STATE OF MICHIGAN

COURT OF APPEALS

CAPITAL TITLE INSURANCE AGENCY INC.,

Plaintiff-Appellant,

v

TOWNE MORTGAGE COMPANY, FEDERAL NATIONAL MORTGAGE ASSOCIATION, MEMBER FIRST MORTGAGE, L.L.C., and MEMBER FIRST TITLE AGENCY,

Defendants-Appellees,

and

ERIC ERSHER, AMY ERSHER, and ESCROW WORKS, L.L.C.,

Defendants.

UNPUBLISHED
March 10, 2009

No. 278712
Oakland Circuit Court
LC No. 2006-075662-CZ

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

This dispute involves the payment of a mortgage in connection with a residential real estate transaction. At closing, plaintiff mistakenly paid $169,567.94, the outstanding amount of the seller's mortgage, to defendant Towne Mortgage Company (Towne Mortgage). Plaintiff sought the return of these monies without success and brought suit against defendants, Towne Mortgage, Federal National Mortgage Association (FNMA), Member First Mortgage, L.L.C (MFM), and Member First Title Agency (MFT).[1] The trial court granted summary disposition in defendants' favor and plaintiff appeals as of right. We affirm.

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[1] Plaintiff also brought suit against the sellers, Amy and Eric Ershers, who were voluntarily dismissed, and Escrow Works, L.L.C. (Escrow Works). The parties stipulated to the entry of a consent judgment against Escrow Works for $169,567.94.

I. Facts

Amy and Eric Ersher owned residential property in Sylvan Lake, Michigan. This property was subject to a mortgage held by FNMA and serviced by Towne Mortgage. Plaintiff was the Ershers' title company. The Ershers entered into a contract for the sale of the property to Jennifer and John Hill. In order to complete the purchase, the Hills obtained a lender, MFM, and a title company, MFT, to represent them in their purchase of the property. A closing was held in June 2005, at which both the Ershers and Hills were present, along with plaintiff and Escrow Works, the latter of which was retained by MFT to collect and disburse funds at the closing. Plaintiff acted as a third party creditor at the closing. Neither FNMA, Towne Mortgage, MFM, nor MFT were present at the closing.

To satisfy the Ershers' mortgage on the property, plaintiff mistakenly issued a check to Towne Mortgage for $169,567.94. Escrow Works also issued a check to Towne Mortgage for the same amount. Towne Mortgage received plaintiff's check on June 8, 2005 and applied it to the Ershers' mortgage obligation on June 10, 2005. After doing so, Towne Mortgage received Escrow Works's check. On June 13, 2005, Towne Mortgage informed plaintiff that it had received Escrow Works's check, but that it had already deposited plaintiff's check. Towne Mortgage then sent plaintiff Escrow Works's original check. Plaintiff sent the original check to Escrow Works and Escrow Works issued a new check payable to plaintiff. Plaintiff sought to deposit Escrow Works check but it was returned for insufficient funds.

Plaintiff then instituted this lawsuit under theories of unjust enrichment, equitable subrogation, and breach of contract seeking return of the money it mistakenly paid. At the close of discovery, the parties cross-motioned for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). The trial court granted judgment in favor of defendants and this appeal followed.

II. Standards of Review

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties and construe that evidence in a light most favorable to the nonmoving party. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In reviewing a court's grant of summary disposition under MCR 2.116(C)(8), we consider the pleadings alone, viewing all the non-moving party's factual allegations as true, and determine whether there is a sufficient legal basis for the claim. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). Summary disposition under this subrule is proper only where the claims alleged are so clearly unenforceable as a matter of law that "no factual development could justify the . . . claim for relief." *Spiek*, *supra* at 337. Unsupported conclusory statements of fact or law are insufficient to state a claim on which relief can be granted. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). To the extent that the trial court did not specify on what subrule it was granting defendants' motions, we will construe the ruling as having been granted based on a lack of material factual

dispute because the court relied on evidence outside the pleadings. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

III. Claims Against MFM and MFT

A. Unjust Enrichment

Plaintiff argues that the trial court erred by dismissing its unjust enrichment claim against MFM and MFT under MCR 2.116(C)(10). Specifically, plaintiff contends that MFM was unjustly enriched because plaintiff paid off the Ershers' mortgage that MFM was allegedly required to pay, thereby extinguishing the Ershers' mortgage, and that MFT was enriched because it would not have to defend against a title claim arising from the Ershers' mortgage. We disagree. Unjust enrichment consists of "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the [defendant's] retention of that benefit . . . ." *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007) (internal quotation marks and citation omitted). "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006).

Plaintiff has not shown that either MFM or MFT was unjustly enriched at plaintiff's expense. It is undisputed that neither MFM nor MFT received plaintiff's mistaken payment. MFM and MFT cannot be held liable in equity for money they did not personally receive. *Trevor v Fuhrmann*, 338 Mich 219, 223-224; 61 NW2d 49 (1953). Furthermore, the benefit that MFM and MFT received as a result of the transaction was only that which they initially expected. MFM satisfied all of its loan obligations by loaning funds to the Hills for the purchase of the Ershers' property and disbursing the proceeds of the Hills' loan. Contrary to plaintiff's allegation, MFM was not required to pay-off the Ershers' mortgage; MFM was required to lend proceeds to the Hills. Consequently, the satisfaction of the Ershers' mortgage, and the return of a promissory note for the loan proceeds secured by a mortgage against the property, was the expected result of MFM's loan transaction with the Hills. This result is the very same benefit that plaintiff contends MFM unjustly received by way of plaintiff's payment of the Ersher mortgage. Thus, it cannot be said that MFM was unjustly enriched at plaintiff's expense because the allegedly unjust benefit is the same benefit that MFM expected and not an independent benefit unjustly received as a result of plaintiff's transaction with Towne Mortgage. See 66 Am Jur 2d, Restitution and Implied Contracts, § 32. For this same reason, MFT also did not receive a benefit from plaintiff.

Plaintiff's reliance on *Morris Pumps v Centerline Piping, Inc*, *supra*, for the proposition that MFM and MFT did not have to physically receive plaintiff's money in order to be unjustly benefited is misplaced. In our view, that case is factually distinguishable from the present matter because the defendant retained construction materials that it received from plaintiff without providing plaintiff any compensation. *Id.* at 195-197. In this matter, plaintiff has not shown that either MFM or MFT received a benefit as a result of plaintiff's mistaken payment to Towne Mortgage. Accordingly, when viewing the evidence in the light most favorable to plaintiff, no material factual dispute exists and defendants, MFM and MFT, are entitled to judgment as a matter of law. *Babula*, *supra* at 48. The trial court did not err in dismissing plaintiff's unjust enrichment claim against MFM and MFT.

B. Breach of Contract

Plaintiff argues that the court erred by dismissing its breach of contract claim for its failure to state a claim. Plaintiff's breach of contract claim is premised on its allegation that Escrow Works was acting as MFM and MFT's agent. According to plaintiff, because Escrow Works breached its promise to pay plaintiff $169,567.94, MFM and MFT should be held vicariously liable for Escrow Works's breach. We disagree. Even assuming that Escrow Works was acting as defendants' agent at closing, plaintiff did not plead any specific factual allegations showing that Escrow Works was acting within the scope of its alleged agency agreement when it acquired its original check from Towne Mortgage and issued a new check to plaintiff in satisfaction of plaintiff's mistaken payment. A principal is generally liable only for the torts of his agent committed within the scope of the agency. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 109; 577 NW2d 188 (1998). Because plaintiff relied on mere conclusory statements that Escrow Works was acting within the scope of an agency relationship with MFM or MFT when it breached its promise to pay plaintiff, plaintiff failed to state a breach of contract claim against MFM and MFT. *Churella*, *supra* at 272. Summary disposition for defendants was proper.

C. Equitable Subrogation

Plaintiff asserts that because MFM has been unjustly enriched to plaintiff's detriment, that plaintiff should be subrogated to MFM's rights under the Hill mortgage. We disagree. In *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999), our Supreme Court observed:

> 'Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer."' [Citation omitted.]

In other words, "a subrogee cannot voluntarily have made payment, but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor." *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 95; 731 NW2d 99 (2006).

Plaintiff presented no evidence showing that it paid a debt for which MFM was primarily responsible: MFM was not obligated to pay-off the Ershers' mortgage. Moreover, plaintiff has failed to show that it was not a "mere volunteer." Plaintiff presented no evidence showing that it paid Towne Mortgage the amount of the Ershers' mortgage in order to fulfill a legal or equitable duty plaintiff owed to MFM. *Id*. Accordingly, plaintiff's argument that it was not a volunteer because its act of payment was a mistake is without merit. In our view, the doctrine of equitable subrogation is inapplicable to the facts of this case. Summary disposition in defendant's favor was proper.

IV. Claim Against Towne Mortgage and FNMA

Plaintiff argues that the trial court erred by granting summary disposition for Towne Mortgage and FNMA on plaintiff's claim of unjust enrichment. We disagree. As noted, unjust

enrichment consists of "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the [defendant's] retention of that benefit . . . ." *Sweet Air Investment, Inc*, *supra* at 504 (internal quotation marks and citation omitted).

It is clear that Towne Mortgage and FNMA received a benefit as a result of plaintiff's mistaken payment. Towne Mortgage received a check in the amount of the Ershers' mortgage, which FMNA used to satisfy the balance of that mortgage. Plaintiff did suffer an inequity as a result of this mistaken payment: it lost $169,567.94 of its own funds.

While it is the longstanding "rule that payment made under a mistake of fact can be recovered even if the mistake could have been avoided by the payor, . . this rule is subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has been changed in consequence of the payment, and it would be inequitable to allow a recovery." *Wilson v Newman*, 463 Mich 435, 441-442; 617 NW2d 318 (2000) (citation and quotation marks omitted). Thus, in situations where the payee can demonstrate that it relied to its detriment on the payor's mistaken payment, e.g., if the means to collect the money owed is no longer available, then return of the payor's money is unjust. *Id*. at 443. In addition, restitution under a theory of unjust enrichment due to a mutual mistake of fact may be denied on the ground that it may adversely affect the rights of innocent third parties. *Lake Gogebic Lumber Co v Burns*, 331 Mich 315, 321-322; 49 NW2d 310 (1951).

While we find that defendants Towne Mortgage and FNMA were unjustly enriched to plaintiff's detriment, we conclude that plaintiff is not entitled to restitution. Towne Mortgage and FNMA, as a result of accepting plaintiff's check in satisfaction of the Ershers' mortgage, released their security interest in the property. By giving up this security interest, both defendants materially changed their position. *Wilson*, *supra* at 441-442. Further, returning the money to plaintiff would adversely affect the property interests of innocent third parties, the Ershers and the Hills. *Lake Gogebic Lumber Co*, *supra* at 321-322. For these reasons, restitution is not proper under the circumstances of this case. Accordingly, the trial court properly determined that defendants Towne Mortgage and FNMA could not be liable under a theory of unjust enrichment.

Plaintiff argues that Towne Mortgage knew that it received plaintiff's check by mistake and therefore a refund is necessary. In support of this argument, plaintiff points out that Towne Mortgage allegedly cashed plaintiff's check and applied it to the mortgage when it had possession of Escrow Works's check at the same time. Plaintiff's statement of the evidence supporting its argument is inaccurate. Towne Mortgage's president swore in an affidavit that Towne Mortgage received and applied plaintiff's check to the Ershers' mortgage before it received Escrow Works's check and that Towne Mortgage did not know that it was supposed to apply Escrow Works's check to the mortgage. Plaintiff's president's affidavit recounting its communications with Towne Mortgage regarding the mistaken payments does not contradict these facts. This evidence neither imputes knowledge of the mistake to Towne Mortgage nor indicates that Towne Mortgage engaged in some type of misleading act that would justify plaintiff's recovery of the money. See *Morris Pumps*, *supra* at 196. Plaintiff's bald allegation to the contrary is insufficient to raise a genuine issue of material fact sufficient to avoid summary disposition. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). Because it would be inequitable to hold either Towne Mortgage or FNMA liable for the return of plaintiff's money because of their changed positions, the trial court did not err in dismissing

plaintiff's claim for unjust enrichment. Thus, we conclude that the evidence, when viewed in the light most favorable to plaintiff, does not create a genuine issue of material fact and defendants were entitled to judgment as a matter of law. *Babula, supra* at 48.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray