STATE OF MICHIGAN

COURT OF APPEALS

SIGNATURE BANK,

Plaintiff-Appellee,

v

ORVILLE J. GANSTINE and DOLORES E. GANSTINE,

Defendants-Appellants,

and

GANSTINE FARMS, LLC,

Defendant.

UNPUBLISHED
July 21, 2011

No. 295741
Lapeer Circuit Court
LC No. 08-040790-CH

Before: M. J. KELLY, P.J., O'CONNELL AND SERVITTO, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting plaintiff summary disposition in its action seeking reformation of mortgage documents. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2007, defendants and Ganstine Farms, LLC,[1] executed mortgages on multiple parcels of land as part of a refinancing transaction. Two of these mortgages are relevant to this dispute: a $182,000 mortgage on "Parcels 3A and 3B," owned by defendants; and a $233,000 mortgage on "Parcel 1," owned by Ganstine Farms. Defendants and Ganstine Farms defaulted on the mortgages. The parties learned that the legal descriptions of the two properties had been transposed in the closing documents. Defendants had signed the mortgage instrument pertaining

[1] Ganstine Farms is not a party to this appeal. The term "defendants" as used herein refers to Orville and Dolores Ganstine.

to Parcel 1, and Ganstine Farms, through its member, Orville Ganstine, had signed the mortgage instrument pertaining to Parcels 3A and 3B.

Plaintiff sought reformation of the mortgages on the ground that the parties had made a mutual mistake resulting in the transposition of the property descriptions in the two mortgage agreements. Plaintiff asserted that the $182,000 mortgage should have been recorded against Ganstine Farms and Parcel 1, and that the $233,000 mortgage should have been recorded against defendants and Parcels 3A and 3B. The trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10) and ordered reformation of the mortgages as requested.[2]

On appeal, defendants first argue that plaintiff failed to prove a mutual mistake of fact by clear and convincing evidence. Defendants assert that the evidence indicates, at best, that plaintiff made a unilateral mistake in drafting the mortgage documents, and that reformation is therefore prohibited.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. Where the proffered evidence, viewed in the light most favorable to the nonmoving party, fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Reformation of a deed is a form of equitable relief. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371-372; 761 NW2d 353 (2008). We review de novo the trial court's decision to grant or deny equitable relief. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995).

B. REFORMATION

A court of equity has the authority to reform a contract to make the contract conform to the agreement actually made by the contracting parties. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). Thus, when a written instrument fails to express the

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[2] Plaintiff proposed an order, and the trial court entered the order without objection. However, plaintiff later realized that this order did not achieve its objective of reforming the mortgages. The trial court entered a second order granting the equitable relief that plaintiff sought.

intention of the parties because of a mutual mistake, the court may enforce the equitable remedy of reformation. *Scott v Grow*, 301 Mich 226, 237; 3 NW2d 254 (1942).

To obtain reformation, a party must establish by clear and satisfactory evidence of a mutual mistake. *Lee State Bank v McElheny*, 227 Mich 322, 327; 198 NW 928 (1924). A "mutual mistake of fact" is "'an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.'" *Briggs Tax Service, LLC v Detroit Pub Schools*, 485 Mich 69, 77; 780 NW2d 753 (2010), quoting *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). A mutual mistake must relate to a fact in existence when the contract was executed. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982). Parol evidence can be used to determine whether reformation is warranted on the basis of mistake. *Scott*, 301 Mich at 239.

In support of its contention that reformation was warranted on the basis of mutual mistake, plaintiff submitted the deeds to the subject parcels, clearly demonstrating that defendants were the owners of Parcels 3A and 3B and that Ganstine Farms was the owner of Parcel 1. Plaintiff also submitted the parties' "Errors and Omissions Agreement," in which defendants agreed to fully cooperate in the correction of any and all loan closing documents if necessary to ensure that the documents accurately described the loan. In their response, defendants never contended that the loan documents were accurate. Rather, defendants argued that plaintiff had demonstrated only a unilateral mistake and therefore reformation was not appropriate.

A mortgage constitutes an interest in land within the meaning of the statute of frauds, MCL 566.106; *Burkhardt v Bailey*, 260 Mich App 636, 659; 680 NW2d 453 (2004), and a grantor cannot convey a right or interest he does not possess. *Gowdy v Gordon*, 240 Mich 558, 564; 215 NW 702 (1927). Defendants submitted no evidence demonstrating that the parties intended for defendants and Ganstine Farms to execute mortgages on properties that they did not own. In the absence of any evidence demonstrating the existence of a genuine issue of material fact regarding the parties' intentions in executing the mortgages, summary disposition was appropriate.

Defendants additionally contend that various equitable considerations nevertheless militate against reforming the mortgages. Equitable considerations are relevant in determining whether reformation is appropriate. *Capitol Savings & Loan Ass'n v Przybylowicz*, 83 Mich App 404, 408, 411; 268 NW2d 662 (1978). "A court acting in equity 'looks at the whole situation and grants or withholds relief as good conscience dictates.'" *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992), quoting *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951). However, the trial court may not make findings of fact in deciding whether to grant summary disposition. *Jackhill Oil Co v Powell Prod Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

Defendants first argue that plaintiff's status as a "sophisticated" entity that routinely drafted mortgage documents should bar it from obtaining equitable relief based on its own mistake. In support of this proposition, defendants cite *Capitol S & L Ass'n*, in which this Court declined to reform a mortgage to correct the plaintiff lender's miscalculation of the defendant mortgagors' monthly payment amount based on the agreed-upon interest rate. We conclude that *Capitol S & L Ass'n* does not compel reversal of the trial court's decision. The *Capitol S & L*

Ass'n panel indicated that its holding was narrowly confined to the combination of factors present in that case. *Capitol S & L Ass'n*, 83 Mich App at 411. Moreover, reformation of the mortgage to correct the plaintiff's mathematical error in *Capitol S & L Ass'n* would have resulted in unforeseen and substantial monetary hardship for the defendants, who had relied upon the plaintiff's representations concerning their monthly payment. In contrast, reformation of the mortgage documents in this case results merely in returning the parties to the very position they presumably contemplated when executing the mortgages.

Defendants also argue that "plaintiff's habit of carelessly drafting documents" further militates against granting it equitable relief. Defendants assert that the mortgage documents drafted by plaintiff did not identify the debts secured by the respective mortgages. However, this argument was not raised below and is not preserved for appellate review, *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005); moreover, this alleged additional clerical error in the mortgage documents is wholly irrelevant to the issue whether reformation is warranted on the basis of a mutual mistake regarding the property descriptions. Defendants also note that plaintiff incorrectly drafted the original order in the trial court, necessitating an additional trip to court on plaintiff's motion to correct that order. However, MCR 2.612 allows a party to seek relief from judgments and orders under certain circumstances, and defendants do not raise on appeal a substantive argument that the trial court erred in granting such relief.

Defendants next assert that the fact that they paid for title insurance, the proceeds of which were apparently used to fund the instant lawsuit, should have weighed in their favor in determining whether equitable relief was appropriate. Defendants have cited no authority for this proposition. Likewise, defendants have provided no support for their additional arguments that because they offered plaintiff a deed in lieu of foreclosure, and because the parties had entered into an agreement prohibiting oral modification of the written mortgage documents, reformation of the mortgages would be inequitable. A party may not leave it to this Court to search for authority to sustain or reject the party's position. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996).

In short, defendants have not demonstrated the existence of a genuine issue of material fact regarding whether plaintiff is entitled to equitable relief. Reformation of a mortgage is particularly appropriate in the case of an erroneous property description. *Etherington v Bailiff*, 334 Mich 543, 552; 55 NW2d 86 (1952). Plaintiff provided evidentiary support for its contention that a mutual mistake was made in the property descriptions contained in the two mortgage agreements, and defendants have failed to refute this evidence or to otherwise demonstrate that a genuine issue of disputed fact exists for trial. *Quinto*, 451 Mich at 362.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto