STATE OF MICHIGAN

COURT OF APPEALS

RONALD K. STOUT and JACQUELINE V. STOUT,

Plaintiffs-Appellees,

v

DONALD J. BOWEN and DIANE L. BOWEN,

Defendants-Appellants,

and

JACQUELINE CONKLIN, DAVID J. ANUSZKIEWICZ, and MARLEEN CONKLIN,

Defendants.

UNPUBLISHED
December 17, 1999

No. 211979
Alcona Circuit Court
LC No. 96-009494 CK

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

Defendants Donald J. Bowen and Diane L. Bowen (hereinafter defendants) appeal of right from the order granting summary disposition for plaintiffs pursuant to MCR 2.116(C)(10). We affirm.

This case involves the sale of real estate by defendants to plaintiffs. As a result of the embezzlement of some of the proceeds of the sale by the real estate agent, Jacqueline Conklin (hereinafter Conklin),[1] defendants' outstanding mortgage on the property was not paid off and plaintiffs did not receive a clear title. This lawsuit was begun to quiet title and to obtain money damages.

"This Court reviews decisions on motions for summary disposition de novo." *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 434; ___ NW2d ___ (1999).

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Defendants first contend that the trial court erred by not dismissing Diane Bowen from the lawsuit because she had no legal interest in the subject property and thus could not be liable on the judgment. We disagree. Defendants assert that Donald Bowen owned the property with his mother and that when she died, he inherited it free of any ownership interest by his wife, Diane. However, both defendants signed the listing agreement, a buy and sell agreement, a seller's disclosure form, a closing statement, and a warranty deed. On each document they identified themselves jointly as the sellers or owners of the property. Therefore, because Diane Bowen repeatedly held herself out to plaintiffs as an owner and seller of the subject property, we conclude defendants are equitably estopped from subsequently claiming that she was not an owner. *Kole v Lampen*, 191 Mich 156; 157 NW 392 (1916).[2]

Defendants next contend that because Conklin was the dual agent of both the buyers and sellers, absent a showing of fault, the misconduct of the agent cannot be imputed to either party. We disagree because we do not believe the facts establish that Conklin was acting as a dual agent. "[D]ual agency occurs when two persons or entities agree to share the services of an individual for a single act." *Vargo v Sauer*, 457 Mich 49, 69; 576 NW2d 656 (1998). In this case, there was no agreement to share Conklin's services in the sale of the subject property; in fact, pains were taken by the real estate agency to make it clear to plaintiffs that its agents worked for defendants. Further, the commission on the sale of the property was collected from defendants. The fact that the real estate agent also functioned as a seller's agent for plaintiffs when they sold a separate and distinct parcel of real estate in a totally separate legal transaction is irrelevant to the question of whether a dual agency existed with regard to the subject property. Because there was no dual agency, Conklin's misconduct should be imputed to defendants. See *Moynes v Applebaum*, 218 Mich 198, 200-201; 187 NW 241 (1922).[3]

Finally, we reject defendants' contention that there was a disputed issue of material fact regarding whose money Conklin embezzled. Having received the equity in their home, and having executed the appropriate closing documents, it fell to defendants and their agent to carry out their obligation under the sales agreement to pay off their mortgage and deliver good title.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald

[1] The trial court granted defendants David Anuskiewicz and Marleen Conklin's motions for summary disposition. Those orders have not been appealed.

[2] The *Kole* Court observed that equitable estoppel

> arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. [*Kole, supra* at 157-158.]

[3] Moreover, as between two innocent parties, the loss should fall on the party who made the fraud possible. *Karibian v Paletta*, 122 Mich App 353, 356; 332 NW2d 484 (1983). Defendants chose to make Conklin their agent, failed to be present at the closing, and failed to follow up on the sale. Defendants' actions allowed Conklin to control and abuse the process. Because defendants "plac[ed] matters in the hands of the wrongdoer[, thereby] . . . making it possible for [her] to perpetrate a fraud with every semblance of verity," *Graham v Sinderman*, 238 Mich 210, 213; 213 NW 200 (1927), responsibility for the wrongdoing must fall on them.