

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN ZALEWSKI and LOUISE
ZALEWSKI,

Plaintiffs-Appellants,

v

THOMAS DEAN COOGAN,

Defendant-Appellee.

UNPUBLISHED
November 24, 2009

No. 286083
Livingston Circuit Court
LC No. 08-023448-CH

Before: Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

In August 2004, plaintiffs Norman and Louise Zalewski, a married couple, each 79 years of age, agreed to help Louise's nephew, defendant Thomas Coogan, avoid foreclosure on his home. Plaintiffs hired an attorney to draft and execute a document entitled "Agreement Regarding Real Property." The agreement was signed by both plaintiffs but not by defendant, as he was the beneficiary of the agreement and not a party to the agreement. The agreement reflected an understanding that plaintiffs purchased defendant's home, paying off the existing mortgage and any other liens on the home, with a cash down payment of \$100,000 and a new mortgage loan in their names. This mortgage was from Net Bank in the amount of approximately \$211,000. The agreement also reflected plaintiffs' intent that defendant would continue to live in the home, pay the property taxes, and make the monthly Net Bank mortgage loan payments. The agreement also stated that plaintiffs executed a quitclaim deed conveying the property to defendant, which was to be held by their attorney in escrow with the instruction that it be released to defendant upon plaintiffs' receipt of the sum of \$100,000 and the discharge of their mortgage loan from Net Bank, or upon plaintiffs' deaths. Between the execution of this agreement in August 2004 and March 2007, defendant continued to live in the home, maintain it, pay the property taxes, and make plaintiffs' monthly Net Bank mortgage loan payments.

Defendant asserts that in March 2007, plaintiffs saw property values depreciating and decided that they no longer wanted the \$211,000 Net Bank mortgage loan in their names.

According to defendant, plaintiffs knew they would eventually give the home back to defendant, so in order to eliminate their debt, they asked their attorney, despite the language in the Agreement Regarding Real Property conditioning the release of the quitclaim deed to defendant on plaintiffs' deaths or plaintiffs' receipt of \$100,000 and the discharge of their mortgage, to release the deed to the home to defendant and to have defendant pay off their Net Bank mortgage debt. In March 2007, plaintiffs' attorney delivered the quitclaim deed to the home to defendant at defendant's mother's address, as well as the following letter:

Pursuant to the request of Louise Zalewski, enclosed is the original Agreement Regarding Real Property and original Quit Claim Deed relating to the property at 401 Darwin, Pinckney, Michigan.

A transfer of the home from plaintiffs to defendant subsequently took place in two locations; first at plaintiffs' home, where both plaintiffs were present along with defendant, a mortgage broker, and a notary public; and second, at Land Title Agency, with defendant present, but outside the presence of plaintiffs. At their home, plaintiffs delivered a Warranty Deed to defendant containing both plaintiffs' signatures, and providing the following verification by the notary public:

On this the 20th day of April, 2007, before me personally appeared Norman Zalewski and Louise Zalewski, his wife, to me known to be the person(s) described in and who executed the foregoing instrument and acknowledged that They executed the same as Their free act and deed.

A Sellers' Closing Statement, signed by both plaintiffs and dated April 23, 2007, set forth a "Contract Sales Price" for the home of \$310,000, and further set forth a "Gift of Equity" in the amount of \$99,000, and a "payoff of first mortgage loan to Net Bank" in the amount of \$211,048.80. A Buyer's Closing Statement, signed by defendant and dated April 23, 2007, provided that the "[p]rincipal amount of [defendant's] new loan(s) from Flagstar Bank, FSB" was \$216,000, and that a "Gift of Equity" from plaintiffs was \$99,000. A United States Department of Housing and Urban Development (HUD) Settlement Statement, dated April 23, 2007, also showed a "Gift of Equity" from plaintiffs to defendant in the amount of \$99,000 for the sale of the home. Plaintiffs' signatures on the HUD Settlement Statement were placed immediately after a certification stating:

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of HUD-1 Settlement Statement.

A warning following plaintiffs' signature at the very end of the HUD Settlement Statement stated in relevant part:

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form.

Defendant took out a new mortgage loan from Flagstar Bank. A condition of the mortgage was that defendant have some equity in the home; however, he had no equity in the

home. Defendant asserts that by signing the Sellers' Closing Statement and the HUD Settlement Statement and gifting defendant the equity in the home, plaintiffs enabled defendant to qualify for his new mortgage loan from Flagstar Bank in the amount of \$216,000, which he used to pay off plaintiffs' existing Net Bank loan balance of \$211,000. According to defendant, shortly after gifting him their equity in the home and getting out from under their mortgage debt, plaintiffs changed their minds and demanded that defendant repay them \$100,000.

Plaintiffs claim that at their home, defendant requested that they sign some documents, giving them the impression that the documents would allow defendant to obtain refinancing so that he could repay them \$100,000. According to plaintiffs, they did not agree to sell the home, they did not attend a closing or know that a closing was taking place, and they were never given copies of the fully executed closing documents. Plaintiffs claim that they never intended to make a gift of equity in the home to defendant and would not have signed any documents unless they believed defendant would repay them \$100,000. Plaintiffs were not represented by an attorney at the time they signed the documents, and claim they do not recall signing any documents.

Three months after the April 23, 2007, date of the closing of defendant's mortgage, Flagstar Bank sent plaintiffs a questionnaire. In their responses to the questionnaire, each plaintiff acknowledged the authenticity of their signatures on the Purchase Agreement and HUD Settlement Statement. They further responded that they did not knowingly sign a Purchase Agreement selling the home to defendant, that they were not present at the closing at Land Title Agency, and that they did not provide their drivers' licenses for the purpose of the sale of the home to defendant. In response to the questions posed, both plaintiffs contended they were ill, that they never intended to sell the home, and that defendant had taken advantage of them. Plaintiffs assert that they went to the police to file a criminal complaint, but were told by detectives that they should first pursue civil remedies.

On October 4, 2007, plaintiffs filed a complaint and jury demand against defendant to recover money damages in the amount of \$100,000, alleging fraudulent misrepresentation. On March 14, 2008, defendant moved for summary disposition, arguing that the money and the resulting equity in the home were a gift from plaintiffs to defendant. Defendant attached several documents in support of his motion, including the Sellers' Closing Statement, the HUD Settlement Statement, the quitclaim deed and the warranty deed, and the March 15, 2007 letter from plaintiffs' attorney delivering the quitclaim deed to defendant. Plaintiffs filed a brief in response to defendant's motion for summary disposition and attached to the motion a copy of the Agreement Regarding Real Property and copies of the Flagstar Bank questionnaires and their responses.

On April 18, 2008, plaintiffs filed a motion to add Flagstar Bank and Land Title Agency as defendants pursuant to MCR 2.206(A)(2), to which they attached an amended complaint alleging fraudulent misrepresentation and negligence against defendant, Flagstar Bank, and Land Title Agency. The amended complaint alleged that Flagstar Bank and Land Title Agency had a duty to ask plaintiffs whether they had intended to make a gift of equity to defendant as represented, and that, subsequent to the closing, Flagstar Bank discovered that plaintiffs did not intend to make a gift of equity to defendant but deliberately or negligently failed to take remedial action.

The trial court held a hearing on both defendant's motion for summary disposition and plaintiffs' motion to add party defendants on May 15, 2008, and ruled:

I'm going to grant summary disposition. I think the documentation is so clear, so overwhelming, that I will grant this summary disposition. Aside from the delivery of the deed—I grant summary disposition. The documentation is overwhelming.

Plaintiffs did not actively pursue their motion to add party defendants at oral argument, and it was denied without discussion. On May 29, 2008, an order to that effect was entered, and this appeal ensued.

II. Standard of Review

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). Our review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm's*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted 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." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

III. Analysis

On appeal, plaintiffs first argue that the trial court erred in granting defendant's motion for summary disposition because, viewing the evidence in a light most favorable to plaintiffs, the record rebuts the presumption, which was created by the physical transfer of the deed to defendant, that plaintiffs intended to give defendant a gift of equity in the home. Plaintiffs contend that there is a genuine issue of material fact as to whether the signing of the documents was accomplished as a result of mistake, misrepresentations, or undue influence.

The physical delivery of a deed raises a presumption of intent to pass title, although the presumption is not conclusive and can be rebutted. *Resh v Fox*, 365 Mich 288, 291-292; 112

NW2d 486 (1961). In this case, however, the trial court found that, excluding the delivery of the quitclaim deed to defendant's mother's home and not his address,¹ the documentary evidence was so overwhelming that plaintiffs intended to make a gift of equity in the amount of \$99,000 that summary disposition in defendant's favor was mandated. The documentary evidence relied upon by the trial court included the Sellers' Closing Statement, the Buyer's Closing Statement, and the HUD Settlement Statement, all of which indicate in writing a gift of equity in the amount of \$99,000. Contrary to plaintiffs' argument on appeal, they have not presented evidence to rebut the presumption that they intended to pass title of the property to defendant. As stated above, the only documentary evidence presented by plaintiffs was the Agreement Regarding Real Property and the Flagstar Bank questionnaires and plaintiffs' responses. Similarly, there is no evidence that plaintiffs' subsequent conduct revealed that they did not intend to pass title to defendant.

Extrinsic evidence may be used to supplement, but not contradict, the terms of a written agreement. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 836 (1982). "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

An examination of the documents that defendant submitted as evidence established that plaintiffs gave a written gift of equity in the home to defendant. The Sellers' and the Buyer's Closing Statements, as well as the HUD Settlement Statement, set forth a clear, unambiguous, and uncontroverted gift of equity in the amount of \$99,000 from plaintiffs to defendant. The Sellers' Closing Statement also provided for the payoff of plaintiffs' mortgage loan from Net Bank in the amount of \$211,048.80. The Sellers' Closing Statement indicated that plaintiffs:

- i) acknowledge that they have read the above and foregoing Closing Statement,
- (ii) acknowledge the same to be true and correct, and (iii) authorize and direct the Closing Agent to receive all amounts and disburse all amounts pursuant to the foregoing Closing Statement.

Plaintiffs both signed the Sellers' Closing Statement. The HUD Settlement Statement, which was also signed by both plaintiffs, showed a "Gift of Equity" in the amount of \$99,000 as being paid by plaintiffs on behalf of defendant for the sale of the home.²

¹ We do not believe this point to be significant because there is no claim by plaintiffs that defendant did not obtain possession of the quitclaim deed or that it was sent to defendant's mother's home with the intent that it not be received by defendant.

² We observe that although plaintiffs claim that they never intended to make a gift of equity in the home to defendant, we do not believe that plaintiffs, who are elderly and ill and were not represented by counsel when they signed the document, "knowingly ma[d]e false statements" in the HUD Settlement Statement regarding the gift of equity.

Citing *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995), plaintiffs assert that an exception to the extrinsic evidence rule exists where the record supports a claim of fraud in the inducement, i.e., 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. When used to enter a contract, it renders the contract voidable at the option of the defrauded party. *Id.* In *Begola*, this Court held:

[T]he trial court made detailed findings of fact on the record and concluded that plaintiff had perpetrated a fraud in inducing defendants to enter into the purchase agreements where plaintiff had no intention of abiding by their terms. The evidence clearly supports such a finding, and the evidence suggesting otherwise is minimal. Therefore, defendants were entitled to rescind the agreements and effected a rescission by refusing to proceed to closing. . . . [*Id.* at 640.]

This case is distinguishable from *Begola*, however, because in that case, the record supported a finding that there was a fraud in the inducement, whereas in this case it does not. Plaintiffs failed to present any evidence that defendant fraudulently induced or mislead them to transfer the home to him or give a gift of the money and the resulting equity in the home to him. Plaintiffs only alleged that defendant left them with the impression he would repay them. But the fact remains that plaintiffs signed documents that clearly stated they were giving a gift of equity to defendant in the amount of \$99,000. There is also no evidence that defendant did not intend to abide by the terms of the contracts he signed, and there is no allegation that he has not, in fact, abided by the terms of the contracts.

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition because, even though the record is limited, it strongly suggests that defendant was unjustly enriched. Therefore, plaintiffs assert, the trial court should have sua sponte imposed the remedy of a constructive trust even though they did not request it.

A constructive trust is an equitable remedy that may be imposed by the trial court where the facts justify it, and to avoid unjust enrichment where appropriate, even in the absence of a specific request for such remedy. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). "When property has been acquired in such circumstances that the holder of the legal title may not, in good conscience, retain the beneficial interest, equity converts him into a trustee." *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958).

In the case at bar, the circumstances do not justify the imposition of a constructive trust. The Sellers' and the Buyer's Closing Statements, as well as the HUD Settlement Statement, set forth a clear, unambiguous, and uncontroverted gift of equity in the amount of \$99,000 from plaintiffs to defendant. While plaintiffs allege that defendant left them with the impression he would repay them, the documents signed by them clearly stated they were giving a gift of equity to defendant. Plaintiffs argue that even if they made a gift, it was with the understanding that it would be repaid. Such an action would not constitute a gift, and plaintiffs' argument in this regard fails to take into account that gifts by their very nature are irrevocable. See, generally, *Jones v Causey*, 45 Mich App 271; 206 NW2d 534 (1973). Defendant was not unjustly enriched because after plaintiffs released the deed to the home to him, he arranged for financing from Flagstar Bank and paid off plaintiffs' Net Bank mortgage debt in the amount of \$211,000 in accordance with the agreement. Thus, the facts and circumstances presented did not warrant the

imposition of a constructive trust, and the trial court correctly granted defendants' motion for summary disposition.

Plaintiffs next argue that the trial court abused its discretion in denying their motion to amend because it can reasonably be inferred from their pleadings and other submissions that defendant made fraudulent misrepresentations or altered the documents after obtaining their signatures. Further, plaintiffs claim that because they were not present for a significant portion of the closing and, because the amount at issue is so substantial, Flagstar Bank should have contacted them to verify that they had indeed executed the documents after they were completed.

Under MCR 2.116(I)(5), in circumstances where the grounds for summary disposition are predicated upon subrule (C)(8), (9), or (10), leave to amend shall be freely given unless the evidence then before the court shows that amendment would not be justified. An amendment is not justified if it would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1977). "If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision." *Id.* at 659.

The documents submitted as evidence, including the Sellers' Closing Statement, the Buyer's Closing Statement, and the HUD Settlement Statement, were dispositive of all of the claims being advanced by plaintiffs, including their motion to amend. Further, the trial court had already ruled on the record that the documents overwhelmingly demonstrated that plaintiffs gave a gift of equity in the home to defendant. Plaintiffs' proposed amendment to add Flagstar Bank and Land Title Company was undermined by the same clear, overwhelming documentary evidence that undermined their original claim against defendant. Because the amendment was clearly futile, the trial court did not abuse its discretion in denying plaintiffs' motion to amend.

Our ruling in this case is based on the documents, most of which were signed by plaintiffs, that clearly stated that plaintiffs gave defendant a gift of equity in the amount of \$99,000. While we concede that plaintiffs may have been unaware of the particulars of the documents they were signing, they nevertheless signed them, and we are bound by case law herein cited to affirm the granting of summary judgment by the trial court.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly