STATE OF MICHIGAN

COURT OF APPEALS

DAWN SMITH and RANDY FISHER, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED October 13, 2016
v	No. 332353 Alger Circuit Court
MJM REAL ESTATE INVESTMENTS LLC, Defendant/Counter-Plaintiff-Appellant.	LC No. 2014-007332-CK

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's order granting plaintiffs' motion to strike defendant's amended counterclaim and dismissing the case. We affirm.

In 2006, plaintiffs sold a parcel of vacant property to defendant pursuant to a land contract. In 2011, the Department of Environmental Quality (DEQ) determined that the lot contained wetlands, thus limiting the ways in which the property could be developed. Defendant admits that it paid only the interest due under the land contract for the years 2010 through 2012. In 2013, plaintiffs commenced a summary proceedings action in the district court for possession of the property, claiming forfeiture of the land contract. Defendant counterclaimed for rescission of the land contract and reimbursement of amounts paid on the contract to date. The litigation progressed in the district court through entry of a judgment of forfeiture, after which it was removed to the circuit court.

Plaintiffs moved the circuit court for summary disposition of defendant's counterclaim on the ground that options for building on the parcel remained despite the wetlands designation. The circuit court granted the motion, but allowed defendant to file an amended counterclaim. After defendant filed its amended counterclaim, plaintiffs filed a motion to strike it as redundant under MCR 2.115(B).

In granting the motion, the circuit court ruled that defendant's amended counterclaim merely presented an issue that had already been decided, i.e., whether there existed a mutual mistake of fact that would justify rescission of the land contract, and was effectively a motion for reconsideration. Treating the amended counterclaim as a motion for reconsideration, the court

then considered whether certain caselaw that defendant now relied on regarding mutual mistake brought to light a legal error warranting reconsideration, concluding that it did not. The circuit court noted that the land contract had "already been forfeited and any remedy there has been lost." The court added:

> [Defendant] here is not an unsophisticated buyer, having purchased adjacent properties to the one in question . . . . The lot has been determined to be a lot capable of development for a residential structure and . . . disputed value alone of the property is insufficient reason for this Court to proceed to revisit the issues previously ruled on by this Court.

The circuit court also observed that the land contract explicitly provided that defendant agreed that plaintiffs had not made any representations or warranties concerning the condition of the premises.

"This Court reviews a trial court's decision regarding a motion to strike a pleading pursuant to MCR 2.115 for an abuse of discretion." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003).

MCR 2.115(B) authorizes a court to strike a pleading in whole or in part where it is redundant, immaterial, impertinent, scandalous, indecent, or not drawn in conformity with the court rules. In this case, the basis for striking defendant's amended counterclaim was that it was redundant for failing to raise any new issues. In challenging the circuit court's decision, defendant does not assert that its amended counterclaim was not redundant, or otherwise attempt to identify any new theory of recovery therein. Instead, defendant points out that the circuit court treated the amended counterclaim as a motion for reconsideration and then proceeds to argue the merits of the earlier decision to grant summary disposition in favor of plaintiffs.

Because defendant does not endeavor to show that its amended counterclaim was not wholly redundant, we affirm the result below for that failure of advocacy. See *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").[1] Moreover, even on substantive examination of defendant's mutual-mistake claim, the argument fails. A mutual mistake of fact sufficient to nullify or rescind a contract entails "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006); see also *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 29; 331 NW2d 203 (1982) ("[W]e think the better-reasoned approach is a case-by-case analysis whereby rescission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties.").

[1] Furthermore, a judgment of forfeiture of the land contract was entered in the district court, and defendant fails to explain on a procedural level how its mutual-mistake argument remains relevant and viable, where defendant apparently does not challenge that judgment.

Defendant's theory appears to be that there was a mutual mistake of fact with respect to the value of the property, and not as to general buildability, given that at the time of the transaction the parties were unaware that the property contained wetlands. Defendant does not dispute the circuit court's finding that the property remains buildable despite the wetlands designation. Rather, defendant contends that the wetlands status diminishes the value of the property, and had that been known at the time of the sale, the consideration would have been much lower or there would have been no sale at all. The Supreme Court's ruling in *Lenawee Co* lends some support, at least in part, to defendant's mutual-mistake theory. *Lenawee Co*, 417 Mich at 29 ("Often, a mistake relates to an underlying factual assumption which, when discovered, directly affects value, [and] simultaneously and materially affects the essence of the contractual consideration.") However, the *Lenawee Co* Court also ruled that "[r]escission is not available . . . to relieve a party who has assumed the risk of loss in connection with [a] mistake[,]" elaborating as follows:

> A court need not grant rescission in every case in which the mutual mistake relates to a basic assumption and materially affects the agreed performance of the parties. In cases of mistake by two equally innocent parties, we are required, in the exercise of our equitable powers, to determine which blameless party should assume the loss resulting from the misapprehension they shared. Normally that can only be done by drawing upon our "own notions of what is reasonable and just under all the surrounding circumstances."
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> Equity suggests that, in this case, the risk should be allocated to the purchasers. We are guided to that conclusion, in part, by the standards announced in § 154 of the Restatement of Contracts 2d, for determining when a party bears the risk of mistake. See fn 12. Section 154(a) suggests that the court should look first to whether the parties have agreed to the allocation of the risk between themselves. While there is no express assumption in the contract by either party of the risk of the property becoming uninhabitable, there was indeed some agreed allocation of the risk to the vendees by the incorporation of an "as is" clause into the contract which, we repeat, provided:
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> "Purchaser has examined this property and agrees to accept same in its present condition. There are no other or additional written or oral understandings."
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> That is a persuasive indication that the parties considered that, as between them, such risk as related to the "present condition" of the property should lie with the purchaser. If the "as is" clause is to have any meaning at all, it must be interpreted to refer to those defects which were unknown at the time that the contract was executed. [*Lenawee Co*, 417 Mich at 30-32 (citations omitted).]

Here, as noted by the circuit court, the land contract specifically provided, "Purchaser agrees that the Seller has made no representations or warranties as to the condition of the premises . . . ." This provision undermines any claim for rescission of the land contract, as it effectively constitutes an "as is" clause. If defendant was granted rescission on the basis that the parties executed the land contract under the mistaken belief that the property did not contain

wetlands, it would reflect an improper rewriting of the land contract, effectively indicating that plaintiffs *were* making representations or warranties concerning the property's wetlands nature. The clause would be rendered meaningless were defendant successful in this litigation.[2]

Affirmed. Having fully prevailed on appeal, plaintiffs are awarded taxable costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause

[2] Additionally, we note that one of defendant's members and managing partners testified that he "was concerned about [the property] being wet in 2006," prior to the sale, and that the property has standing water on it, up to a foot, six months out of the year, although he claimed that he had no idea that there might be a "wetlands" issue and that plaintiffs informed him that the water was not problematic. Plaintiffs denied being asked about any water issues, and, regardless, there is no dispute that the DEQ did not give the property a wetlands designation until five years after the sale. And defendant has abandoned any argument regarding earlier fraud and misrepresentation claims that were rejected by the circuit court. Despite the knowledge of alleged significant amounts of water on the property, defendant executed the land contract and accepted the no-representations-or-warranties clause. There simply is no basis for rescission as a matter of law. We also question whether there truly was a mistake of fact *at the time of the transaction*, where the property at that point had not been designated by the DEQ as containing wetlands, allowing for the possibility that environmental changes may have occurred later bearing on the issue.