

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JANET MILLER,

Plaintiff-Appellant,

v

WELLS FARGO BANK, N.A., and ARGENT  
MORTGAGE CO.,

Defendants-Appellees,

and

ESCROW FACTORY, JOHN DOE, and JANE  
DOE,

Defendants.

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UNPUBLISHED

March 16, 2010

No. 288259

Sanilac Circuit Court

LC No. 07-031758-CH

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

In this action to quiet title to property following a mortgage foreclosure, plaintiff appeals as of right from the orders granting defendants' motions for summary disposition. We affirm.

Plaintiff sought to quiet title to property after a mortgage foreclosure. Plaintiff owned the property with her husband, Robert Miller. After the couple divorced, Robert failed to make the payments, but was able to obtain a new mortgage with defendant Argent Mortgage Company (Argent). The mortgage was later assigned to defendant Wells Fargo Bank, N.A. In order to obtain the mortgage with defendant Argent, plaintiff's ex-husband asked her to sign off on the deed to the property, and she complied. Unfortunately, plaintiff's ex-husband was unable to maintain the payments on the new mortgage with defendant Argent, and the property was foreclosed. Plaintiff filed this action to prevent the foreclosure and quiet title to the land, alleging that defendants engaged in improper lending practices and that the underlying mortgage was void against public policy. However, plaintiff admitted in her deposition testimony that the contract at issue involved her ex-husband only, and she was not a party to the agreement. Consequently, the trial court granted defendants' motions for summary disposition of the claims alleging quiet title, silent fraud, conversion, and intentional infliction of emotional distress.

Plaintiff first alleges that the trial court erred in dismissing her claim for silent fraud. We disagree. The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Allegations of fraud must be pleaded with particularity, MCR 2.112(B)(1), and the failure to do so is fatal to the complaint. *Zimmerman v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 151 Mich App 566, 574; 391 NW2d 353 (1986). An action for fraudulent misrepresentation must be predicated on a past or existing fact, and future promises are contractual in nature and cannot constitute actionable fraud. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997).

The elements of a claim for silent fraud are: “(1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury[.]” *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988) quoting *Jaffa v Shackel*, 114 Mich App 626, 640-641; 319 NW2d 604 (1982). “The false material representation needed to establish [silent] fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose.” *Clement-Rowe v Mich Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). To establish a claim of silent fraud, a plaintiff must allege that the defendant intended to induce her to rely on a nondisclosure and that the defendant had an affirmative duty to disclose. *Id.*

In determining whether a legal duty is imposed, the court must evaluate factors such as the relationship of the parties, the foreseeability of the harm, the degree of certainty of injury, the closeness or connection between the conduct and the injury, the burden on the defendant, the moral blame attached to the conduct, the policy of preventing future harm, the burdens and consequences of imposing a duty and liability for breach, and the nature of the risk presented. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004); *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). The threshold question of whether a duty exists presents a question of law for the court. *Murdock*, 454 Mich at 53. After the court concludes that a duty exists, the factfinder determines, in light of the facts of each individual case, if there was a breach of duty. *Id.* at 53-54.

Plaintiff alleged that the trial court erred in concluding that defendants did not owe a duty to her. To reach that conclusion, plaintiff asserted that the trial court erroneously accepted defendants' representation that there was no contact between plaintiff and defendant Argent. Furthermore, defendant Argent allegedly misrepresented to plaintiff that her name had to be removed from the deed. Review of the documentary evidence submitted by the parties reveals that plaintiff admitted in her deposition that the financing transaction occurred between defendant Argent and plaintiff's ex-husband. Specifically, plaintiff testified that her ex-husband told her to deed the property to him to allow him to obtain the mortgage. All communications

regarding the mortgage at issue occurred between plaintiff's ex-husband and defendant Argent. Additionally, she testified that "everything to do with the mortgage, [she] was left out." At the closing, her ex-husband gave her a paper to sign. Furthermore, in her deposition testimony, plaintiff admitted that she knew that if her ex-husband did not pay the mortgage, the property would be lost in foreclosure. Plaintiff admitted that she did not have a contractual or any other type of relationship with defendants. Under the circumstances, the trial court did not err in dismissing the claim for silent fraud. The mortgage transaction at issue was between plaintiff's ex-husband and defendant Argent. Defendant Argent did not owe any duty to plaintiff. Moreover, if an improper financing transaction occurred, plaintiff's ex-husband would be entitled to challenge the transaction as a party to the contract. Therefore, this challenge to the dismissal of the silent fraud claim is without merit.<sup>1</sup>

Next, plaintiff alleges that the trial court failed to exercise its equitable jurisdiction, failed to provide due process of law, and erred in failing to strike defendants' second motion for summary disposition when discovery was outstanding. We disagree. Again, summary disposition decisions are reviewed de novo. *Kuznar*, 481 Mich at 175. This Court reviews de novo the issue of whether a due process violation occurred. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002).

Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Procedural due process serves as a limitation on government action and requires government to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id.* at 382. Due process is a flexible concept applied to any adjudication of important rights. *Thomas*, 249 Mich App at 724. The procedural protections, which include fundamental fairness, are based on what the individual situation demands. *Id.* Fundamental fairness includes: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the interest of the state or government, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Dobrzanski v Dobrzanski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). The opportunity to be heard does not include a full trial-like proceeding. *Id.* However, it does require a hearing such that a party has the chance to learn and respond to the evidence. *Id.*

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<sup>1</sup> Plaintiff alleges that two pages of her deposition testimony demonstrate that an agent of defendant Argent made a false statement to her. Our review is limited to the record created in the lower court. See MCR 7.210(A)(1). A party may not leave it to this Court to search for the factual basis offered in support of a position, but must correlate factual assertions to the location in the record. *Begin v Mich Bell Telephone Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). The pages cited by plaintiff are not contained in the lower court record. Additionally, only one of the two pages was attached to the brief on appeal. Therefore, plaintiff failed to substantiate the contacts with defendants such that a duty to disclose existed.

A motion for summary disposition filed before the close of discovery is premature unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *Liparoto Constr, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). A party opposing a motion for summary disposition on the basis of incomplete discovery must comply with the requirements in MCR 2.116(H) by presenting affidavits to support its position. *Coblentz v Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006) (with the court rule essentially requiring the nonmoving party to provide an affidavit addressing why the documentary evidence was unavailable and what the evidence would establish). If the opposing party fails to present the necessary affidavits to demonstrate that the position would be supported by additional discovery, the party cannot complain that summary disposition pursuant to MCR 2.116(C)(10) was premature. *Id.* at 571.

With regard to the discovery claim, there is no indication that plaintiff filed an affidavit in accordance with MCR 2.116(H) in the lower court record. Therefore, the trial court did not err in granting the motions for summary disposition before the close of discovery. Plaintiff claims that the discovery would have yielded information regarding the predatory lending. However, plaintiff does not dispute that she was not a party to the mortgage. Therefore, even if documentation of predatory lending was uncovered, the cause of action arising from that information belongs to plaintiff's ex-husband. Although plaintiff asserted that her name did not need to be removed from the deed, plaintiff failed to present any information from experts or her own financial information to indicate that a mortgage would have been offered to her ex-husband while plaintiff still had an interest in the property. Additionally, plaintiff acknowledged in her deposition that she had no contact with agents of defendants. Rather, her ex-husband told her that the removal of her name from the deed was required. The trial court did not err in granting summary disposition in favor of defendants prior to the close of discovery when plaintiff failed to comply with the requirements of MCR 2.116(H) and was not a party to the mortgage transaction.

