

STATE OF MICHIGAN
COURT OF APPEALS

LARRY EBERSOLE,

Plaintiff-Appellant,

V

CONSTRUCTION LOAN ONE, LLC,

Defendant-Appellee.

UNPUBLISHED

October 26, 2010

No. 292871

Jackson Circuit Court

LC No. 09-000834-CK

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Plaintiff, Larry Ebersole, appeals an order that granted summary disposition to defendant, Construction Loan One, LLC. For the reasons set forth below, we affirm.

In 2007 and 2008, defendant made a series of business loans to plaintiff, secured by some of plaintiff's properties. According to defendant, plaintiff defaulted on the notes and mortgages, so, after notifying plaintiff of the defaults, and after plaintiff failed to cure the defaults, defendant published a notice of a foreclosure sale and, on March 18, 2009, sold the properties that secured the loans. On March 19, 2009, plaintiff filed this action, and asserted claims of misrepresentation, breach of contract, promissory estoppel, and violation of the Michigan Consumer Protection Act (MCPA).

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) and argued that plaintiff failed to adequately plead his fraudulent misrepresentation and breach of contract claims, the promissory estoppel and violation of the MPCA do not apply to the transactions between plaintiff and defendant, and that plaintiff cannot establish an issue of material fact to support his fraud and breach of contract claims. In response, plaintiff asserted that defendant failed to discharge some of the loans after plaintiff paid them off and one of the loans was invalid because plaintiff received no loan proceeds. Plaintiff urged the court to deny the motion as premature and argued that documents produced during discovery would support his claims. After briefing and oral argument, the trial court granted summary disposition to defendant.

Plaintiff argues that the trial court incorrectly granted summary disposition to defendant because plaintiff properly pleaded his breach of contract and fraud claims and because there are genuine issues of material fact with regard to those claims.¹ “This Court reviews a trial court’s decision on a motion for summary disposition de novo.” *Lee v Detroit Medical Center*, 285 Mich App 51, 58-59; 775 NW2d 326 (2009). As this Court also explained in *Lee* at 59:

“A motion for summary disposition brought [under] MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone.” *Id.* A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party.

With regard to plaintiff’s misrepresentation claims, the trial court correctly granted summary disposition to defendant. To establish a claim of fraudulent misrepresentation, plaintiff was required to show that “(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 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.” *Cummins v Robinson Twp*, 283 Mich App 677, 695-696; 770 NW2d 421 (2009) (quotations and citations omitted). Claims of fraud must be pleaded with particularity and the complaint must set forth specific facts on which the plaintiff relies. MCR 2.112(B)(1); *Zimmerman v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 151 Mich App 566, 574; 391 NW2d 353 (1986). Plaintiff failed to set forth in his complaint any specific, material assertions made by defendant, in what manner those representations were false, how plaintiff relied on any statements by defendant or how any alleged misrepresentation caused plaintiff to sustain damages. “General allegations will not suffice to state a fraud claim [and] . . . mere speculations are not sufficient to overcome a motion for summary disposition.” *LaMothe v Auto Club Ins Ass’n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Accordingly, the trial court correctly granted summary disposition to defendant.

On his breach of contract claim, plaintiff alleged in his complaint that he paid more than \$80,000 to defendant and that some properties should have been released as security, but that defendant failed to discharge any of the properties and foreclosed on all of them. In its motion for summary disposition, defendant asserted that plaintiff failed to attach copies of the notes and mortgages to the complaint in violation of MCR 2.112(B)(1), and plaintiff failed to specify which of the agreements defendant allegedly breached. A complaint must contain “[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims

¹ Plaintiff has apparently abandoned his claims of promissory estoppel and violation of the MCPA.

the adverse party is called on to defend . . .” MCR 2.111(B)(1). Plaintiff failed to comply with this rule when he failed to set forth sufficient facts and allegations to reasonably notify defendant about his claims.

Defendant observes that plaintiff does not and cannot deny that he defaulted on all of the mortgages and promissory notes and, therefore, he cannot show that defendant acted improperly in foreclosing on the properties. Again, plaintiff claims that defendant failed to discharge one or more of the properties secured by the business loans after plaintiff paid certain sums to defendant. However, plaintiff failed to present any documentary evidence to support his contention that he paid off the loans or that defendant’s foreclosure violated the terms of any one of the contracts. Indeed, even if evidence showed that plaintiff made some payments to defendant, no evidence shows that plaintiff paid any of the loans in full or otherwise complied with the terms of the contracts. It is well settled that, “[w]here the burden of proof rests with the nonmoving party, that party must respond with documentary evidence to demonstrate the existence of a genuine issue of material fact for trial.” *Curry v Meijer, Inc*, 286 Mich App 586, 591; 780 NW2d 603 (2009). “The failure of the nonmoving party to so respond results in the entry of judgment for the moving party.” *Id.*

We also note that, both in the trial court and on appeal, plaintiff has failed to set forth legal authority to support his breach of contract claim or to respond to defendant’s arguments. “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.” *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Because plaintiff has failed to present legal or evidentiary support for his breach of contract claim, we hold that the trial court correctly granted summary disposition to defendant.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad