STATE OF MICHIGAN

COURT OF APPEALS

JOHN COLOMBO,

Plaintiff/Counter-Defendant/Appellant,

v

ELIZABETH MOORE,

Defendant/Third-Party-Plaintiff/Appellee,

and

KEYBANK, N.A.,

Defendant/Third-Party-Plaintiff/Counter-Plaintiff/Appellee,

and

HOLLIE E. MAJEWSKI, CHRISTOPHER Z. MAJEWSKI, and CREATIVE PRECISION, L.L.C.,

Third-Party-Defendants.

UNPUBLISHED
June 28, 2011

No. 297085
Macomb Circuit Court
LC No. 2009-001707-CK

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants Elizabeth Moore and KeyBank, N.A. (KeyBank) (collectively referred to as "defendants"), and the judgment entered in favor of Key Bank. We affirm.

According to the complaint, plaintiff entered into a contract with third-party defendants Hollie E. Majewski and Christopher Z. Majewski to purchase a boat that would be refurbished, including the installation of specific engines, for spring 2007. The Majewskis volunteered to secure financing for plaintiff for the purchase of the boat and on July 31, 2006, Moore, as representative of KeyBank, came to plaintiff's office. Plaintiff entered into a loan transaction with KeyBank for $248,464. The boat was to serve as security for the loan. The note contained

an integration clause, which stated that "[t]his Note represents the complete and integrated understanding between Borrower and Lender regarding the terms hereof."

Plaintiff later made an "unannounced visit" to the Majewskis' facility, where he discovered that his vessel was not on site, and that no engines for the vessel had been ordered. Plaintiff initiated an action against the Majewskis in 2007 when his vessel was not refurbished and delivered to him as promised. Plaintiff ultimately obtained a judgment in his favor and against the Majewskis, who have since fled the state, for fraud/misrepresentation, conversion, and violation of the Michigan Consumer Protection Act in the amount of $337,659.67.

In April 2009, plaintiff filed a complaint against KeyBank and Moore, alleging breach of contract, violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, fraud and misrepresentation, innocent/negligent misrepresentation, and seeking rescission of the note. Plaintiff alleged that the vessel "does not exist, did not exist on July 31, 2006, and has never existed at any time." Defendants subsequently moved for summary disposition pursuant to MCR 2.116(C)(8), and the trial court granted the motion, construing it as being brought under MCR 2.116(C)(10).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "[The movant] must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The nonmoving party then has the burden to produce admissible evidence setting forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). On the other hand, "[a] motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden*, 461 Mich at 119. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* When deciding such a motion, only the pleadings may be considered. MCR 2.116(G)(5).

The trial court properly considered the motion as being brought under MCR 2.116(C)(10) because plaintiff introduced matters outside the pleadings in his response to defendants' motion for summary disposition and at the hearing on the motion. Plaintiff has not cited any authority for his position that a trial court commits error when it grants summary disposition pursuant to MCR 2.116(C)(10) where the motion is brought only pursuant to MCR 2.116(C)(8), or that the court must provide notice before granting a motion in such a fashion; thus, he has abandoned this argument. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). This Court also addressed a similar argument in *Ruggeri Electrical Contracting Co, Inc v City of Algonac*, 196 Mich App 12, 18; 492 NW2d 469 (1992):

> Plaintiff also contends that summary disposition was improper because it was based on grounds not asserted in defendant's motion. This argument is without merit. MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law," the court "*shall* render judgment without

> delay" (emphasis supplied). A court may even enter judgment for the opposing party if it is entitled to judgment. MCR 2.116(I)(2). If the moving party has asked for summary disposition under one subpart of the court rule when judgment is appropriate under another subpart, the defect is not fatal. See, eg, *Retired Policemen & Firemen of Lincoln Park v Lincoln Park*, 6 Mich App 372, 375; 149 NW2d 206 (1967). The movant need not identify the specific subrule under which it seeks summary disposition. *Moy v Detroit Receiving Hosp*, 169 Mich App 600, 605; 426 NW2d 722 (1988). When a motion is brought under MCR 2.116(C)(8) but should have been brought under subpart (C)(10), the court should proceed under the latter as long as neither party is misled. *Chonich v Ford*, 115 Mich App 461, 464; 321 NW2d 693 (1982).

Plaintiff has not shown how he was misled by the trial court's consideration of defendants' motion under (C)(10) where plaintiff argued the existence of facts outside the pleadings.

We further conclude that there is no merit to plaintiff's argument that summary disposition was premature where discovery was not complete. In *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994) (citations omitted), this Court ruled that "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." Plaintiff has failed to identify a specific issue on which discovery is incomplete and has offered no independent evidence that a dispute exists.

Moreover, summary disposition was proper on all claims under either MCR 2.116(C)(10) or MCR 2.116(C)(8). With respect to MCR 2.116(C)(10), the trial court could have properly granted summary disposition on plaintiff's breach of contract claim. In his response to defendants' motion for summary disposition, plaintiff did not identify any provision in the note that defendants breached. Likewise, in his brief on appeal, plaintiff failed to identify any provision of the contract that defendants allegedly breached, stating only that the note extended credit to plaintiff to purchase the boat, the note indicated that the boat existed and was being documented, and that KeyBank was taking a security interest in it. Plaintiff has failed to demonstrate the existence of any genuine issues of material fact that defendants breached the contract.

Summary disposition under (C)(10) was also appropriate with respect to plaintiff's MCPA claim. Plaintiff contends that Moore is a "person" subject to the MCPA, and that she made representations in the loan documents that the boat existed and was being documented, and that KeyBank was taking a security interest in it. However, plaintiff failed to explain how KeyBank and/or Moore violated the MCPA when plaintiff acknowledged in the note that the "collateral" existed and was "in good condition," and represented that he owned the collateral. He has therefore failed to demonstrate a genuine issue of material fact that defendants violated the MCPA.

Summary disposition under (C)(10) was additionally proper for plaintiff's fraud and misrepresentation claims.

> As a general rule, actionable fraud consists of the following elements: (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. [*M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (citations omitted).]

The trial court noted that the pleaded claims were premised on allegations that defendants falsely stated that they would be taking a security interest in the boat when they "either knew said vessel was not in existence, or took no reasonable steps to determine same." The trial court pointed out, however, that plaintiff acknowledged in his response brief that he contracted with the Majewskis to "commission a 1978 38[-]foot Magnum Watercraft to a 2007 38' Creative Precision Aronow Magnum" and that he "viewed the 1978 vessel hull" (before signing the note). Thus, the trial court found that plaintiff conceded the "actual existence of the vessel that was to be transformed into his boat," and plaintiff has not challenged this finding. Thus, we conclude that plaintiff has not demonstrated that any genuine issue of material fact exists related to his claim that defendants made misrepresentations concerning the existence of the vessel.

Plaintiff has also failed to show that a genuine issue of material fact exists to preclude summary disposition on his rescission claim. Plaintiff alleged that defendants' actions "resulted in a failure of consideration justifying the recision [sic] of the subject contract/loan, the very subject of the purchase having been illegal and void and of no effect." The trial court noted that plaintiff's claim for rescission was based on defendants' "provision of financing for a boat that never existed." However, plaintiff admitted in his response to defendants' motion that the hull for his boat existed when he saw it at Creative Precision's facility; and he has not shown the existence of a genuine issue of material fact that the "subject" of the purchase was illegal or void simply because the boat itself had not yet been constructed at the time he entered into the contract. Thus, summary disposition on this claim would be properly granted under subrule (C)(10).

Summary disposition was also proper on all claims under MCR 2.116(C)(8) because plaintiff has failed to state any valid claims. Plaintiff claimed that KeyBank breached a contract "to provide financing of a vessel in existence," thereby indicating that KeyBank had a duty to confirm the existence of the boat. However, the note clearly states that "Lender has no duty to take any action to protect the value of the Collateral or to exercise any rights of Borrower with respect to the Collateral." And, plaintiff has identified no specific provision in the contract that *requires* KeyBank to ensure that the vessel, as described, existed or that it undertook a contractual duty to do so. Therefore, the trial court properly dismissed plaintiff's breach of contract claim against KeyBank. Additionally, any breach of contract claim against Moore could properly be dismissed under MCR 2.116(C)(8) because she was not a party to the note. See *L Loyer Constr Co v City of Novi*, 179 Mich App 781, 795; 446 NW2d 364 (1989).

With respect to plaintiff's MCPA claim, plaintiff argues that the complaint alleged that contracting to provide plaintiff a loan for a nonexistent vessel violated the MCPA, and that the contract was therefore void. However, as the trial court pointed out, plaintiff failed to allege any

particular violation of the MCPA in his complaint. He therefore failed to state a valid claim. Likewise, KeyBank's activities with respect to the note are exempt from the MCPA.

Plaintiff alleged in his complaint that KeyBank is a "national bank doing business in Macomb County," and KeyBank alleged in its counterclaim that it is a national banking association with its principal place of business in Ohio. MCL 445.904 states, in relevant part:

> (1) This act does not apply to . . . the following:
>
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

National banking associations are regulated by the United State Office of the Comptroller of Currency. See 12 USC 21; 12 USC 24; 12 USC 93a. The National Bank Act authorizes such associations to engage in loan transactions. 12 USC 24. As such, the loan at issue is a transaction specifically authorized under laws administered by a regulatory board and is exempt from the MCPA.

With respect to plaintiff's fraud and misrepresentation claims, the note's merger clause barred these claims as a matter of law. Plaintiff argues that parol evidence is admissible to "prove that an agreement was the product of fraud or mistake." However, this Court held in *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 503; 579 NW2d 411 (1998), that "while parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract." Plaintiff did not plead, nor does he argue, that the merger clause itself was invalid. Thus, plaintiff's fraud and misrepresentation claims were clearly unenforceable where plaintiff contends that he may prove them through inadmissible parol evidence. Furthermore, plaintiff's fraud and misrepresentation allegations essentially restated defendants' alleged contractual obligations under the note, and if no duty exists that is "separate and distinct from the defendant's contractual obligations," then "no tort action based on contract will lie." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). Plaintiff's fraud and misrepresentation claims were thus unenforceable as a matter of law.

Finally, summary disposition under (C)(8) was also proper on plaintiff's rescission claim. The trial court noted that plaintiff's response to defendants' motion conceded that he "immediately became suspicious of the transaction . . . after reading the documents on the evening of July 31, 2006," and he sued the third-party defendants in 2007. However, plaintiff did not file this action until almost two years later, and this delay justified the grant of summary disposition as a matter of law. See *Livingston v Krown Chem Mfg, Inc*, 394 Mich 144, 152; 229 NW2d 793 (1975), quoting *Wall v Zynda*, 283 Mich 260, 265; 278 NW 66 (1938) ("courts have uniformly required a plaintiff in rescission to assert his right to rescind without any unnecessary delay").

The trial court also denied plaintiff's motion for reconsideration. On appeal, plaintiff argues only that his motion was "ask[ing] for the opportunity to revisit the [summary disposition motion] (at the conclusion of discovery) and allow [p]laintiff to respond to the Motion as if it

were under (C)(10)." Plaintiff has not shown that the trial court made a palpable error or that a different disposition would result from correction of the error. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). The court thus did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto