

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA HOWARD,

Plaintiff-Appellant,

v

TROTT & TROTT, PC and DONALD L. KING,

Defendants-Appellees.

UNPUBLISHED

September 11, 2012

No. 304457

Wayne Circuit Court

LC No. 10-007351-CZ

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

In this fraud and abuse of process case, plaintiff Cynthia Howard appeals the trial court's grant of defendant Trott & Trott, PC and Donald L. King's motion for summary disposition under MCR 2.116(C)(7) (statute of limitations), and MCR 2.116(C)(8) (failure to state a claim on which relief may be granted). We affirm in part and reverse in part and remand.

The case arose from an eviction proceeding brought by defendants on behalf of a mortgage lender. Plaintiff obtained a 30-year mortgage from a Michigan financial services company to buy a home in Detroit in August 1997. The mortgage was later assigned to Alliance Mortgage Company of Jacksonville, Florida. Six years later, in late 2003, plaintiff lost her job and fell behind in her mortgage payment. AMC referred the mortgage to the law firm of Trott & Trott, P.C. for foreclosure. Defendants notified plaintiff that the property would be sold in an auction on January 21, 2004. At the auction, AMC bid on the property and obtained a sheriff's deed with a redemption deadline of July 21. After the foreclosure sale, plaintiff found a group of investors led by Douglas Benoit of the Douglas Realty Group, Ltd (the realty group) who agreed to redeem the property and lease it back to her until she could obtain financing to buy it back.

On the last day of the redemption period, Benoit presented plaintiff with a warranty deed for her signature to transfer title to a company owned by Benoit and his associate Mark Smith. Plaintiff was told that Jefferson Finance had redeemed her property and accordingly signed the warranty deed transferring title to Jefferson Finance. She was not given or shown any proof of the redemption.

Unbeknownst to plaintiff, on the same day, July 21, 2004, the register of deeds notified defendants that redemption had been made of the sheriff's deed. Defendants filed a notarized acknowledgment with the register of deeds confirming their receipt of full payment for redemption of the property. Three weeks later, on August 5, 2004, plaintiff signed a lease with

Benoit for a month-to-month rent of the redeemed property until she could obtain financing to buy it back. Shortly after she signed the lease, plaintiff was served with a complaint for a summary proceeding in 36th District Court commenced on behalf of the mortgage lender by defendants, to evict her from her home on the ground that she was wrongfully holding over in the property after the expiration of the redemption period following a mortgage foreclosure sale.

Plaintiff took the complaint to Douglas Benoit to inform him and the realty group that attorneys for the mortgage lender filed action in the 36th District Court to evict her from her home because they claimed the property was not redeemed before the end of the redemption period. Douglas Benoit told plaintiff he would contact the lender's attorneys and the district court to straighten things out.

On the eviction hearing date, August 13, 2004, plaintiff went to court to be sure the complaint to evict her from her home had been withdrawn, but instead was surprised when her case was called to see an attorney from defendant's office in court for the hearing. The attorney presented the sheriff's deed to the judge. Plaintiff told the judge that she was informed Jefferson Finance had redeemed the property on her behalf and that she signed a lease to live in the property. The judge would not consider her claim without any proof and told plaintiff that she must move out of the property she was occupying or else she would be removed by court order on September 14, 2004. Defendants requested that plaintiff sign a judgment form giving possession of the property to the mortgage lender. Plaintiff signed the judgment.

After the eviction hearing, plaintiff contacted Douglas Benoit to inform the realty group that the lender's attorney was in court to demand possession of her house because the property was not redeemed before the end of her redemption period, that the court told her to move out of the property or else she would be removed by court order on September 14, 2004 and that she was told to sign the judgment giving the property to the mortgage company. Douglas Benoit said he was going to contact the lender's attorneys to clear things up. On August 31, 2004, plaintiff, believing that her home had not been redeemed and that she was faced with eviction by the court, moved out of the property and did no further investigation of the matter for nearly six years.

Plaintiff contacted an attorney in May 2010 to look into the loss of her home. Plaintiff learned from the attorney that her home was actually redeemed on her behalf on the last day of her redemption period by Jefferson Finance; that defendants were notified of the redemption on the same day; and that an attorney from defendants' office filed a notarized acknowledgment confirming their receipt of payment in full for the redemption on the same day.

Plaintiff brought this action against defendants asserting claims for fraud and abuse of process, and seeking damages for the loss of the equity in her home and the hardship and suffering she has endured as a result of her wrongful eviction from her home. Defendants filed a motion for summary disposition of the claims against them pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). After hearing arguments from the parties, the trial court concluded that plaintiff's claim for fraud had not been supported by sufficient allegations, and that plaintiff's abuse of process claim was barred by the statute of limitations. On November 23, 2010, the trial court entered an order granting defendants' motion for summary disposition.

We review a trial court's order of summary dismissal de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In assessing a motion brought under MCR 2.116(C)(8), all factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

We review de novo a trial court's ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(7). *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). In reviewing the record to determine if the moving party was entitled to judgment as a matter of law, we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings in favor of the non-moving party. *Id.* Absent a disputed question of fact, the determination whether a cause of action is barred by a statute of limitations is a question of law that this Court reviews de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). As a general rule, exceptions to statutes of limitations are strictly construed. *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984).

The elements of 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 due to reliance on the misrepresentation. *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 517; 309 NW2d 645 (1981). Plaintiff established that defendants made a false representation when they told her and the court that the property had not been redeemed. Plaintiff also provided evidence that defendant law firm had received notice, and acknowledged that the property had been redeemed a week before the hearing thereby establishing that defendants knew or should have known that the property had been redeemed. Additionally, it appears as though defendants intended plaintiff to rely on their assertions and intended that she vacate the property.

Next plaintiff must establish that she reasonably relied on a material misrepresentation. See *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005) (noting that the plaintiff was required to "show that any reliance on defendant's representations was reasonable"); *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004) (agreeing with the trial court that a party's reliance in a fraud action must be reasonable). Plaintiff has alleged that she relied on defendants' misrepresentations that the property had not been redeemed. Additionally, defendants made the same misrepresentation to the district court, which then made a ruling against plaintiff based on the incorrect information. Based on this misrepresentation, plaintiff contends that she moved from the property. Given plaintiff's lack of sophistication and defendants' superior knowledge of the law and judicial process, a factfinder may well find that

plaintiff's reliance on defendants' representations was reasonable. Before summary disposition may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. *Peterfish v Frantz*, 168 Mich App 43, 48-49; 424 NW2d 25 (1988). Summary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind. *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). The court may not make findings of fact or weigh credibility in deciding the motion. *Paul v US Mutual Financial Corp*, 150 Mich App 773, 779; 389 NW2d 487 (1986). Thus, when the truth of a material factual assertion depends on a determination of credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). Here, because it is possible that plaintiff reasonably relied on defendants' misrepresentations, summary disposition was not appropriate.

The final element of a fraud claim is injury. Plaintiff has alleged that she moved from the property and missed an opportunity to buy back her house. She stated that she had established equity in the house worth at least \$30,000, which she could have possibly regained if not for defendants' misrepresentations that caused her to vacate the property. Therefore, plaintiff has alleged facts sufficient to support the element of injury.

Because plaintiff's complaint alleged facts sufficient to support her claim of fraud, the trial court erred by granting summary disposition of her fraud claim.

As for plaintiff's abuse of process claim, plaintiff's complaint merely states, "[d]efendants' fraudulent and improper use of the court to bully and intimidate Plaintiff and pressure her to move out of her home without any basis in law constitutes an abuse of process." The Michigan Supreme Court defined the tort of abuse of process as "the willful and fraudulent use of a valid legal process to obtain a result the law did not intend." *Moore v Michigan National Bank*, 368 Mich 71, 74; 117 NW2d 105 (1962). This court has stated that the essential elements of an action for abuse of process are: (1) the existence of an ulterior purpose and (2) an act in the use of the process not proper in the regular conduct or prosecution of the case. *Rowbotham v DAIIE*, 69 Mich App 142, 147; 244 NW2d 389 (1976), citing *Spear v Pendill*, 164 Mich 620; 130 NW 343 (1911).

Here, plaintiff has not provided any evidence that defendants had an ulterior motive in bringing an eviction action against plaintiff. Plaintiff theorizes that defendant wanted to "deny plaintiff the chance to retain her equity in the property in retaliation for plaintiff depriving them at the 11th hour of the redemption period of the opportunity to flip for a profit the property which was worth more than the mortgage debt." While this could be a possible motive for defendants' conduct, there is absolutely nothing in the record to support this theory. "[A] plaintiff making out a claim for abuse of process must allege a use of process for a purpose outside of the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive." *Young v Motor City Apartments Limited Dividend Housing Ass'n No 1 & No 2*, 133 Mich App 671, 681; 350 NW2d 790 (1984). Without any evidence that defendants acted with an ulterior purpose, the trial court correctly granted defendants' motion for summary disposition of plaintiff's claim of abuse of process.

In addition to failing to state a claim of abuse of process on which relief could be granted, plaintiff's abuse of process claim is also precluded by the statute of limitations. Pursuant to MCL 600.5805(10), the statute of limitations for an abuse of process claim is three years. Plaintiff filed her claim nearly six years after the eviction hearing. Therefore, the trial court also properly granted summary disposition because the claim of abuse of process was barred by the statute of limitations.

In sum, the trial court erred in granting summary disposition of plaintiff's fraud claim, and properly granted summary disposition of plaintiff's abuse of process claim.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra