STATE OF MICHIGAN

COURT OF APPEALS

WAYNE MUMROW and LEAH MUMROW,

Plaintiffs-Appellants,

v

FIRST OF MICHIGAN CORPORATION and KEN THOMPSON,

Defendants-Appellees.

UNPUBLISHED
November 4, 1997

No. 182037
Genesee Circuit Court
LC No. 94-028079-CZ

Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

PER CURIAM.

In this securities fraud action, plaintiffs Wayne and Leah Mumrow appeal as of right from an order granting summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) in favor of defendants First of Michigan Corporation and its employee Ken Thompson. We affirm in part and reverse in part.

Plaintiffs filed suit based upon the performance of four investments (referred to herein as the Krupp, Balcor, Enex I and Enex II investments) that defendant Thompson, a securities broker, advised plaintiffs to purchase because they were safe, risk-free, and good investments for retired persons. Plaintiffs' complaint contained eight counts including negligence (count I), malpractice (count II),[1] breach of fiduciary duty (count III), respondeat superior (count IV), breach of contract (count V), fraudulent misrepresentation (count VI), violation of the Michigan Uniform Securities Act, MCL 451.810(a)(2)*.;* MSA 19.776(410)(a)(2) (count VII), and violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.;* MSA 19.418 *et seq*. (count VII). Pursuant to defendants' motions for summary disposition, the trial court found that all of plaintiff's claims relating to the Krupp, Balcor and Enex I investments were barred by the applicable statutes of limitations because the Enex I investment, being the most recent of these three investments, was purchased on January 28, 1988, and plaintiffs filed suit on March 25, 1994, over six years later. The court also found that with respect to Enex II, the investment that plaintiffs purchased on December 15, 1988, all of plaintiffs' claims except the fraudulent misrepresentation, breach of contract, and MCPA claims were also barred by their respective statutes of limitations. Nevertheless, the court determined that these remaining three claims raise no genuine

* Circuit judge, sitting on the Court of Appeals by assignment.

issues of material fact or failed to state a claim upon which relief could be granted, so the court also summarily dismissed these three claims under MCR 2.116(C)(8) and (10).

I

A

With respect to plaintiffs' contention that the trial court erred in finding that their claims were barred by the applicable statutes of limitations and upon de novo review, we disagree. See *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). The statute of limitations for negligence claims (count I) and breach of fiduciary duty (count III) is three years. MCL 600.5805(8); MSA 27A.5805(8). A negligence claim accrues when "a prospective plaintiff first knows or reasonably should know he is injured." *Stephens v Dixon*, 449 Mich 531, 538; 536 NW2d 755 (1995). Although defendants' alleged negligence and breach of duty occurred when defendant Thompson recommended investments that were unsuitable for plaintiffs' needs and were not risk-free, plaintiffs made their last investment in Enex II on December 15, 1988, which was more than three years before they filed their March 1994 complaint. Thus, these claims were properly dismissed as untimely.

Under the Michigan Uniform Securities Act, the statute of limitations is two years from the date plaintiffs knew or should have known of the violation but no longer than four years after the securities were purchased. MCL 451.810(e); MSA 19.776(410)(e). Because plaintiffs purchased their last security, Enex II, more than four years before March 1994, this claim (count VII) is also time-barred.

The statutes of limitation for breach of contract (count V) and fraudulent misrepresentation (count VI) are both six years. MCL 600.5807(8); MSA 27A.5807(8); MCL 600.5813; MSA 27A.5813; *Fagerberg v Le Blanc*, 164 Mich App 349, 353-354; 416 NW2d 438 (1987). A claim for breach of contract accrues when the promisor fails to perform or fulfill his obligations under the contract, *Cordova Chemical Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995), while a fraud claim accrues on the date that plaintiffs knew or should have known of the misrepresentation, *Fagerberg, supra*. The Michigan Consumer Protection Act also requires that plaintiffs file suit with respect to violations of the act within six years from "the occurrence of the method, act, or practice which is the subject of the action." MCL 445.910; MSA 19.418(11). The Krupp, Balcor and Enex I investments were entered into by January 1988. Any promises that defendant Thompson made to plaintiffs in breach of any implied or express contract between the parties with respect to these three investments had to be raised by January 1994, three months prior to the filing of plaintiffs' complaint. Thus, the court did not err in finding that plaintiffs' breach of contract claim is not time-barred with respect to Enex II, the investment that plaintiffs made in December 1988.

The same conclusion is reached with respect to plaintiffs' fraudulent misrepresentation claim because plaintiffs did not establish that March 1988 was the earliest that they either knew or should have known about defendant Thompson's misstatements regarding these first three investments. Regarding the Enex II investment, however, the court properly declined to dismiss it pursuant to MCR 2.116(C)(7) because plaintiffs' purchased it less than six years before plaintiffs filed the instant

complaint.[2] As to the MCPA count, again, the alleged violation occurred, if at all, when defendant Thompson represented the "risk-free" quality of the investments to plaintiffs; accordingly, the comments made regarding the Enex II investment are not time-barred. Accordingly, we affirm the trial court's dismissal of all but the breach of contract, fraudulent misrepresentation, and MCPA counts in plaintiffs' complaint.

B

Plaintiffs also argue that this Court should apply the discovery rule to their claims. We find no support for the application of the rule in this case. The discovery rule states that a plaintiff's claim accrues when he discovers, or through the exercise of reasonable diligence, should have discovered, an injury and the causal connection between the injury and the defendant's breach of duty. *Lemmerman v Fealk*, 449 Mich 56, 66; 534 NW2d 695 (1995). This rule has been applied in medical malpractice and product liability actions but been found inapplicable in sexual abuse and ordinary negligence cases. *Id.* at 66; *Stephens, supra*. Plaintiffs have provided no authority to the contrary, and we will not search for it. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

We are also unpersuaded that the applicable statutes of limitations were tolled because defendant Thompson allegedly concealed his wrongdoing from plaintiffs. MCL 600.5855; MSA 27A.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim . . . from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Because plaintiffs failed to establish that it was on or after March 1992 that they discovered or should have discovered that defendant Thompson concealed the alleged fraud from them, we find that MCL 600.5855; MSA 27A.5855 does not apply to resurrect plaintiffs' untimely claims.

II

Because only three causes of action remain,[3] we need only determine whether the trial court erred in dismissing, pursuant to MCR 2.116(C)(8) or (10), plaintiffs' breach of contract, fraudulent misrepresentation, and MCPA claims. We affirm summary disposition of plaintiffs' breach of contract and MPCA claims but reverse with respect to their fraudulent misrepresentation claim.

We review de novo the grant of summary disposition pursuant to MCR 2.116(C)(10) and will affirm where, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law

Skinner v Square D Co, 445 Mich 153, 161; 516 NW2d 475 (1994); *Fitch v State Farm Fire and Casualty Co*, 211 Mich App 468, 470-471; 536 NW2d 273 (1995). We must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party and grant the benefit of any reasonable doubt to the opposing party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The court may not make factual findings or weigh credibility in deciding a motion for summary disposition. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). Thus, this Court examines the facts of this case in a light most favorable to plaintiff. *Radtke, supra*. *Manning v Hazel Park*, 202 Mich App 685, 689-690; 509 NW2d 874 (1993).

Also, in reviewing de novo the grant of a motion for summary disposition under MCR 2.116(C)(8), we look to the pleadings, accept as true all factual allegations and their reasonable inferences, and uphold the grant where no factual development could possibly justify a right of recovery. *State Treasurer v Schuster*, 215 Mich App 347, 350; 547 NW2d 332 (1996); *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395-396; 516 NW2d 498 (1994).

Although the trial court did not discuss why it dismissed plaintiffs' breach of contract claim under MCR 2.116(C)(10), we find that plaintiffs failed to satisfy their burden of showing that a genuine issue of material fact existed. See *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989). Plaintiffs presented no documentary evidence in support of their theories that a contract existed and was breached or what duty that defendants breached that, in turn, justified a finding that an implied contract existed.[4] Thus, summary disposition was appropriate.

With respect to plaintiffs' MCPA claim, we find that summary disposition was also appropriate. The trial court granted defendants' motion under MCR 2.116(C)(8) after correctly stating that it was unaware of any Michigan cases that permitted plaintiffs to state a claim under the MCPA for securities act violations. In fact, MCLA 451.810(a); MSA 19.776(410)(a) sets forth a cause of action for persons alleging fraud or misrepresentation in connection with the sale of securities. We believe that because the conduct complained of here is subject to the very specific regulation and scrutiny by the Corporation and Securities Bureau of the Michigan Department of Commerce, it is exempt under §4(1)(a) of the MCPA. We find that no factual development could possibly justify plaintiffs' right to recovery under the MCPA. *Schuster, supra; Caproni v Prudential Securities, Inc*, 15 F3d 614, 620-621 (CA 6, 1994); *Silverman v Niswonger*, 761 F Supp 464, 471-472 (ED Mich, 1991). Therefore, we also affirm the award of summary disposition with respect to plaintiffs' MCPA claims.

Upon further review and consideration of the pleadings and other documentary evidence in a light most favorable to plaintiffs, we find that defendants were not entitled to judgment as a matter of law regarding plaintiffs' fraudulent misrepresentation claim, however. *Radtke, supra; Manning, supra*. Plaintiff Wayne Mumrow admitted at his deposition that when he purchased all four investments, defendant Thompson told him that he would be receiving *in the mail at a later date* the prospectus for the applicable investment and that plaintiffs should not look at it because the prospectus was too

confusing; rather, plaintiffs should just throw away each prospectus. Thus, although defendants presented as evidence a subscription agreement stating that plaintiffs had received the prospectuses for these investments at the time they purchased them,[5] plaintiffs presented contradictory documentary evidence through their deposition testimony that defendant Thompson told them that they would receive the prospectus for the Enex II investment *after the fact* and via the mail.[6]

This Court's holding in *Webb v First of Michigan Corp,* 195 Mich App 470, 472-475; 491 NW2d 851 (1992), does not alter this conclusion. In *Webb, supra*, this Court found that the trial court properly dismissed the plaintiffs' claims for fraud and misrepresentation, unsuitability of investment, and breach of an implied contract. To constitute actionable fraud, the plaintiffs had to establish that "(1) defendant made a material representation; (2) it was false; (3) when it was made defendant knew that it was false or made it recklessly, Without knowledge of its truth and as a positive assertion; (4) defendant made it with the intent that it should be acted upon by plaintiff; (5) plaintiff did act in reliance upon it; and (6) plaintiff thereby suffered injury." *Id.* at 473. Viewing the facts in a light most favorable to the plaintiffs, this Court found that future promises regarding an investment's return do not constitute fraud, but claims that an investment was "risk-free" involved statements regarding past or existing facts that could constitute fraud. *Id.* at 473-474. Nevertheless, because the plaintiffs signed a subscription agreement before making their initial investment that stated they understood the risks involved in the investment, and the prospectus' front page stated that the investment involved special risks, we found that "[e]ven a cursory review of any of these documents would have enlightened plaintiffs that the investment was not "risk free" as represented by the broker." *Id.* at 475. Because the plaintiffs had information available to them that they "chose to ignore," the plaintiffs' claims were properly dismissed. *Id.*

Contrary to the holding in *Webb, supra* at 474, a genuine issue of material fact exists in this case regarding whether, prior to purchasing the investment, "the means of knowledge regarding the truthfulness of the representation are available to the plaintiff[s]" in light of defendant Thompson's admonition that, when plaintiffs subsequently received the prospectus in the mail, they throw it away and not read this unintelligible document. Further, unlike the subscription agreement in *Webb, supra*, the Enex II subscription agreement mentions nothing regarding the "risks" associated with this investment. It only states, in the middle of the second paragraph, that "there is no assurance that any distributions will be made or that any distributions which are made will be made on a uniform basis in amount or interval." This language pales by comparison with the "financial hazards" and "risks involved" language in the *Webb* subscription agreement. Again, even though the Enex II subscription agreement states that plaintiffs acknowledged receipt of the prospectus, plaintiffs testified that defendant Thompson said they would receive their prospectuses *in the mail after they paid for their initial investment.* Because the trial court cannot resolve credibility contests on summary disposition, *Featherly, supra*, we find that the trial court prematurely dismissed plaintiffs' cause of action for fraudulent misrepresentation as we are not satisfied that plaintiffs are completely unable to prove their claim at trial. *Fitch, supra* at 471.

Because plaintiffs' claim for fraudulent misrepresentation against defendant Thompson is still viable, plaintiffs' derivative respondeat superior claim against defendant First of Michigan Corporation also survives summary disposition.

Reversed in part, affirmed in part, and remanded for further proceedings regarding plaintiffs' fraudulent misrepresentation and respondeat superior claims. No taxable costs pursuant to MCR 7.219 because neither party has prevailed in full.

/s/ Jane E. Markey
/s/ Donald A. Teeple

[1] At the hearing on defendants' motions for summary disposition, plaintiffs affirmed that they were no longer pursuing the malpractice count so the court treated count II as being dismissed.

[2] This does not mean, however, that we agree with the trial court's ultimate resolution regarding plaintiffs' fraudulent misrepresentation claim, as we will be discussed below.

[3] The trial court did not discuss plaintiffs' respondeat superior claim but, as a derivative claim, it was most likely dismissed because plaintiffs had failed to prove defendant Thompson's liability on any other claim, thereby meriting dismissal of the respondeat superior claim regarding defendant First of Michigan.

[4] Plaintiffs' complaint merely alleged that an express or implied contract existed between the parties such that defendant Thompson would receive compensation for investment services and counsel to plaintiffs, which gave rise to a duty to select only suitable investments and disclose the risks involved in those investments. Because defendant selected unsuitable investments for plaintiffs and told them that the investments were risk-free, defendant allegedly breached this express or implied contract.

[5] We recognize that it is common practice to include the subscription agreements, such as the one plaintiffs signed when they purchased their Enex II investment, within a prospectus, which would support defendants' assertion that plaintiffs had the prospectus when they made the purchase. We will not, however, at this stage in the proceedings, make such a factual determination in light of the incomplete record before us, nor will we discount, as the trial court apparently did, plaintiffs' deposition testimony that they did not see the Enex II prospectus before investing.

[6] Plaintiff Wayne Mumrow stated in his deposition that defendant Thompson made this assertion each time plaintiffs purchased a new investment. Because the record is devoid of evidence as to when plaintiffs in fact received the prospectuses, we cannot determine the effect that plaintiffs post-investment receipt of each prospectus would have on their claims concerning the Krupp, Balcor and Enex I investments, i.e., had plaintiffs received the prospectuses well after purchasing the investments, then the date upon which they received the prospectuses would be the date on which they knew or should have known that defendant Thompson did not fully disclose the risks attendant with these investments would be later than the date that plaintiffs purchased the investments.