STATE OF MICHIGAN

COURT OF APPEALS

GABRIELA GIURA, MARIA GIURA, PETRU GIURA and DANUTZ GIURA,

Plaintiffs-Appellees,

V

ALDO BARTOLOMEO and SOURCE ONE MORTGAGE CORPORATION d/b/a MAXIMUM MORTGAGE & FINANCIAL SERVICES,

Defendants,

and

DAWN BARTOLOMEO,

Defendant-Appellant.

UNPUBLISHED
September 28, 2010

No. 291952
St. Clair Circuit Court
LC No. 07-003120-CZ

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant Bartolomeo (hereafter defendant) appeals by right an April 20, 2009 judgment awarding plaintiffs $42,885.06 in actual damages and $19,000 in attorney fees under the Michigan Consumer Protection Act (MCPA) as to the parties' transactions regarding several parcels of real property. We affirm.

We first address defendant's argument that the circuit court should have processed plaintiff Gabriela Giura's related appeal from a district court judgment in favor of defendant as an appeal, pursuant to MCR 7.100 *et seq.*, and should have decided that appeal solely on the basis of the district court record. Instead, the circuit court "merged" that appeal with the separate circuit court action plaintiffs filed, calling both matters for trial on March 26, 2009. Defendant argues that the procedure the circuit court followed was not authorized by the Michigan Court Rules and improperly allowed a collateral attack on the district court's judgment.

We note defendant has abandoned this claim through lack of development on appeal.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. If a party fails to adequately brief a position, or support a claim with authority, it is abandoned. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Here, defendant maintains that the circuit court erred in "merging" plaintiff Gabriela Giura's appeal with the plaintiffs' other claims and maintains that this was an impermissible collateral attack. But she provides no discussion of how, if at all, defendant's district court proceeding could have, or should have, prevented Gabriella Giura from filing her counterclaim in circuit court, irrespective of whether the district court still retained jurisdiction of defendant's initial claim for forfeiture. She fails to discuss the applicable court rules or case law giving jurisdiction to the district court in these circumstances. Nor has she discussed how the district court proceeding could have or should have prevented the other plaintiffs, who were not named parties in the district court proceeding, from filing their complaint in circuit court. Nor has she provided authority on whether the circuit court was required to stay its own proceedings or to hear Gabriela's appeal before it reviewed the claims made by the plaintiffs. Most importantly, she has not discussed how, in light of the circuit court's other findings and conclusions, which we affirm below, a remand would avail her of anything at this point. "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *MOSES, Inc v Southeast Michigan Council of Gov'ts*, 270 Mich App 401, 417; 716 NW2d 278 (2006). Because defendant has failed to adequately brief or support this claim of error with authority, we find that it is abandoned.

Next defendant argues that the trial court erred in finding that she violated the MCPA because mortgage brokers are specifically regulated by statute and are therefore exempt from having to comply with the MCPA. Defendant argues that mortgage brokers, lenders, and services are exempt because they are specifically regulated by the Michigan Mortgage Brokers Lenders and Servicers Licensing Act, which covers any person who makes mortgage loans. But the MCPA specifically places the burden of proving an exemption from the MCPA on the person claiming the exemption. MCL 445.904(4). The exemption under MCL 445.904(1)(a) is an affirmative defense, *Liss v Lewiston-Richards*, 478 Mich 203, 208 n 13; 732 NW2d 514 (2007), which is waived unless the party asserting the defense raises it in the party's first responsive pleading or motion for summary disposition. *Id.*; MCR 2.111(F)(2), (3). Unlike in *Liss*, defendant did not timely assert as an affirmative defense the argument that she was exempt from the MCPA. Because defendant failed to raise the affirmative defense and failed to meet its burden of proving that she was exempt from the MCPA, defendant has waived this defense.

Defendant further contends that the trial court's award of attorney fees was not reasonable. The trial court has discretion to award attorney fees under the MCPA. MCL 445.911(2); *Smolen v Dahlmann Apts, Ltd*, 186 Mich App 292, 296; 463 NW2d 261 (1990). However, we need not consider defendant's unpreserved claim regarding the reasonableness of the attorney fee award, which was raised for the first time on appeal and was not included in her statement of questions presented. MCR 7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281

Mich App 184, 221; 761 NW2d 293 (2008); *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000).

Next defendant argues that the trial court should have treated her motion for a directed verdict as a motion for involuntary dismissal pursuant to MCR 2.504(B)(2). Defendant contends the motion should have been granted since plaintiffs did not show that they were entitled to relief by providing sufficient evidence to support their claims. This Court reviews a trial court's ultimate decision on a motion for involuntary dismissal de novo, and reviews underlying factual determinations for clear error. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Under MCR 2.504(B)(2), a motion for involuntary dismissal should be granted when the court, sitting as factfinder, determines based on the facts and the law the plaintiff has shown no right to relief. *Id*. Similarly, this Court reviews "the trial court's findings of fact in a bench trial for clear error and conduct[s] a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). We will determine a trial court's findings are clearly erroneous only when we are left with a definite and firm conviction that a mistake has been made. *Wild Bros*, 210 Mich App at 639.

Defendant specifically contends that there was insufficient evidence to support a determination of fraud in the inducement. Defendant maintains that plaintiffs were not induced by any misrepresentations; they did not act in reliance on false statements, and they were not damaged since they would have lost all of their properties regardless of defendant's actions based on their financial status. According to defendant, at the time plaintiffs contacted her and Source One Mortgage, the properties were already all in foreclosure. Defendant also argues that the trial court erred in its determination of fraud in the execution and forgery because it did not apply the statutory presumption of validity for notarized documents.

The elements of actionable fraud are (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew when the representation was made that it was false, or made it recklessly, without knowledge of its truth as a positive assertion, (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon the misrepresentation, and (6) the plaintiff suffered damage. *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Fraud in the inducement occurs when a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are in fact relied upon. *Wild Bros*, 210 Mich App at 639. "'Fraud in the execution' or factum means the proponent of the instrument told the signatory thereof that the instrument really didn't mean what it clearly said, and that the signatory relied on this fraud to his detriment." *Paul v Rotman*, 50 Mich App 459, 463-464; 213 NW2d 588 (1973).

Here, defendant argues that the trial court "did not properly address" the elements of fraud, did not explain how defendants intended to induce reliance, and did not discuss how plaintiffs were damaged. However, we find that the trial court's findings of fact were not clearly erroneous given the testimony and evidence presented and that the evidence was sufficient to support the trial court's decision regarding plaintiffs' various fraud claims.

In the present case, the trial court made detailed findings of fact on the record and concluded that defendant and Aldo Bartolomeo had perpetrated a fraud in inducing Gabriela to enter into the land contract agreements. The trial court further found that defendant acted

fraudulently in creating and filing an earlier promissory note and concurrent quitclaim deeds for the two vacant lots, 6049 St. Pierre and 9620 Pearl Beach Blvd., referenced in the land contracts, and ostensibly transferred by Maria Giura. The court concluded that defendant and Aldo Bartolomeo had engaged in this activity in order to improperly claim ownership of the parcels.

The evidence supports the trial court's findings concerning the execution of the deeds purporting to transfer title of the vacant lots from Maria Giura to defendant. The promissory note dated September 8, 2005, ostensibly signed by Maria, indicated that she owed the Bartolomeos $38,000 plus late fees and stated that Maria was quitclaiming four properties to defendant to secure the debt owed on the properties. The note stated:

> I owe Dawn and Aldo Bartolomeo $38,000 plus late fees. It is my understanding that until the debt is paid in full I am quitclaiming 604[9] St. Pierre, Township of Clay, MI 48001 and 9620 Pearl Beach Boulevard, Township of Clay, MI 48001. These two properties shall secure my debt owed *and shall secure the land contracts on 9634 Pearl Beach Boulevard, Township of Clay, MI 48001 and 9628 Pearl Beach Boulevard, Township of Clay, MI 48001*. It is in full understanding that the Giura family will receive a lien release on the lots when the land contracts are satisfied and paid in full. It is in full agreement that the land contracts will be satisfied in a twelve month period. If the Giura family default on the Land Contracts, the vacant lots will be forfeited to pay outstanding expenses. The Giura family shall pay the taxes due on all four properties. [Signed] Maria Giura. [Emphasis added].[1]

Defendant argues that the trial court erred in its determination of fraud in the execution and forgery. She asserts that the trial court failed to apply the statutory presumption of the validity of the facts stated in notarized documents, relying on MCL 55.113, and cases such as *Vriesman v Ross*, 9 Mich App 102, 106; 155 NW2d 857 (1967), applying that statute. But 2003 PA 238 repealed MCL 55.113 and replaced it with the Michigan Notary Public Act, MCL 55.261, *et seq.*, effective April 1, 2004. As noted already, this Court is not required to search for authority to sustain or reject a position raised by a party. *Mitcham*, 355 Mich at 203. Although it is presumed that the signatures affixed to a deed are accurate and valid, *Boothroyd v Engles*, 23 Mich 19, 21 (1871), a presumption may be rebutted by the presentation of clear, positive, and credible evidence in opposition, *Vriesman*, 9 Mich App at 106. So, too, fraud may be established by clear, satisfactory and convincing evidence. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008).

Here, defendant presented the promissory note and quitclaim deeds and argued that the documents should be presumed valid because they were notarized. However, the trial court did

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[1] The two related quitclaim deeds were also dated September 8, 2005 and listed the consideration on each deed as one dollar. The deed covering 9620 Pearl Beach Blvd. was recorded on December 27, 2005. The deed covering 6049 St. Pierre was recorded on January 24, 2006.

not err in concluding that there was clear and credible evidence to rebut any presumption that may have arisen. There was contradictory evidence that Maria Giura did not sign the documents and was not aware that the documents existed. Maria stated that she never discussed a promissory note or quitclaim deeds with defendant. Maria said that she first learned of the quitclaim deeds in the summer of 2007 when she attempted to sell the two vacant lots and a real estate agent informed her that she did not own the properties. On the quitclaim deeds, Maria was listed as a single woman, although she was married at all relevant times. Maria maintained that she had no understanding that she owed defendant and Aldo Bartolomeo $38,000 plus late fees. Maria testified that she did not sign the promissory note or the two quitclaim deeds, and she had not seen the documents until 2007 during a meeting with her attorney. Petru Giura also testified that the signature on the documents did not look like Maria's. Also, as the trial court observed, the note, ostensibly signed in September 2005, refers to land contracts that were not executed until February 2006, and which were not even contemplated for months after the execution of the note. When reviewing the trial court's findings of fact, we must recognize the trial court's unique opportunity to observe the witnesses, determine credibility, and weight of trial evidence. MCR 2.613(C); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Taken as a whole, the evidence was sufficient to support the trial court's finding of forgery.

Moreover, plaintiffs provided evidence that defendant obtained Gabriela's signature on the two land contracts at issue by misrepresenting that each land contract was encumbered by one property, when in fact each land contract had a second vacant property listed as collateral. Gabriela claimed that when she went to sign the land contracts, defendant had improperly included the two vacant lots as collateral on the land contracts. Danutz corroborated Gabriela's testimony. According to Danutz, the land contract for 9634 Pearl Beach Blvd. also incorrectly included 6049 St. Pierre, and 6049 St. Pierre was crossed out and initialed. The land contract for 9628 Pearl Beach Blvd. improperly included 9620 Pearl Beach Blvd. Danutz and Gabriela requested that the vacant lots be removed from the land contracts and defendant agreed to correct the documents and mail a new cover page. Gabriela signed the land contracts. Neither she nor Danutz ever received a copy of corrected land contracts, as promised. Based on this evidence, the trial court could correctly find fraud in the inducement, given the promise to remove the language concerning the vacant lots, or perhaps more correctly fraud in the execution, in that Gabriela signed the documents relying on defendant's assertion that they did not involve the vacant lots. Thus, sufficient evidence supported the court's conclusion that defendant fraudulently obtained title to the two vacant lots.

We affirm. Plaintiffs, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering