

STATE OF MICHIGAN
COURT OF APPEALS

DANETTA LYNESE SIMPSON,

Plaintiff-Appellant,

UNPUBLISHED
June 14, 2012

v

JP MORGAN CHASE BANK, N.A., as Trustee,
and OCWEN LOAN SERVICING, L.L.C.,

No. 302800
Wayne Circuit Court
LC No. 09-006829-CK

Defendants-Appellees.

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

In this mortgage foreclosure case, plaintiff, Danetta Lynese Simpson, appeals as of right the circuit court order granting summary disposition in favor of defendants, JP Morgan Chase Bank N.A. (“JP Morgan”), and Ocwen Loan Servicing, L.L.C. (“Ocwen”). Because we find that plaintiff failed to demonstrate a genuine issue of material fact in regard to her innocent misrepresentation claim, we affirm.

In 2002, plaintiff executed a mortgage which was subsequently purchased by defendant JP Morgan and serviced by defendant Ocwen. Plaintiff often struggled to make her mortgage payments, and the parties entered into numerous forbearance agreements allowing plaintiff to modify her obligations to postpone foreclosure between 2004 and 2007. Eventually, defendants commenced foreclosure proceedings on March 15, 2007, and set a foreclosure sale date of April 19, 2007. The foreclosure sale never occurred on April 19, 2007 because on April 4, 2007, the parties negotiated another forbearance agreement. Defendants faxed a written agreement to plaintiff at a party store that plaintiff had used in the past to accept faxes on April 4, 2007. The forbearance agreement required that plaintiff pay defendants \$2,500 by April 9, 2007. Plaintiff claims defendants did not notify her they were sending the fax and that she did not receive it until April 15, 2007, when she happened to be shopping at the store.

Plaintiff called defendants on April 17, 2007, and explained that she did not have the full \$2,500 down payment but that she had \$1,300 she could send immediately and would send the rest as soon as possible. Defendants informed her there was no guarantee they would halt the foreclosure sale within 72 hours. On April 18, 2007, the parties spoke again and the call logs indicate a customer service agent informed plaintiff that management approved a resolution to

postpone the foreclosure sale for one week, until April 25, 2007, to allow plaintiff additional time to submit the necessary funds.

Plaintiff claims the agent told her she had until May 2, 2007, to submit the payment. Plaintiff submitted \$2,500 to defendants on April 30, 2007, but defendants had already commenced foreclosure proceedings and sold plaintiff's home in a foreclosure sale on April 26, 2007. On May 2, 2007, plaintiff returned the signed forbearance agreement to defendants.

On May 30, 2007, the April 26, 2007 foreclosure sale was rescinded and the prior mortgage was declared to be in full force and effect. Plaintiff continued to try to make arrangements with defendants to pay the mortgage and avoid foreclosure, but was unable to do so. On August 27, 2007, another foreclosure sale was noticed. A note in defendants' call log, dated September 26, 2007, indicates that forbearance would no longer be available to plaintiff. A foreclosure sale was held on October 18, 2007, and the property was sold to defendant JP Morgan for \$340,832.78. Plaintiff had until April 18, 2008, to redeem the property. She failed to do so.

After expiration of the redemption period, defendant JP Morgan filed a summary proceeding for possession of the property in the district court. The district court entered judgment in favor of defendant JP Morgan¹ on September 30, 2008, and on January 9, 2009, the circuit court affirmed.

On March 24, 2009, plaintiff filed a complaint in the circuit court, claiming breach of contract, innocent misrepresentation, and a violation of the Michigan Regulation of Collected Practices Act. She also sought to set aside the sheriff's sale as void and requested injunctive and other relief, including a temporary restraining order permitting her to remain in the home. Plaintiff also moved to stay the writ of restitution in the district court, and the district court granted the stay on the condition that plaintiff pay a \$2,000 bond and \$300 monthly payments into escrow.

Defendants moved for summary disposition and, on June 15, 2009, the circuit court granted defendants' motion and dismissed the case on the ground that all issues were precluded by res judicata, having been litigated in the district court possession action.

Plaintiff appealed and, on September 30, 2010, a panel of this Court affirmed the circuit court's dismissal of plaintiff's breach of contract claim, her request to set aside the sheriff's sale, and her request for injunctive relief. *Simpson v JP Morgan Chase Bank, N.A.*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2010 (Docket No. 292955). However, this Court held the circuit court erred in dismissing plaintiff's claims for innocent misrepresentation and violation of the Michigan Regulation of Collected Practices Act, finding these issues were not barred by res judicata since they were not raised in the district court proceedings and a judgment in plaintiff's favor on those issues would not conflict with the

¹ Although in the possession action defendant JP Morgan was actually the plaintiff, for consistency we refer to JP Morgan as defendant and Simpson as plaintiff.

district court's judgment awarding possession. *Id.* Accordingly, this Court remanded those claims to the circuit court. *Id.* at 3.

On December 10, 2010, defendants filed another motion for summary disposition in the circuit court on remand, pursuant to MCR 2.116(C)(7), (8), and (10). Defendants asserted that both claims should be dismissed for failure to state a claim, that plaintiff waived all claims against defendant Ocwen, that the innocent misrepresentation claim should be dismissed because tort claims cannot be brought pursuant to a breach of contract, and that plaintiff's claims were barred by the statute of frauds.

The circuit court held a hearing on defendants' motion for summary disposition on February 4, 2011. The circuit court found that plaintiff failed to establish her innocent misrepresentation claim because she could not show reliance on defendants' statements, damages, or that any benefit had inured to defendants as a result of any purportedly false statements. The circuit court accordingly dismissed the innocent misrepresentation claim. The circuit court also found that defendants were not debt collection agencies as defined by Michigan law and dismissed plaintiff's claim that defendants violated the Michigan Regulation of Collected Practices Act.

On appeal, plaintiff argues that the circuit court erred in dismissing her innocent misrepresentation claim.² She claims that defendants' representation to her that they would wait until May 2, 2007, to foreclose on her home was false because they sold the house in a foreclosure sale on April 26, 2007. She alleges that she relied on this representation, she suffered injury because of it, and a benefit inured to defendants as a result of her injury.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7),³ (8), and (10). Although the circuit court was not explicit about which rule it used, defendants submitted documentary evidence with their motion. When a trial court considers facts outside the pleadings, summary disposition is treated as having been based on MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

We review a trial court's decision on a motion for summary disposition de novo. *Duffy v Mich Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011), citing *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006). A motion based on MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474-475; 776 NW2d 398 (2009), citing *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This Court must review only the evidence that was before the trial court when it decided the motion, and must do so in the light most favorable to the nonmoving

² Plaintiff does not appeal the circuit court's dismissal of her claim based on the Michigan Regulation of Collected Practices Act.

³ Defendants claim pursuant to MCR 2.116(C)(7) was based on the affirmative defenses of the statute of frauds and plaintiff's contractual release of claims.

party. *Innovative Adult Foster Care, Inc*, 285 Mich App at 475-476, citing *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). A genuine issue of material fact exists “when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008), citing *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The Court is liberal in finding a genuine issue of material fact. *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008), citing *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). The mere possibility that a claim might be supported by evidence brought at trial is insufficient to establish a genuine issue of material fact. *Maiden*, 461 Mich at 121.

“A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation.” *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009), quoting *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). The representation must be material. *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008). A plaintiff need not show that the representation was intentionally fraudulent, but must show privity of contract existed between the parties. *Unibar Maintenance Servs, Inc*, 283 Mich App at 621, citing *M & D, Inc*, 231 Mich App at 27-28.⁴

Plaintiff does not argue the parties lacked privity of contract. With respect to the elements of innocent misrepresentation, plaintiff claims defendants told her that, if she paid them \$2,500 by May 2, 2007, they would not foreclose on the property. Because defendants sold the property in a foreclosure sale on April 26, 2007, plaintiff claims that defendants’ alleged representation that the property would not be foreclosed on until May 2, 2007 was false. Plaintiff essentially argues that she detrimentally relied on being able to wait until May 2, 2007, to make her \$2,500 down payment and that she suffered injury when defendants foreclosed on her home prior to that date. However, defendants submitted call logs showing that on April 18, 2007, defendants told plaintiff that management had approved a resolution to allow plaintiff one week to submit the necessary funds. This would have given plaintiff until April 25, 2007, to pay defendants, rather than May 2, 2007, as plaintiff claimed. If true, this negates plaintiff’s allegation of a false representation because the representation that defendants would wait until April 25, 2007, to foreclose was not false. The foreclosure sale occurred on April 26, 2007. Plaintiff submitted no documentary evidence to refute this factual showing by defendants.

Pursuant to MCR 2.116(G)(4), when a motion for summary disposition is supported by affidavits, depositions, admissions, or other documentary evidence, “an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as

⁴ Defendants assert they owed plaintiff no duty of care; however, that argument is relevant only to a claim of negligent misrepresentation, not to innocent misrepresentation, which is what plaintiff asserted here. See *Unibar Maintenance Servs, Inc*, 283 Mich App at 621, quoting *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006) (holding that a negligent misrepresentation claim requires that a plaintiff show she justifiably and detrimentally relied on information prepared without reasonable care by a party who owed the plaintiff a duty of care).

otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” Appropriate judgment shall be entered against any party that fails to set forth specific facts showing a genuine issue of fact for trial. MCR 2.116(G)(4). In light of plaintiff’s failure to refute defendants’ factual showing that plaintiff was told that she had only until April 25, 2007, to make her payment in order to postpone foreclosure, defendants’ postponement of the foreclosure sale until April 26, 2007, and plaintiff’s admitted failure to pay defendants the \$2,500 down payment until April 30, 2007, we conclude that there is no genuine issue of material fact with respect to whether defendants made a false representation. Plaintiff cannot defeat a motion for summary disposition simply by continuing to allege that defendants told her she had until May 2, 2007, to make her payment in the face of defendants’ presentation of documentary evidence showing they told her she only had until April 25, 2007.

Additionally, plaintiff has not articulated any benefit that has inured to defendants. She concedes defendants returned her \$2,500 down payment and refused to accept any further monthly payments from her after April 2007. She points to no other benefit received by defendants, simply alleging that “she has suffered injuries as a result of the representations that have led to the foreclosure and sale of her home at Sheriff’s Sale and that this injury inures to the benefit of the Defendant[s]” without citing any factual support for her allegation. Even if all of plaintiff’s factual allegations are accepted as true, plaintiff has not established a genuine issue of material fact with respect to whether any benefit has inured to defendants as a result of their representations. Accordingly, the circuit court properly granted summary disposition to defendants pursuant to MCR 2.116(C)(10).⁵

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

⁵ In light of our conclusion that summary disposition was proper based on plaintiff’s failure to demonstrate a genuine issue of material fact, we decline to address defendants’ additional arguments regarding the statute of frauds and release of claims.