Plaintiff's contention that she was deprived of due process of law and fundamental fairness also does not have merit. The trial court was not required to hear oral argument regarding plaintiff's motion to strike, MCR 2.119(E)(3), and the trial court was not required to rule on the motion to strike before the hearing regarding defendants' second motion for summary disposition. Plaintiff contends that she was deprived of due process of law because she was required to engage in discovery despite a severe medical condition, but defendants were not required to provide answers to her interrogatories. In the lower court record, documentary evidence indicates that defendants objected to the cancellation of plaintiff's deposition. However, plaintiff failed to present any hearing transcripts wherein the trial court required plaintiff to participate in discovery despite a serious illness. Furthermore, there are no medical records in the lower court file indicating that plaintiff was unable to participate in discovery due to illness. Therefore, it cannot be concluded that a denial of due process occurred. *Thomas*, 249 Mich App at 724.

With regard to the contention that the trial court was distracted during the hearing, we conclude that the record does not support the allegations that the trial court's review of materials before rendering its ruling constitutes a denial of due process. The trial court stated that it had read the materials and repeatedly asked plaintiff's counsel to wrap up oral argument because counsel was reciting information contained in the briefs and the hearing was approaching an hour

in length. Then, the trial court asked, on the record, for a staff member to bring a “volume” of materials to review. The trial court was apparently reviewing the materials when plaintiff’s counsel stopped arguing because the trial court was “distracted.” The trial judge stated that he was listening and referenced the information that plaintiff’s counsel had last addressed. The trial court’s preparation to render a decision while plaintiff’s counsel continued to speak does not demonstrate a denial of due process. *Thomas*, 249 Mich App at 724.

Plaintiff next contends that the trial court erred in dismissing her claim for intentional infliction of emotional distress. We disagree. In order to establish a claim for intentional infliction of emotional distress, plaintiff had to demonstrate: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). Liability for this tort will only be found where the conduct complained of is so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). The trial court must initially determine whether a defendant’s conduct may reasonably be regarded as so extreme and outrageous to permit recovery. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999).

The possible loss of one’s residence is surely a stressful event. However, plaintiff testified that her ex-husband fell behind on a prior mortgage. Therefore, he sought out financing from defendant Argent. Plaintiff learned of the new mortgage because her ex-husband advised that she needed to sign off on the deed to the property. She acknowledged, in her deposition, that the property would be subject to foreclosure if her ex-husband failed to make the payments to defendant Argent. However, as noted previously, the transaction at issue was between her ex-husband and defendants. Plaintiff failed to identify defendants’ intentional and reckless conduct directed toward her when she admittedly had no relationship with them. We recognize that plaintiff raised allegations of impropriety underlying the mortgage transaction involving her ex-husband. However, the viability of a cause of action between her ex-husband and defendants is not at issue in this case.<sup>2</sup> Accordingly, plaintiff failed to sustain a cause of action for intentional infliction of emotional distress against these defendants.

Lastly, plaintiff alleged that the trial court erred in failing to hold that a genuine issue of material fact existed regarding the posting of notice of foreclosure on the front door of the subject property. We disagree. A statement of position without citation to authority is insufficient to raise an issue before this Court. *Sherman v Sea-Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002). Plaintiff contends that a factual issue exists because she did not see the notice. However, she fails to cite to the applicable statutes to address the type of notice required and whether constructive notice is sufficient. For purposes of completeness, we note that MCL 600.3208 provides that notice of the mortgage foreclosure must be published in the newspaper, and a true copy of the notice “shall be posted in a conspicuous place upon any part of

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<sup>2</sup> We note that defendant Title Stream, an entity not a party to this appeal, filed a notice of a non-party at fault against Robert Miller, the ex-husband. Despite this notice, he was not added as a party to this litigation.

the premises described in the notice.” The party challenging the sufficiency of the posting has the burden of proof. *Cox v Townsend*, 90 Mich App 12, 15; 282 NW2d 223 (1979). Personal or actual notice is not required at common law or by statute. *Moss v Keary*, 231 Mich 295, 299; 204 NW 93 (1925); *Cheff v Edwards*, 203 Mich App 557, 560-561; 513 NW2d 439 (1994). Plaintiff was not entitled to actual notice, and therefore, her contention that she did not see the notice is insufficient.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Richard A. Bandstra  
/s/ Karen M. Fort Hood