

STATE OF MICHIGAN
COURT OF APPEALS

JANET WILKINSON,
Plaintiff-Appellant,

UNPUBLISHED
January 17, 2006

v

BETTY WYGANT,
Defendant/Cross-Defendant-
Appellee,

No. 255791
Kent Circuit Court
LC No. 02-011550-CP

and

BRAD MONROE,
Defendant/Cross-Plaintiff,

and

CHOICE FEDERAL MORTGAGE, INC,
Defendant-Appellee.

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants arising out of her purchase of a mobile home. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Plaintiff Janet Wilkinson filed suit against defendants Betty Wygant, Brad Monroe¹, and Choice Federal Mortgage, Inc, alleging claims of fraud, violation of the Michigan Consumer

¹ Monroe died during the course of the proceedings. The stipulation and order of dismissal regarding Monroe's cross-claim against defendant Wygant was the final order from which plaintiff now appeals. MCL 7.203(A)(1); 7.202(6)(a)(i).

Protection Act, MCL 445.901 *et seq.*², and rescission. Plaintiff also alleged a conversion claim against Wygant and a claimed violation of the mortgage brokers, lenders, and servicers lending act, MCL 445.1651 *et seq.*, against Choice Federal.

We review de novo a trial court's ruling on a motion for summary disposition. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition under MCR 2.116(C)(10) is appropriate if there is no genuine issue regarding any material fact, and the moving parties are entitled to judgment as a matter of law. *Id.*

Here, the trial court granted summary disposition in favor of defendants, finding that the proofs established that the parties engaged in a scheme involving various misrepresentations to enable plaintiff to obtain financing to purchase a mobile home. The trial court found that, because there was no factual dispute that plaintiff knowingly participated in and benefited from the scheme, dismissal of her claims of fraud, violation of the MCPA, conversion, and violation of the mortgage brokers, lenders, and servicers lending act was proper. We disagree.

In making its decision, the trial court relied exclusively on the doctrine of wrongful-conduct to support its finding that plaintiff's participation with defendants in a fraudulent scheme to obtain financing to purchase a mobile home barred her claims against defendants. Our Supreme Court has explained that the "wrongful-conduct rule" is comprised of two common law maxims:

[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party. [1A CJS, Actions, § 29, p 386. See also 1 Am Jur 2d, Actions, § 45, p 752.]

[A]s between parties in *pari delicto*, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them. [1A CJS, Actions, § 29, p 388. See also 1 Am Jur 2d, Actions, § 46, p 753.] [*Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995).]

² Plaintiff does not appear to challenge the trial court's finding that Choice Federal was exempt from her claimed MCPA violations. Because plaintiff did not raise this issue on appeal, it is not preserved for our review, and we decline to address it. *Mahnick v Bell Co*, 256 Mich App 154, 164; 662 NW2d 830 (2003).

However, there is a “culpability exception’ to the wrongful-conduct rule where the plaintiff and the defendant have both engaged in illegal conduct, but one is more culpable than the other.” *Stopera v DiMarco*, 218 Mich App 565, 570; 554 NW2d 379 (1996). That is, “even though a plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff’s injuries, a plaintiff may still seek recovery against the defendant if the defendant’s culpability is greater than the plaintiff’s culpability for the injuries, such as where the plaintiff has acted “under circumstances of oppression, imposition, hardship, undue influence, or great inequality or condition or age”” *Orzel, supra* at 569, quoting *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 775; 447 NW2d 864 (1989), quoting 1 Story, *Equity Jurisprudence* (14th ed), § 423, pp 399-400.

Here, the trial court erred in finding that there was no genuine issue of material fact that plaintiff’s claims were barred because the evidence established that she engaged in wrongful conduct. There was at least a question of fact regarding whether plaintiff’s actions constituted wrongful conduct, or, if plaintiff’s conduct was wrongful, there was at least a question of fact regarding the relative culpability of the parties. In her deposition testimony, plaintiff maintained that she did not sign or send a letter to Choice Federal falsely asserting another source of income, and averred that she was unaware of the letter’s existence. Instead, the evidence showed that other actors created and transmitted the letter. Plaintiff also maintained that she did not receive in advance or read any of the documents she signed at closing; instead, she just “smile[d] and sign[ed],” at the direction of Wygant and Monroe. Plaintiff denied knowing that the loan was only for owner-occupied homes and denied falsely representing that she would cohabituate with Monroe, her cosigner on the mortgage. Moreover, defendants failed to present a signed occupancy agreement. Viewing the evidence in the light most favorable to plaintiff, the record suggests that she was a relatively unsophisticated individual who entered into a mortgage agreement without full knowledge of the resultant consequences, not that her actions were so culpably wrongful that summary disposition was warranted.

However, contrary to plaintiff’s assertion, the trial court properly granted summary disposition in favor of defendants on her rescission claim. The holder of the mortgage, Northpointe Bank, is not a party to the case, and relief cannot be granted against nonparties. See *Cicotte v Anciaux*, 53 Mich 227, 237-238; 18 NW 793 (1884); *Coxe v Hart*, 53 Mich 557, 558-559; 19 NW 183 (1884); Mich Pl & Prac, § 85.28, p 90-91 (2d ed).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey