

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES E. DRURY and SHARON M. DRURY,

Plaintiffs-Appellees,

v

HAROLD C. KIESS,

Defendant-Appellant.

UNPUBLISHED

November 23, 1999

No. 204670

Alcona Circuit Court

LC No. 96-009474 CH

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition for plaintiffs in this action for specific performance of a real estate contract. We affirm.

The basic issue presented in this appeal concerns who must bear the loss of defendant's real estate broker absconding with plaintiffs' down payments totaling \$40,000 and plaintiffs' payment of \$527.19 for prorated real estate taxes. Defendant contends that he is responsible only for \$5,000 of the funds embezzled by the broker because the broker was only authorized to receive an earnest deposit of \$5,000 on defendant's behalf. We disagree.

The purchase agreement signed by defendant authorized the broker to hold "[a]ll deposits" relating to the transaction. While the agreement only required plaintiffs to deposit a total of \$5,000 of the purchase price upon defendant's acceptance of the purchase agreement, nothing in the agreement limited the broker's authority to receive and hold additional deposits on the purchase price. Indeed, defendant indicates that he did not question or protest the broker's action when the broker advised him that she had received plaintiffs' additional payments because the broker had told him the additional monies were being held as an "increased ... earnest deposit." Defendant's claim that his broker was only authorized to accept \$5,000 in deposits is belied by his own course of conduct.

This case was submitted to the trial court for summary disposition on stipulated facts pursuant to MCR 2.116(A). This Court reviews the denial or grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Although we do not disagree with defendant's contention that the broker's authority to sell did not include the authority to convey the property on defendant's behalf, this does not affect our determination of the broker's authority to receive plaintiffs' payments. Defendant's reliance upon the rule that an agent's unlawful acts are presumed to be outside of the scope of the agency is also misplaced. There is nothing unlawful about the act of a licensed real estate broker receiving and holding a purchaser's down payment deposits on a real estate transaction, in and of itself. That the broker used fraud to accomplish this otherwise lawful act within the scope of her authority does not relieve defendant of responsibility where innocent parties have reasonably relied upon the agent's actual or apparent authority. See, e.g., *Margolis v Benton*, 343 Mich 34, 39; 72 NW2d 213 (1955); *Stolberg v Oakman*, 233 Mich 92; 206 NW 488 (1925); *Karibian v Paletta*, 122 Mich App 353 ,356; 332 NW2d 484 (1983).

Finally, we note that defendant's reliance on the distinction between the authority to sell and the authority to transfer is not decisive in this case. "Unless otherwise agreed on, an agent's authority to transfer the principal's property for sale includes authority to receive the purchase price." *Brooks v January*, 116 Mich App 15, 32; 321 NW2d 823 (1982), citing Restatement of Agency 2d, § 56, p 162.

Affirmed.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ William C. Whitbeck