STATE OF MICHIGAN

COURT OF APPEALS

DANIEL CASTILLO,

Plaintiff,

and

JODY CASTILLO,

Plaintiff/Counter-Defendant-Appellant,

v

JEREMY VANNUIL and JENNIFER VANNUIL,

Defendants,

and

DON REUSCHEL, BRYAN MYRICK, SCHMIDT REAL ESTATE, INC, d/b/a COLDWELL BANKER WOODLAND SCHMIDT,

Defendants-Appellees,

and

TELL IT LIKE IT IS HOME INSPECTIONS,

Defendant/Counter-Plaintiff.

UNPUBLISHED
October 20, 2015

No. 323581
Ottawa Circuit Court
LC No. 13-003342-CK

Before: TALBOT, C.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

Plaintiff Jody Castillo (Jody) appeals as of right from an order of the trial court granting summary disposition in favor of defendants Don Reuschel, Bryan Myrick, and Schmidt Real Estate, Inc., d/b/a Coldwell Banker Woodland Schmidt (CBWS). Finding no errors warranting relief, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This matter arises out of Jody's purchase of a home located in Holland (the Property). On April 17, 2013, Jeremy VanNuil and his wife, Jennifer VanNuil, sold the Property to Jody. Reuschel served as Jody's real estate agent with regard to the transaction. The VanNuils engaged Myrick as their agent with respect to the sale. Both Reuschel and Myrick are associated with the same real estate agency, CBWS.

Before she purchased the Property, Jody voiced concerns to Reuschel because, although it was February, a sump pump was constantly running. She also was concerned that a concrete patio was cracked, despite being recently installed. Reuschel stated that these conditions were normal. In a seller's disclosure document, the VanNuils disclosed a single incident of water intrusion in 2008 related to a storm. Jody asked for more information, and the VanNuils explained that water entered the basement during the storm because power was lost.[1] Jody made an offer to purchase the Property, which was accepted by the VanNuils. Before closing on the Property, Jody engaged Tell It Like It Is Home Inspections to inspect it. This inspection found no water or drainage issues.

Jody signed three agreements of relevance to this matter. In an agency agreement, dated February 6, 2013, Jody agreed to the following:

> 11. SCOPE OF REPRESENTATION: The services of [CBWS] and [Reuschel] under this Agreement shall ordinarily be those services customarily provided by real estate professionals, including consultation with Buyer with respect to the desirability of particular properties and the availability of financing, formulating acquisition strategies, and negotiating purchase agreements. However, Buyer agrees not to seek or rely upon advice from either [CBWS] or [Reuschel] with respect to legal and/or tax matters, heating, air-conditioning, plumbing, structural and/or architectural matters, environmental matters, matters of survey, or any other matters relating to the condition of the Property; [CBWS and [Reuschel] recommend that Buyer consult competent professionals with respect to those matters, and Buyer hereby releases any claim against [CBWS] or [Reuschel] related to the matters stated in this paragraph.

Along with affixing her signature to this agreement, Jody specifically initialed paragraph 11.

A purchase agreement executed the same day provides that:

> Buyer agrees that Buyer is not relying on any representation or statement made by Seller or any real estate salesperson (whether intentionally or negligently) regarding any aspect of the premises or this sale transaction, except as may be

[1] In a deposition, Jeremy VanNuil explained that the property lost power during the storm, which caused the sump pump to stop operating. Less than an inch of water accumulated in the basement.

> expressly set forth in this Agreement, a written amendment to this Agreement, or a disclosure statement separately signed by the Seller.

This language appears twice in the purchase agreement: first, in a clause regarding Jody's right to inspect the Property, and second, in a clause in which CBWS recommended that Jody "seek legal, tax, environmental, and other appropriate professional advice relating to this transaction." Jody initialed the page on which this language first appears, and her signature and initials appear on the page containing the second instance of this same language.

Finally, when she closed on the property on April 17, 2013, Jody signed a stand-alone document entitled, "WAIVER," which stated the following:

> We, the undersigned purchaser(s), borrower(s) and seller(s) of the above captioned property, acknowledge that we have been advised to obtain a SURVEY AND ANY OTHER INSPECTIONS NOT COMPLETED FOR THIS TRANSACTION for said property.
>
> We hereby release CHICAGO TITLE, COLDWELL BANKER WOODLAND SCHMIDT AND COLDWELL BANKER WOODLAND SCHMIDT and their employees and/or agents, from any and all responsibility and/or liability concerning or pertaining to matters that may or may not have been determined as the result of said inspection(s) and/or report(s) and generally the failure to obtain such inspection(s).
>
> We have decided, completely of our own volition, not to obtain a SURVEY AND ANY OTHER INSPECTIONS NOT COMPLETED FOR THIS TRANSACTION and wish to complete the transaction without the recommended inspection(s) and/or report(s).

Soon after closing, Jody discovered that the Property suffered from poor drainage, which caused severe flooding issues in the backyard of the Property. She then had the Property evaluated by an engineering firm. This firm concluded that the Property had a significant drainage problem caused by improper grading and placement of the home on the Property. Relevant to this appeal, Jody[2] filed suit against Reuschel, Myrick, and CBWS.[3] While based on

[2] Jody is married to Daniel Castillo (Daniel), and both were named as plaintiffs in the suit. While Jody asks this Court to reverse the trial court's order with respect to Daniel, she does not address the trial court's reason for dismissing him from the suit - that Daniel lacked standing. "When an appellant fails to dispute the basis of the trial court's ruling, this Court need not even consider granting [the appellant] the relief [she] seek[s]." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation marks, brackets, ellipses, and citation omitted). As Jody has failed to dispute the basis of the trial court's decision to dismiss Daniel from the suit, we will not consider reversing the trial court on this point.

different theories of liability, each count of the complaint was based on the same premise: that Reuschel, Myrick, and CBWS had failed to disclose the drainage problem and thereby misrepresented the condition of the Property. The trial court granted summary disposition motions brought by Reuschel, Myrick, and CBWS, and dismissed the claims against these defendants. Jody now appeals from this decision.

II. DISCUSSION

A. STANDARD OF REVIEW

The trial court granted summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). We review a trial court's decision on a motion for summary disposition de novo.[4] Summary disposition is appropriate pursuant to MCR 2.116(C)(7) if a claim is barred by release. "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial."[5] "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant."[6]

> A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim, and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is proper if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. This Court considers only the evidence that was properly presented to the trial court in deciding the motion.[7]

Issues of contract interpretation are questions of law that we review de novo.[8] To the extent Jody has failed to properly preserve her arguments for appeal, our review is for plain error affecting her substantial rights.[9]

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[3] Jody also brought claims against Tell It Like It Is Home Inspections and the VanNuils. Her claim against Tell It Like It Is Home Inspections was dismissed by stipulation, and her claim against the VanNuils was dismissed after the parties accepted a case evaluation award.

[4] *Plunkett v Dep't of Transp*, 286 Mich App 168, 174; 779 NW2d 263 (2009).

[5] *Fingerle v Ann Arbor*, 308 Mich App 318, 320 n 1; 863 NW2d 698 (2014) (quotation marks and citations omitted).

[6] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[7] *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 506; 802 NW2d 712 (2010) (quotation marks and citations omitted).

[8] *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

[9] *Rivette v Rose-Molina*, 278 Mich App 327, 328-329; 750 NW2d 603 (2008). As a general matter, the issue of the enforceability of the release clauses was presented to the trial court and

B. ANALYSIS

On appeal, Jody presents several arguments purporting to demonstrate that the release language contained in the purchase agreement may not be enforced. Jody does not contest whether this language, if enforced, bars her claims.[10] "The validity of a release turns on the intent of the parties. A release must be fairly and knowingly made to be valid."[11] "If the language of a release is clear and unambiguous, the intent of the parties is ascertained from the plain and ordinary meaning of the language."[12] "A release is invalid if (1) the releasor was acting under duress; (2) there was a misrepresentation as to the nature of the release agreement, or (3) there was fraudulent or overreaching conduct to secure the release."[13] Each of Jody's arguments fails to demonstrate that the release language is invalid.

1. MISCONDUCT BY REUSCHEL

Jody first argues that the release language is invalid as against Reuschel because he encouraged Jody to rely on his experience as an engineer, misrepresented the condition of the Property, and then presented Jody with a purchase agreement containing language stating that she would not rely on his advice. Jody's argument fails to demonstrate any "fraudulent or overreaching conduct *to secure the release*."[14] Rather, it points to the very claim that Jody released through the purchase agreement, in which she agreed that she was "not relying on any representation or statement made by Seller or any real estate salesperson (whether intentionally or negligently) regarding any aspect of the premises . . . ." Jody's argument is without merit.

2. LACK OF INTENT

Jody next argues that the release is invalid because her "actions do not manifest an intention to bind her to a release." Jody relies on *Hungerman v McCord Gasket Corp*, which stated:

> Second, plaintiff claims that his release is invalid because there was a misrepresentation regarding the nature of the instrument. To warrant recision or

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decided in its opinion. However, many of the specific arguments now raised by Jody were only presented in a motion for reconsideration of that opinion. "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

[10] Although it would certainly appear that Jody's claims are barred by the release language contained within all three agreements, the trial court seemed to rely on the language of the purchase agreement. Because the release language contained within the purchase agreement is enforceable, we need not decide whether Jody's claims are also barred by the other agreements.

[11] *Batshom v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 649 n 4; 624 NW2d 903 (2001).

[12] *Id*.

[13] *Brooks v Holmes*, 163 Mich App 143, 145; 413 NW2d 688 (1987), citing *Denton v Utley*, 350 Mich 332, 342; 86 NW2d 537 (1957).

[14] *Id*. (emphasis supplied).

> invalidation of a contract or release, a misrepresentation must be made with the intent to mislead or deceive. An innocent misrepresentation is insufficient to invalidate a release. Where fraud or mistake is alleged, the intent of the parties should be considered. In determining the intent of the parties, we look to the following factors: (1) the haste with which the release was obtained, (2) the amount of consideration, (3) the circumstances surrounding the release, including the conduct and intelligence of both the releasor and the releasee, and (4) the actual presence of an issue of liability.[15]

Jody argues that each of the four factors weigh in favor of finding that she did not intend to agree to the release. With regard to the first factor, she argues that she felt pressured to make an offer on the Property and did not read the release language. Our case law is clear; "one who signs a contract cannot seek to invalidate it on the basis that he or she did not read it . . . ."[16] Second, she contends that "no consideration was given for the release . . . ." This is simply untrue. The release was contained in the purchase agreement, for which the Property served as consideration.[17] With regard to the third factor, she explains only that "the circumstances demonstrate Don Reuschel's conduct that [Jody] rely on his affirmations and expertise in going through with the closing." Jody ignores her own conduct, which included signing the purchase agreement and initialing the individual pages containing the release language – language in which she specifically agreed that she was not relying on "any representation or statement . . . regarding any aspect of the premises . . . ." With regard to the fourth element, there was no issue of liability at the time the release was obtained, weighing against invalidating the release.[18] On balance, these factors do not weigh in favor of invalidating the release language. Jody's argument is without merit.

3. MISREPRESENTATION

Jody next argues that the release clauses are unenforceable because Reuschel did not discuss the terms of the release with her, and thus, "misrepresented the release by not pointing it out." To invalidate a release clause, "a misrepresentation must be made with the intent to

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[15] *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991) (citations omitted).

[16] *Paterek v 6600 Ltd*, 186 Mich App 445, 450; 465 NW2d 342 (1990). See also *Zurcher v Herveat*, 238 Mich App 267, 299; 605 NW2d 329 (1999) (quotation omitted) ("It is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms.").

[17] See *Hall v Small*, 267 Mich App 330, 334; 705 NW2d 741 (2005) (where a release is contained within a larger agreement, the release need not be supported by separate consideration; rather, the consideration that supports the entire agreement also supports the release).

[18] See *Theisen v Kroger Co*, 107 Mich App 580, 584; 309 NW2d 676 (1981) (that a party's liability was "not clearly indicated" tends to militate against invalidating the release).

mislead or deceive."[19] Jody cites no authority holding that the failure to specifically draw another's attention to a particular clause of a contract amounts to such a misrepresentation. Quite the contrary, it is the responsibility of one signing an agreement to know and understand its contents.[20] Jody again fails to demonstrate that the clauses should be held invalid.

4. CONCERT OF ACTION

Jody argues that the release language is invalid with regard to Myrick because "Myrick [was] complicit in the VanNuil's fraud under the theory of concert of action." Jody goes on to discuss, at great length, the concert of action concept, and how it might apply to allow her to hold Myrick liable for the VanNuils' conduct. She similarly argues that Reuschel may be held liable under a concert of action theory. What is entirely absent from this discussion, however, is any explanation of how this conduct has any effect on the validity of the release language contained within the purchase agreement. Accordingly, Jody has presented no reason to invalidate the release clauses.[21]

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael F. Gadola

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[19] *Paterek*, 186 Mich App at 449.

[20] *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 92; 468 NW2d 845 (1991) (quotation omitted) ("The stability of written instruments demands that a person who executes one shall know its contents or be chargeable with such knowledge.").

[21] Further, to the extent Jody's argument could be understood as contesting whether there is evidence to support her concert of action claims against Myrick and Reuschel, no such question is before the Court. Jody's statement of the question presented only asks us to consider whether the release language is valid. Issues not raised in an appellant's statement of the questions presented are waived. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).