STATE OF MICHIGAN

COURT OF APPEALS

KARL TROPF and CATHERINE TROPF,

Plaintiffs-Appellants,

v

HOLZMAN & HOLZMAN and CHARLES J. HOLZMAN,

Defendants-Appellees.

UNPUBLISHED
January 17, 2006

No. 257019
Oakland Circuit Court
LC No. 2000-021267-CZ

KARL F. TROPF and CATHERINE TROPF,

Plaintiffs-Appellants,

v

HOLZMAN & HOLZMAN and CHARLES J. HOLZMAN,

Defendants-Appellees.

No. 257843
Oakland Circuit Court
LC No. 2000-021267-CZ

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In Docket No. 257019, plaintiffs appeal as of right the circuit court's order granting summary disposition in defendants' favor. In Docket No. 257843, plaintiffs appeal as of right the court's order awarding defendants $16,560 in case evaluation sanctions. We affirm in both cases.

This Court reviews de novo the grant of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most

> favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Williams, supra* at 507, quoting *Maiden, supra* at 120.]

"When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Shepherd Montessori Center Milan v Ann Arbor Township*, 259 Mich App 315, 324; 675 NW2d 271 (2003).

Plaintiffs first argue that summary disposition was inappropriate on the civil conspiracy claim because they presented documentary evidence that created a genuine issue of material fact. We disagree. The essential elements of a civil conspiracy are: (1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose (4) or a lawful purpose by unlawful means. *Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 313; 486 NW2d 351 (1992). Defendants correctly argued that there could be no civil conspiracy if they were acting as agents within the scope of the agency agreement. The intra-corporate trust doctrine holds that a cause of action does not exist for civil conspiracy between a corporation and its agents acting within the scope of their employment. See, e.g., *Landmark Sav & Loan v Loeb Rhoades, Hornblower & Co,* 527 F Supp 206, 209 (ED Mich, 1981). The intra-corporate conspiracy doctrine was first developed in an anti-trust case, *Nelson Radio and Supply Co v Motorola*, 200 F2d 911 (CA 5, 1952), and the United States Court of Appeals for the Sixth Circuit subsequently adopted the doctrine in that context. See, e.g., *Nurse Midwifery Assoc v Hibbett*, 918 F2d 605, 615 (CA 6, 1990). Other jurisdictions have applied the intra-corporate conspiracy doctrine to bar conspiracy actions in other contexts where the agent is acting within the scope of his authority. See, e.g., *Hodges v Tomberlin*, 510 F Supp 1280, 1286 (SD Ga, 1980); *Renner v Wurdemen*, 231 Neb 8, 16; 434 NW2d 536 (1989); *Soft Water Utilities, Inc v LeFevre*, 159 Ind App 529, 539; 308 NE2d 395 (1974).

In *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1996), this Court, although not addressing the precise question at issue in this case, noted that "an agent or employee cannot be considered a separate entity from his principal or corporate employer, respectively, as 'long as the agent or employee acts only within the scope of his agency [or] employment.'" *Id.*, quoting *Metro Club, Inc v Schostak Bros & Co, Inc*, 89 Mich App 417, 420; 280 NW2d 553 (1979). "An attorney often acts as his client's agent, and his authority may be governed by what he is expressly authorized to do as well as by his implied authority." *Uniproprop, Inc, v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004).

Here, plaintiffs failed to present any evidence that defendants were acting as anything other than agents within the scope of their agreement when the alleged fraud occurred. Plaintiffs presented evidence that defendants acted for Lynne Wolenski and 20th Century Corporation in the mortgage license application process and at the land contract forfeiture hearing. However, the allegation that defendants participated in Wolenski's fraudulent behavior was not supported by any evidence. Karl Tropf admitted that Holzman never made any representations to plaintiffs. Plaintiffs presented no evidence that defendants had any knowledge that the deed or land contract were fraudulent. Plaintiffs also did not present evidence to support their conclusion that Wolenski would not have received a mortgage license without defendants' letter of support. Plaintiffs' conclusion that they would not have lost their house if defendants had not supported

Wolenski's application is speculative, especially because plaintiffs stopped making mortgage payments and their house was sold in a forfeiture sale over one year before Wolenski offered them a land contract in order to redeem their property.

Plaintiffs next argue that the circuit court abused its discretion when it ordered plaintiffs to limit the scope of their claim to civil conspiracy because Michigan law requires joinder of all claims against a party. We disagree. Although plaintiffs attempt to construe this issue as an issue of joinder, the issue is actually a challenge to the circuit court's October 31, 2003, order granting in part defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) because plaintiffs failed to state a claim for fraud, deceit or "gangsterism."

Motions brought under MCR 2.116(C)(8) test the legal sufficiency of the claim with regard to the pleadings alone. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). All well-pleaded facts are accepted as true and are construed in a light most favorable to the nonmoving party. *Id*. Summary disposition under MCR 2.116(C)(8) is proper when the claim is "'so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.'" *Id.*, quoting *Maiden, supra* at 118. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Id*. However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

The elements of fraudulent misrepresentation are: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992). Plaintiffs failed to allege that defendants made a misrepresentation intending that plaintiffs act on it, nor did they allege that they acted in reliance on defendants' alleged misrepresentations. Thus, plaintiffs failed to plead a claim for fraudulent misrepresentation. The court properly granted defendants' motion for summary disposition on that claim pursuant to MCR 2.116(C)(8).

Although the court did not address plaintiffs' claims for trespass, wrongful eviction and unjust enrichment when it limited plaintiffs' complaint to civil conspiracy, those claims also failed as a matter of law to survive defendants' motion for summary disposition. A trespass is an unauthorized invasion upon the private property of another by an actor who intended to intrude. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). Plaintiffs did not plead that defendants entered their land. Moreover, the wrongful eviction claim failed because plaintiffs did not challenge the writ of restitution. Where an eviction occurs pursuant to an unchallenged writ of restitution, there can be no subsequent relitigation of the issue of the propriety of the eviction. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575-577; 621 NW2d 222 (2001). Thus, because plaintiffs did not challenge the writ of restitution in the trial court, litigation regarding the propriety of their eviction was properly dismissed as a matter of law.

The elements of unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Plaintiffs alleged that defendants used the alias "Lynne Wolenski" in order to fraudulently obtain monies from plaintiffs via a forged deed and land contract. While plaintiffs arguably stated a claim for unjust enrichment, they did not present any evidence that defendants received any benefit from plaintiffs. Their factual allegations and speculation was not sufficient to survive defendants' motion for summary disposition.

In Docket No. 257843, plaintiffs argue that the circuit court abused its discretion when it awarded case evaluation sanctions to defendants. We disagree. A trial court's decision to grant case evaluation sanctions is subject to de novo review on appeal. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). However, because a trial court's decision whether to award costs pursuant to the "interest of justice" provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion. *Id.*

MCR 2.403(O) provides, in pertinent part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, vthat party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
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> (2) For the purpose of this rule "verdict" includes,
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> (a) a jury verdict
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> (b) a judgment by the court after a nonjury trial,
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> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.
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> * * *
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> (11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

MCR 2.403(O)(11) is an exception to the mandatory rule set forth in MCR 2.403(O)(1) that a party who rejects a case evaluation "must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." In *Haliw v Sterling Heights (On Remand)*, 266 Mich App 444, 447-450; 702 NW2d 637 (2005), citing *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996), this Court held that the "interest of justice" exception should be invoked only in "unusual circumstances," such as where a legal issue of first impression or public interest is present, the law is unsettled and substantial damages are at issue, there is a significant financial disparity between the parties, or where the effect on third persons may be significant. *Haliw, supra* at 448-449, quoting *Luidens, supra* at 36. These

factors are not exclusive. *Id.* "'Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.'" *Id.*, quoting *Luidens, supra* at 36.

Here, plaintiffs rejected the case evaluation award and the verdict was not more favorable to plaintiffs than the case evaluation award. Because the verdict was the result of a ruling on a motion after rejection of the case evaluation, the circuit court had discretion to refuse to award actual costs in the interests of justice. MCR 2.403(O)(11). The court awarded defendants reasonable attorney fees resulting from plaintiffs' rejection of the case evaluation award. There are no unusual circumstances in this case that would justify invoking the interests of justice exception to MCR 2.403(O). Plaintiffs pursued this claim after the case evaluation panel determined that the claim against defendants was frivolous and after the court granted defendants' motion for summary disposition on all of plaintiffs' claims except for civil conspiracy. Thus, the circuit court did not abuse its discretion when it awarded reasonable attorney fees to defendants.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder