

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA NASH,

Plaintiff-Appellant,

v

LEE SCOTT and REAL ESTATE EQUITIES,
LTD.,

Defendants-Appellees.

UNPUBLISHED

May 18, 2004

No. 246832

Wayne Circuit Court

LC No. 02-208916-CK

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants in this breach of contract action. We affirm.

In evaluating a motion for summary disposition brought under MCR 2.116(C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by a party and admissible in evidence, however supportive material is not required. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id.* The nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). This Court reviews de novo a trial court's decision granting summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiff argues on appeal that the trial court erred when it found that the general release precluded plaintiff's breach of contract claim. She contends that there is a genuine issue of fact with regard to whether adequate consideration was given for the release and whether the release was based on fraudulent misrepresentations.

Michigan adheres to a tender-back rule relating to consideration given for a release. *See Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163; 458 NW2d 56 (1990). In brief, a plaintiff who accepts the consideration offered for a release must tender that consideration back to the party who gave it in order to repudiate the release. *Id.* at 159. Without tendering the consideration and repudiating the release, a plaintiff has no right to sue for monetary damages for claims the release covers, even if the plaintiff believes that the

consideration for the release is inadequate. *Id.* at 167-168, 169. A plaintiff can only satisfy this tender rule by returning the consideration before or at the same time the plaintiff sues because tender is a "precondition." *Id.* at 170. In this case, defendants gave and plaintiff received \$500 in exchange for the release, which plaintiff had to return to defendants before it could sue, even if this consideration was inadequate. There is no question from the record that plaintiff failed to tender this money to defendants before commencing this action. Nor is there any question regarding whether plaintiff's claims fall outside the release's scope, given the all-encompassing language used in the release. Thus, unless an exception to the tender rule applies to this case, summary disposition was appropriate. See *Collucci v Eklund*, 240 Mich App 654, 659; 613 NW2d 402 (2000).

Under Michigan law, a plaintiff is excused from the tender-back requirement only if the defendant waives the duty or the plaintiff demonstrates fraud in the execution. *Id.* There is no evidence that defendants ever waived plaintiff's duty to return the money given in exchange for the release; in fact, defendants insist that this tender-back rule controls the outcome of this case. Plaintiff, however, does claim that defendants made a fraudulent misrepresentation.

In support of the claim of fraudulent misrepresentation, plaintiff asserted that defendants stated that plaintiff would not receive her money if she did not sign the release and that if she were to sue defendants, then defendants would sue the Wayne County Register of Deeds and plaintiff would become intimately involved in that litigation. However, plaintiff's assertions imply not fraud in the execution, but rather, fraud in the inducement. Fraud in the execution occurs when a party is made to believe that he is signing something other than the release, while fraud in the inducement goes to inducing a party, by fraud, to sign a release the effect of which he understands. *Stefanac, supra* at 165-166. Plaintiff does not contend that she was unaware of or did not understand the nature of the release; rather, plaintiff claims that defendants' fraudulent misrepresentations induced her to execute the release. Therefore, plaintiff's claim does not fall within the fraud in the execution exception. *Collucci, supra*. Accordingly, the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kathleen Jansen

/s/ Michael J. Talbot