

STATE OF MICHIGAN
COURT OF APPEALS

TEIA MCGEE,

Plaintiff/Counterdefendant-Appellee,

v

DONNAHUE GEORGE,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED

December 10, 2020

No. 352362

Wayne Circuit Court

LC No. 19-010158-CH

Before: MURRAY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

In this land contract foreclosure action, defendant/counterplaintiff (defendant), proceeding *in propria persona*, appeals as of right the trial court’s order denying his motion for summary disposition, granting summary disposition for plaintiff/counterdefendant (plaintiff), and granting a judgment of foreclosure in favor of plaintiff. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On January 25, 2018, defendant executed an agreement to purchase real property from plaintiff by land contract for \$32,000. The purchase agreement provided that “[b]y closing this transaction, Buyer shall be deemed to have accepted the Property in ‘AS IS’ condition and it shall be deemed by closing this transaction that Buyer is satisfied with the condition of the property.”

In 2018, defendant brought an action against plaintiff and real estate broker Harry Nanes in LC No. 18-010253-CZ, alleging that they fraudulently represented that the plumbing at the property was in good working condition. The trial court dismissed that action for failure to state a claim for relief. In a prior appeal, this Court provided the following summary of the relevant facts stemming from this transaction:

When George purchased the subject property on land contract, McGee provided a seller’s disclosure statement indicating that there were no “known problems” with the building’s plumbing system. The listing indicated that it was a “turn key deal” and an “[e]asy turnkey deal,” and that McGee “ha[d] satisfied all City of Detroit requirements for rental license.” After closing the sale, George

turned on the water supply to the property and discovered that the “pipes were leaking or blocked and corroded” throughout. George had to pay to replace the plumbing and repair water damage.

George, acting in pro per, filed a handwritten one-page complaint against McGee and the “seller’s agent,” Nanes. He alleged that defendants committed fraud by selling the subject property “without disclosing that the plumbing was no good.” George further alleged that defendants “concealed a material fact”—that the plumbing was in poor condition—upon which George relied. In a second count, George accused Nanes of “[u]nfair and deceptive trade practices along with negligence and gross negligence,” averring that Nanes “owed [George] a duty of care” and breached it by providing a “final contract” that “had no sellers [sic] disclosure or [d]ual [a]gency agreement as required by law.” Additionally, George alleged that Nanes “[n]ever explained” or mentioned “[d]ual [a]gency” to him.

McGee generally denied George’s allegations, but Nanes never filed a responsive pleading. George responded to McGee’s answer with a “reply” that was actually a motion for summary disposition. The court never acknowledged that motion. Approximately one week later, McGee filed her own motion for summary disposition under MCR 2.116(C)(8), arguing that George’s tort claims should be dismissed under the economic loss doctrine. Before the motion could be heard, George filed a new motion for summary disposition under MCR 2.116(C)(9) and (10). The court did not consider that motion either. And in response to McGee’s summary disposition motion, George advised the court that Nanes had yet to reply and therefore requested that the court enter a default judgment against him. That request too was left unanswered by the court.

The circuit court ultimately dismissed George’s complaint without prejudice. In doing so, the court described that George asserted tort claims in a contract action. The tort claims were therefore barred by the economic loss doctrine, the court ruled. George aptly advised the court that the economic loss doctrine “only applies to consumer goods,” not “real estate transactions,” but the court rejected his plea. The alleged violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, the court found, were not applicable to individuals. [*George v McGee*, unpublished per curiam opinion of the Court of Appeals, issued February 20, 2020 (Docket No. 347636), pp 1-2 (footnotes omitted).]

This Court held that the trial court erred by dismissing the fraud claim on the basis of the economic-loss doctrine, vacated in part the trial court’s order dismissing defendant’s complaint, and remanded the case for further proceedings in the trial court. *Id.*, unpub op at 4-5.

On July 30, 2019, while that appeal was pending in this Court, plaintiff filed her complaint in this case. Plaintiff asserted in Count I of an amended complaint that defendant had ceased payments on the land contract, that he owed \$16,556 on the contract as of June 11, 2019, and that the contract provided that plaintiff had the right “to declare the entire principal balance, and unpaid interest, immediately due and payable, and proceed to enforce the Land Contract by judicial

foreclosure.” Plaintiff also alleged claims for breach of contract (Count II), defamation (Count III), and intentional infliction of emotional distress (Count IV).

Defendant filed an answer in which he asserted that “payments were no longer required under the contract” because plaintiff refused to cure the defects in the property, that “if there was fraud on the part of the seller payments were not due,” and that after plaintiff breached the contract, she no longer had the authority to accelerate the balance due. Defendant also filed a counterclaim for fraud, asserting that plaintiff had advertised that the property was in turnkey condition and approved for rental, that she had provided a disclosure statement stating that the plumbing was working properly, that she knew that these representations were false, that he relied on these representations in purchasing the property, and that he was injured by having to replace the plumbing and having to defend this action and previous actions brought by plaintiff. Defendant alleged additional counterclaims for intentional infliction of emotional distress, defamation, and breach of contract.

In her answer to defendants’ counterclaims, plaintiff asserted that defendant had “executed a contract wherein he acknowledged that he had examined the subject premises and accepted the premises in the condition they were in at the time of execution,” and generally denied defendant’s allegations of fraud as untrue. Plaintiff also denied the allegations of intentional infliction of emotional distress, defamation, and breach of that contract.

Defendant filed a motion for summary disposition, seeking dismissal of plaintiff’s breach of contract claim pursuant to MCR 2.116(C)(6) “because there is an open case in the Michigan Court of Appeals regarding these same facts,” pursuant to MCR 2.116(C)(7) because plaintiff “committed fraud and is barred from relief because of the statute of frauds,” and pursuant to MCR 2.116(C)(8) because plaintiff’s claim “is barred by the doctrine of first breach, fraud, unclean hands and failure of performance.” He also sought dismissal of plaintiff’s defamation claim under MCR 2.116(C)(8), asserting that plaintiff “failed to specify what she alleges [defendant] said or did to defame her.” In addition, defendant sought summary disposition of his counterclaims for breach of contract and fraud pursuant to MCR 2.116(C)(9), asserting that plaintiff “failed to state a valid defense for her actions,” and pursuant to MCR 2.116(C)(10) “because there is no genuine issue of material fact.” Defendant argued that summary disposition was warranted pursuant to MCR 2.116(C)(8) because “[a]s a matter of Michigan case law, a party who breaches a contract cannot itself maintain an action for breach by the other party.” He also argued that summary disposition was warranted under MCR 2.116(C)(10) because plaintiff admitted at a previous district court proceeding that she had provided a disclosure statement stating that the plumbing was in working order and admitted that “the plumbing was bad and the property was flooding when Defendant Donnahue George turned on the water.”

Plaintiff disputed defendant’s allegations and argued that the related case that was then pending in this Court had no effect on her foreclosure claim, that defendant failed to state a claim for fraud, that documents attached to defendant’s motion proved the validity of her defamation claim, and that she had stated valid defenses to defendant’s counterclaims. She agreed that there was no genuine issue of material fact, but asserted that a judgment in her favor was warranted under MCR 2.116(C)(10) and (I)(2). Plaintiff argued that defendant had agreed to purchase the property on a land contract, that he had the opportunity to inspect the property but chose not to do so and accepted the property “as is,” that he had stopped making the required payments, and that

pursuant to the contract, she was entitled to accelerate the principal and unpaid interest. She also asserted that defendant's allegation that plaintiff assured him that the plumbing was in working order was untrue and that the seller's disclosure merely stated that "there are no known problems with the plumbing."

The trial court observed that the contract called for the property to be sold "as is" and that defendant had waived his right to an inspection. The court further found that "[t]here's no evidence that [plaintiff] was aware of bad plumbing which would be required for her to have violated the seller's disclosure." The court denied defendant's motion for summary disposition, dismissed defendant's counterclaims with prejudice pursuant to MCR 2.116(I)(2), dismissed plaintiff's defamation claim with prejudice, and awarded plaintiff a judgment of foreclosure on the land contract. The court later denied defendant's motion for reconsideration.

II. STANDARD OF REVIEW

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Although defendant relied on multiple subrules in support of summary disposition, the parties and the circuit court relied on documentary evidence beyond the pleadings, and therefore, we treat the motion as having been granted under MCR 2.116(C)(10). *Mino v Clio Sch Dist*, 255 Mich App 60, 63 n2; 661 NW2d 586 (2003).

Summary disposition is appropriate pursuant to MCR 2.116(C)(10) where there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(4), (G)(5); *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68; 919 NW2d 439 (2018). To succeed on a motion for summary disposition, the moving party must make and support the motion with admissible documentary evidence. *McCoig Materials LLC v Galui Constr Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). After the moving party makes and supports the motion, the burden shifts to the nonmoving to demonstrate a genuine issue of material fact. *Id.*

A motion for summary disposition granted under MCR 2.116(I)(2) is also reviewed de novo. *RPF Oil Co v Genesee Co*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 344735); slip op at 2. "If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly granted under MCR 2.116(I)(2)." *Lockwood v Twp of Ellington*, 323 Mich App 392, 401; 917 NW2d 413 (2018) (citations omitted).

III. ANALYSIS

A. BREACH OF CONTRACT

Defendant contends that the trial court erred by denying his motion for summary disposition because plaintiff first breached the contract when she did not deliver the property in the “turnkey” condition described in the listing.¹ We disagree.

Under Michigan law, a party who first breaches a contract may not prosecute an action against another party for a subsequent breach or failure to perform. *Skaates v Kayser*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 346487); slip op at 9; *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994).

In this case, neither party disputes the existence of a contract for the sale of the property. However, defendant failed to make and support his motion with admissible documentary evidence. *McCoig Materials LLC*, 295 Mich App at 694. He submitted no evidence of any plumbing defects and no evidence that plaintiff was aware of any defects. The seller’s disclosure answers the question whether there are any *known* plumbing problems with a single word: “No.” The language of the disclosure states only that plaintiff was unaware of any plumbing problems, not that there were “no plumbing issues.” Under the circumstances, the trial court properly denied defendant’s motion for summary disposition.²

Conversely, in support of her request for summary disposition on her foreclosure claim, plaintiff provided evidence that defendant had defaulted on the payments due under the land contract. Defendant did not dispute this evidence. Because defendant failed to provide evidence of any “first breach” by plaintiff and produced no evidence to negate plaintiff’s foreclosure claim, defendant failed to satisfy this burden as well. *Id.* Therefore, the trial court properly granted summary disposition for plaintiff with regard to her claim seeking foreclosure.

B. RIGHT TO JURY TRIAL

Next, defendant submits that his constitutional right to a jury trial was denied by granting summary disposition for plaintiff. We disagree.

Defendant raised this issue for the first time in two sentences in his motion for reconsideration, but failed to cite any constitutional provision or caselaw in support of his argument. Although an issue first presented in a motion for reconsideration is not properly preserved, this Court may review the issue if it is an issue of law for which all the relevant facts are available. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

A party’s request for a jury trial does not preclude the grant of a motion for summary disposition. “[A]lthough a jury determines the amount of damages, it is the court’s job to determine whether a plaintiff is legally entitled to the damages.” *Prentis Family Foundation v*

¹ We note that defendant does not challenge the dismissal of each individual claim raised in his countercomplaint, and therefore, we do not address them.

² Defendant also asserted that plaintiff made admissions that the plumbing was not in working order during a district court hearing. We have reviewed the documentary evidence and opine that it contains no such admission, but only the argument of plaintiff’s counsel.

Barbara Ann Karmanos Cancer Institute, 266 Mich App 39, 55; 698 NW2d 900 (2005). Ninety years ago, our Supreme Court explained that “[i]f there are not issues of fact to be determined, one is not entitled in a civil case to trial by jury.” *People’s Wayne Co Bank v Wolverine Box Co*, 250 Mich 273, 281; 230 NW 170 (1930). More recently, our Supreme Court held that “[w]here the facts of a case are uncontroverted and the only question left is what legal conclusions can be drawn from the facts, the question is for the court and not the jury.” *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993), abrogated on other grounds by *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 389; 738 NW2d 664 (2007). Defendant’s citation to caselaw is distinguishable and fails to controvert this authority. In this case, because defendant did not establish any genuine issues of material fact, his right to a jury trial was not violated by the trial court’s decision granting summary disposition.

C. FIRST BREACH AND PENDING LITIGATION

For his final issue on appeal, defendant alleges that the trial court erred by denying his motion for summary disposition and dismissing his counterclaim because “the doctrine of first breach is established law and there is a case pending in the Michigan Court of Appeals regarding the same issues.” We disagree.

To the extent that defendant argues that plaintiff first breached the contract, thereby excusing his failure to perform, we have already addressed and rejected that argument. Regarding the claim that the previous appeal requires reversal of the trial court’s orders, defendant has given this issue only cursory treatment with no citation to relevant legal authority. Defendant “may not merely announce [his] position and leave it to this Court to discover and rationalize the basis for [his] claims; nor may [he] give issues cursory treatment with little or no citation of supporting authority.” *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Defendant’s failure to properly address the merits of his assertions of error constitutes abandonment of the issue on appeal. *Id.* Moreover, to the extent that defendant’s brief can be construed as arguing that the trial court erred by denying his motion to disqualify the court, by violating Michigan rules regarding foreclosure, and by dismissing his defamation counterclaim with no explanation, none of these issues are raised in defendant’s statement of the issues on appeal, and therefore, are not properly before this Court. MCR 7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008). Accordingly, defendant failed to demonstrate entitlement to appellate relief.

Affirmed. Plaintiff, the prevailing party, may tax costs.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens