STATE OF MICHIGAN

COURT OF APPEALS

MIDLAND MUTUAL LIFE INSURANCE,

Plaintiff,

v

JOHN R. ROBISON and MARILYNN G. ROBISON,

Defendants/Cross-Plaintiffs/
Counter-Defendants/
Third-Party Plaintiffs/Appellants,

and

MITAN PROPERTIES COMPANY,

Defendant/Cross-
Defendant/Counter-
Plaintiff/Appellee,

and

KENNETH MITAN,

Third-Party Defendant/Appellee,

and

KEITH MITAN,

Defendant/Appellee,

and

UNPUBLISHED
February 21, 1997

No. 185868
LC No. 93-307775 CZ

FIRST OF AMERICA BANK-ANN ARBOR,
JOHN R. ROBISON, D.D.S., and SHAFT
CHIROPRACTIC,

Defendants.

Before: Gribbs, P.J., and Young and W. J. Caprathe,* JJ.

PER CURIAM.

John Robinson and Marilynn Robison appeal as of right from the April 24, 1995, order denying their motion for reconsideration of a previously entered order granting Mitan Properties, Kenneth Mitan and Keith Mitan's motion for summary disposition. We affirm.

This dispute arises out of the sale of certain property located in the Charter Township of Canton. There are three medical buildings on the property. A portion of the land was owned by the Robisons and the larger plot was subject to a mortgage note held by plaintiff. The Robisons sold the larger plot of land to Mitan Properties pursuant to a land contract. Mitan Proeprties never made payments on the land contract and the Robisons defaulted on the note. Plaintiff initiated this action against the Robisons and the other defendants seeking judgment on the note and foreclosure of the property. The Robisons answered the complaint, and filed a cross-claim and a third-party complaint against Mitan Properties, Kenneth Mitan and Keith Mitan alleging breach of contract. The Mitans then filed a counter-complaint against the Robisons alleging fraudulent misrepresentation and fraudulent concealment. The lower court granted the Mitans' motion for summary disposition pursuant to MCR 2.116(C)(10).

The Robisons first argue that the lower court erred when it granted summary disposition because it relied upon an affidavit that did not conform with the court rules and because the affidavit was submitted by a witness who was not listed on the Mitans' witness list. We disagree. On appeal, a trial court's grant of summary disposition is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The lower court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. Then, giving the benefit of any reasonable doubt to the nonmoving party, the lower court must determine whether a record might be developed which would leave open an issue upon which reasonable minds can differ. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 378; 512 NW2d 86 (1994). Summary disposition may be granted only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

A review of Jeffrey Goulet's affidavit reveals that it was based upon his personal knowledge, it stated facts that were admissible as evidence and it indicated that he could testify competently to the facts stated in the affidavit. As such, the affidavit conformed to the court rule. MCR 2.119(B)(1). Further, the lower court properly relied upon the affidavit as the Mitans were unaware that the property could not be divided until after speaking with Jeffrey Goulet. At that point, he became a necessary witness for the Mitans' case and there was good cause to include him on the witness list. *Tinsbury v Armstrong*, 194 Mich App 19, 20-21; 486 NW2d 51 (1992). The Robisons were not prejudiced by the information in the affidavit as the record indicated that they were aware of the contents of the affidavit. *Id.*

The Robisons also argue that the lower court erred in granting summary disposition on the basis of mutual mistake because the Mitans failed to plead that defense and, therefore, waived it. The Robisons have failed to preserve this issue for appellate review as it was not raised and resolved on the record below. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). In any event, the Mitans pleaded an affirmative defense of rescission and a contract may be rescinded on the basis of mutual mistake. *Dingeman v Reffitt*, 152 Mich App 350, 355; 393 NW2d 632 (1986).

The Robisons next argue that the Mitans failed to prove mutual mistake. We disagree. The determination of whether a party is entitled to rescission involves a bifurcated inquiry: (1) was there a mistaken belief entertained by one or both of the parties to a contract? and (2) if so, what is the legal significance of the mistaken belief? A contractual mistake is a belief that is not in accord with the facts and it must relate to a fact in existence at the time the contract is executed. The legal significance of a mistaken belief is determined on a case by case basis. *Dingeman*, *supra*, 152 Mich App 355-356. Under that approach, rescission is appropriate where the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties. *Britton v Parkin*, 176 Mich App 395, 398; 438 NW2d 919 (1989); *Dingeman*, *supra*, 152 Mich App 356.

Here, there was mistaken belief by both parties at the time they executed the land contract because they believed that the land could be divided into two separate parcels. This belief, however, proved to be erroneous because, after the execution of the contract, the parties discovered that several zoning variances would be necessary to effectuate the partitioning of the property and that the granting of the zoning variances would not be attainable because there was insufficient space to accommodate the needed road easement. At the time the contract was entered into, the zoning ordinances were in effect and the ordinances existed at the time the contact was executed. *Dingeman*, *supra*, 152 Mich App 355.

Also, the legal significance of the mistaken belief related to a basic assumption of the parties upon which the contract was made, and which materially affected the agreed performances of the parties. The parties erroneously assumed that the property could be partitioned and that the Robisons could transfer a warranty deed to the Mitans. However, the variances necessary to effectuate the division of the land were impossible to obtain and hence, prevented the Robisons from providing a

warranty deed to the Mitans. This mistake clearly affected the agreed performances of the parties because the Robisons could not transfer clear title. *Britton*, *supra*, 176 Mich App 398; *Dingeman*, *supra*, 152 Mich App 356.

Lastly, the Robisons argue that a condominium deed is the equivalent of a standard warranty deed. We find no merit to this argument. A comparison of the statute governing warranty deeds, MCL 565.151; MSA 26.571, and the statute governing condominium deeds, MCL 559.101 *et seq.*; MSA 26.50(101) *et seq.*, reveals that the interest that transfers pursuant to a warranty deed or a condominium deed are fundamentally different. The Mitans contracted for a warranty deed as opposed to a condominium deed.

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe