was no longer with Miller Shea. The trier of fact is in the best position to determine questions of veracity of witnesses. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). We find no clear error in the trial court's finding that plaintiffs were more credible. Furthermore, notwithstanding the fact that Berman was *actually* no longer employed by Miller Shea after September 30, 2003, where a principal does not notify third parties of the termination of an agency relationship, it is bound by any acts of the agent within the scope of that former agency, even after the agency has been terminated. *Woodruff v Auto Owners Insurance Co*, 300 Mich 54, 63; 1 NW2d 450 (1942).

Finally, an ostensible agency can exist where the person dealing with the ostensible agent reasonably believes him or her to be an authorized agent, that belief is due to the actions or the neglect of the ostensible principal, and the person seeking to rely on the ostensible agency was not negligent. *Vanstelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003). Plaintiffs here dealt with Berman for almost a year when Berman actually was Miller Shea's agent and had provided various materials to plaintiffs reflecting that fact. Plaintiffs even continued to contact Berman at Miller Shea's offices after Berman was no longer employed by Miller Shea. Plaintiffs were reasonable in believing Berman to be Miller Shea's agent until they were given contrary information. Although Miller Shea was not under a general affirmative obligation to tell plaintiffs that Berman was no longer its agent, it was neglectful not to do so under the circumstances of this case. And because there is no evidence that plaintiffs were given any reason prior to January 2004 to think that Berman had left the firm, plaintiffs were not themselves negligent. Therefore, all three prongs of ostensible agency were met and so from September 2003 through January 2004, when plaintiffs finally found out defendant Berman was no longer employed by defendant Miller Shea, defendant Berman was an ostensible agent of defendant Miller Shea.

Defendant Miller Shea argues that that plaintiffs must additionally show that they suffered harm because of their reliance on defendant Berman as an ostensible agent of defendant Miller Shea. Presuming this to be the case,[1] plaintiffs have done so. There is a significant difference between retaining a 40-attorney law firm with the attendant support staff and services, and retaining a solo practitioner with no staff and possibly no malpractice insurance or experience. Relevant to this case, a more extensive support structure reduces the likelihood that any aspect of a case that requires an attorney's attention would be missed or forgotten. We therefore find that plaintiffs were harmed by their mistaken belief that defendant Berman was still an agent of defendant Miller Shea, and the trial court did not err when it held that Miller Shea was liable for Berman's negligence.

Miller Shea next argues that the proximate cause of plaintiffs' damages was Burns's alleged malpractice in failing to argue that the contractual limitations period was inapplicable to a setoff claim. We disagree.

Under the common law, recoupment through a counterclaim is not barred by a statute of limitations so long as the original action was timely. *Mudge v Macomb County*, 458 Mich 87, 106-107; 580 NW2d 845 (1998). Miller Shea argues that this same law applies where the limitations period for filing suit is set by contract rather than by a statute of limitations. In *Wausau Underwriters Ins Co v Vulcan Development, Inc*, 323 F3d 396, 403 (CA 6, 2003), the Sixth Circuit held that under MCL 600.5823, all counterclaims dated back to the original claim. However, at issue in the instant case is a limitations period created by contract rather than by statute. Whether the counterclaim is barred is therefore a matter of contractual interpretation.

An unambiguous contract must be enforced as written unless it is "contrary to law or public policy, or is otherwise unenforceable under recognized traditional contract defenses." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142; 706 NW2d 471 (2005). There are no such defenses alleged here. The contract language regarding the limitations period states: "I understand and agree that - if either of us should breach this contract - the other of us shall have

---

[1] Miller Shea relies on *Little*, *supra*, which predates the "first out rule," MCR 7.215(J)(1), and is therefore technically not binding on this Court.

only one year after the occurrence of that breach in which to commence an action for breach of contract." There is no mention of the limitations period being extended if a claim for breach is a counterclaim rather than a claim. We find no ambiguity in this, so the contract must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Once the one-year period had expired, the chance for plaintiffs to file suit for the damaged and improperly constructed home also expired, regardless of any subsequent arguments by Burns. The failure to file within the limitations period was therefore a proximate cause of plaintiffs' damages.

Miller Shea next argues that the trial court erred in awarding plaintiffs $16,683.72 in extra-contractual damages for late fees and penalties. We disagree. The damages paid by plaintiffs in addition to the contract price were contractual late fees and attorney fees that accrued after delivery of the home. This included a 1.5 percent late fee that was charged on the unpaid balance per month after delivery. Miller Shea argues that those damages would have been applied irrespective of whether Berman was negligent, because any setoff could not have been applied against those damages and because the fees were part of the contract. But this ignores the facts that the home was damaged when delivered and that it was also nonconforming to the contract. Therefore, the contract was arguably breached first by Long's, which might have been a valid defense against a claim of breach by Long's. See *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (one who breaches a contract in a substantial manner cannot maintain an action against the other party for failure to perform).

Whether a given breach is substantial would be a factual issue. But given the damage and nonconformity to the home, we find no error in the trial court treating this as an issue plaintiffs could have successfully relied on if filed within the one year limitations period. Even if the late fees were generally unavoidable for plaintiffs, the failure to timely file an answer resulted in this case lingering longer than it otherwise would have, thereby increasing the number of months of late fees. Timely handled, the fees would have been less and Long's may have been willing to settle Thus, the trial court did not clearly err by finding that the $16,683.72 was proximately caused by defendant Berman's malpractice.

Finally, Miller Shea argues that the trial court erred in its damages calculation, because plaintiffs settled their claim with Long's for $13,000 less than what was owed to them, an amount which exceeded their setoff claim as determined by the trial court. Therefore, Miller Shea argues that plaintiffs received a double recovery beyond what they would have received if the counterclaim had been timely filed. However, a timely answer would have resulted in fewer fees and greater bargaining power in settlement negotiations. As it is, plaintiffs had over $6,000 in damages to the home, paid the contract price and more than $16,000 in addition, paid $7,000 to Northpointe Mortgage for attorney fees, and had to pay additional attorney fees to Burns.[2] Had the original contract been equitably settled, they would have been compensated for the damages to the home and they would not have had to pay late fees – which would have been the equivalent to their recovery in this case. That amounts to being made whole, not to double recovery. Thus, the trial court's failure to consider it a double recovery was not erroneous.

---

[2] However, it is unclear to us whether plaintiffs ever had to pay defendant Berman.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis