STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK RUBIN and ROBERT DOETTL,

Plaintiffs-Appellants,

v

RAMCO KENTWOOD ASSOCIATES, RAMCO GERSHENSON PROPERTIES TRUST, REIT RAMCO GERSHENSON, INC., RICHARD GERSHENSON, DENNIS GERSHENSON, JOEL GERSHENSON, BRUCE GERSHENSON, and MICHAEL A. WARD,

Defendants-Appellees,

and

GRANT THORNTON, P.C.,

Defendant.

UNPUBLISHED
March 27, 2001

No. 214560
Oakland Circuit Court
LC No. 98-004212-CK

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from the trial court's grant of summary disposition to defendants[1] in this action involving allegations of breach of contract, fraud, and breach of a settlement agreement. We affirm.

Plaintiffs are minority partners in a partnership that owns a shopping mall in Kentwood. Defendants hold the majority interest in the partnership, and defendant Ramco Gershenson, Inc., manages the mall. The operation of the mall has been fraught with disputes that the parties attempted to settle in 1994. In 1998, however, plaintiffs filed this action, claiming that defendants had, *inter alia*, breached the settlement agreement and were liable for fraud and misrepresentation. The trial court ruled that plaintiffs' claims were barred by the settlement

[1] The term "defendants" in this opinion refers to the appellees.

agreement and by a lack of specificity in the complaint, and it therefore granted defendants' motion for summary disposition. We review de novo a trial court's grant of summary disposition. *Girvan v Fuelgas Co*, 238 Mich App 703, 710; 607 NW2d 116 (1999).

Plaintiffs argue that the trial court erred in summarily disposing of Counts II, III, and IV of their complaint based on the settlement agreement. Public and judicial policies favor settlement. *Steel v Wilson*, 29 Mich App 388, 395; 185 NW2d 417 (1971). A settlement subsumes the underlying claims by merging and barring all the included claims and preexisting causes of actions. *Pedder v Kalish*, 26 Mich App 655, 657; 182 NW2d 739 (1970). A settlement is a contract and is to be construed and applied as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994).

Here, the settlement agreement, dated December 31, 1994, stated that the agreement

> . . . shall serve as a full settlement of all claims, accounts, and causes of action arising out of the Partnership, the Partnership Agreement, or the Project, accruing to the date of this Settlement Agreement, except as relates to the performance of the terms of this Agreement and compliance with the Agreed Upon Procedures.

The agreement further specified that the accounting firm of Grant Thornton would examine the records relating to the parties' business dealings and disclose any non-traceable "items of accounting and flow of funds." Defendants were to reimburse the partnership for any non-traceable monies. Defendants were obligated to make all necessary records available to Grant Thornton. The agreement further specified that "[b]oth [parties] acknowledge and agree that the findings of the Accountant shall be deemed final and binding and shall not be subject to challenge in any court of law or other governmental body." Grant Thornton issued a report on September 20, 1995, indicating that approximately $5,000 was non-traceable.

In Counts II, III, and IV of the complaint, plaintiffs alleged various acts of fraud and breach of the partnership agreement by defendants and sought $2,000,000 in compensatory and punitive damages. The trial court correctly held that any claims in Counts II, III, and IV relating to actions taken before December 31, 1994 were barred by the settlement agreement.[2] Plaintiffs suggest on appeal that these claims were not barred by the settlement agreement because defendants breached the agreement by failing to provide Grant Thornton with all the applicable documentation regarding the parties' business dealings. However, defendants submitted two affidavits indicating that they did indeed provide all the applicable documentation, and plaintiffs

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[2] Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and the trial court did not specify under which subrule it granted summary disposition with respect to these claims. However, the court looked outside the pleadings in reviewing these claims. Accordingly, we will treat the claims as dismissed under MCR 2.116(C)(10). See *Atkinson v Detroit*, 222 Mich App 7, 9; 564 NW2d 473 (1997). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party bears the initial burden to support its position by affidavits, depositions, admissions, or other documentary evidence. *Id*. at 455. The burden then shifts to the nonmoving party to establish a genuine issue of disputed fact. *Id*.

did not counter these affidavits with evidence. Accordingly, plaintiffs' suggestion is without merit.[3] See *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiffs further contend that the trial court should not have *completely* disposed of Counts II, III, and IV of the complaint because claims that accrued after December 31, 1994 were not barred by the settlement agreement. A review of the record reveals that the trial court dismissed the claims that accrued after December 31, 1994 because they lacked sufficient specificity.[4]

MCR 2.112(B)(1) provides that allegations of fraud must be stated with particularity in pleadings. General allegations are not sufficient to state a fraud claim. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Mere speculation of fraud does not overcome a motion for summary disposition. *Easley v University of Michigan*, 178 Mich App 723, 726; 444 NW2d 820 (1989). The elements of fraud include: (1) that the defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or that he made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that the plaintiff should act on it; (5) that the plaintiff acted in reliance upon it; and (6) that the plaintiff thereby suffered injury. *Kuebler v Equitable Life Assurance. Society of the United States*, 219 Mich App 1, 6; 555 NW2d 496 (1996).

In Count II, the only claim that plaintiffs specifically alleged below and allege on appeal to have accrued after December 31, 1994 is the claim that defendants "[c]aused a note receivable against the Plaintiffs in the amount of $33,123.81 on April 30, 1996 by creating a false capital call." We hold that this claim was not pleaded with sufficient specificity to survive summary disposition. C.f. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442-443; 491 NW2d 545 (1992). Indeed, the claim did not specifically indicate what the "false capital call" consisted of or how plaintiffs acted on the falsehood to their detriment. The trial court properly dismissed Count II of the complaint.

Count III did not allege fraud and was therefore not subject to the fraud specificity requirement. Nonetheless, plaintiffs did not indicate below, nor do they indicate on appeal, that any claims in Count III accrued after December 31, 1994. Accordingly, Count III was barred by the settlement agreement, and the trial court did not err by dismissing it.

In Count IV, plaintiffs first alleged that defendants induced the partnership into making unnecessary loans. Only two of these loans occurred after December 31, 1994. However,

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[3] Moreover, plaintiffs do not set forth a coherent argument on appeal for their conclusion that defendants failed to provide Grant Thornton with necessary documentation. Accordingly, they have not adequately briefed the argument for appellate review. See *Mudge v Macomb County*, 458 Mich 87, 104-105; 580 NW2d 845 (1998).

[4] The trial court's reasoning with regard to these claims indicates that it dismissed them under MCR 2.116(C)(8). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim to determine whether the opposing party's pleadings allege a prima facie case. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993).

plaintiffs did not indicate with specificity how defendants manipulated them into making these loans. Plaintiffs further alleged in Count IV that defendants did not account for certain non-traceable debits, created non-traceable bank debits, created non-traceable bank transfers, manipulated partnership records, and caused entry of a false note receivable.[5] Some of these allegations related to actions that occurred after December 31, 1994 and were therefore not barred by the settlement agreement. However, plaintiffs have not indicated *with specificity* how defendants committed fraud with regard to these various actions, i.e., how defendants perpetrated falsehoods on which plaintiffs relied to their detriment. Accordingly, the trial court properly dismissed these claims.

Finally, plaintiffs contend that the trial court improperly dismissed Count V of the complaint,[6] which alleged that defendants breached the settlement agreement by (1) failing to provide Grant Thornton with all applicable documentation; (2) unilaterally entering the partnership into a new management agreement with the successor to Ramco Gershenson, Inc.; and (3) failing to pay plaintiffs $1,200,000 in non-traceable assets.

With regard to the first allegation in Count V, defendants submitted two affidavits indicating that they did indeed provide all the applicable documentation, and plaintiffs did not counter these affidavits with evidence. Accordingly, this claim was properly dismissed.[7] See *Smith*, *supra* at 455. With regard to the second allegation, plaintiffs do not indicate *how* this alleged action on the part of defendants breached the settlement agreement. As stated in *Mudge v Macomb County*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

Because plaintiffs' second assertion from Count V is inadequately addressed on appeal, we decline to review it. *Mudge*, *supra* at 104. With regard to plaintiffs' third assertion from Count V, the report of Grant Thornton found only a relatively small amount of non-traceable assets from its review of the parties' business dealings, and plaintiffs do not adequately explain why

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[5] Plaintiffs made further claims in Count IV but did not specify below, nor do they indicate on appeal, that the claims accrued after December 31, 1994. Accordingly, we hold that the trial court properly dismissed these claims based on the settlement agreement.

[6] See footnote 2, *supra*.

[7] See also footnote 3, *supra*. We additionally note that the basis for the trial court's dismissal of the first claim from Count V is unclear from the record, and the court appears to have wrongly analyzed the claim. Nonetheless, we find upon our de novo review that summary disposition of this claim was indeed warranted, and "we do not reverse where the trial court reaches the right result for a wrong reason." *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

Grant Thornton's findings should be rejected in light of a settlement agreement dictating that its findings be deemed conclusive and not subject to challenge. Accordingly, plaintiffs have also waived review of the third allegation from Count V.[8] *Id.*

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter

[8] Plaintiffs additionally argue that the trial court erred by failing to provide specific findings regarding its dismissal of Count V. Plaintiffs, however, cite no authority for their suggestion that the trial court was required to provide specific findings, and they have therefore waived this issue for appeal. See *Mudge*, *supra* at 105.