STATE OF MICHIGAN

COURT OF APPEALS

MAE HOSS, Plaintiff-Appellant,	UNPUBLISHED October 4, 2011
v	No. 299133 Tuscola Circuit Court
MAE A. BLANCHARD, CABE SENTELL, and TINA M. SENTELL, Defendants-Appellees.	LC No. 09-025638-CK

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants. We affirm.

In December 2004, defendant Mae Blanchard purchased a home. This purchase was made possible by plaintiff, Blanchard's mother, who provided $130,000 to her daughter to be used toward the purchase. Plaintiff claims that this money was a loan that Blanchard was required to pay back if she ever sold the property. Blanchard characterizes the money as a gift. If any agreement existed at the time of purchase, it was not reduced to writing.

On April 15, 2009, Blanchard entered into a land contract with defendants Cabe and Tina Sentell to buy the home. After Blanchard did not repay the money given to her by plaintiff over four years earlier, plaintiff filed the present lawsuit. Plaintiff claimed she was entitled to recovery under breach of contract/equitable mortgage, fraud/misrepresentation, or unjust enrichment theories. On April 16, 2010, the circuit court granted summary disposition in favor of defendants, and awarded sanctions to the Sentells. On appeal plaintiff claims that the statute of frauds did not bar this case, that this case falls within the bad faith exception to the rule that promises for future performance cannot represent fraud, and that naming the Sentells as defendants did not justify the award of sanctions.

A decision to grant summary judgment is reviewed on appeal de novo and in a light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). An appeal from a trial court's determination that a claim is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A determination is clearly erroneous when, although there is sufficient evidence to support it, the Court is left with a definite and firm conviction that a mistake has been made. *Id*. at 661-662.

The statute of frauds provides that any interest in land, "other than leases for a term not exceeding 1 year," may only "be created, granted, assigned, surrendered or declared" if it is done so by "a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." MCL 566.106. Plaintiff argues that the alleged contract does not fall within the statute of frauds because it can be completed in one year. However, each case cited by plaintiff deals with contracts other than those for an interest in property.[1] The principle underlying these cases is codified in MCL 566.132—but that statute does not address contracts involving an interest in land. When an interest in land is at stake, the only exception to the writing requirement provided in the statute of frauds is "leases for a term not exceeding 1 year." MCL 566.106. Because plaintiff claimed the alleged loan of $130,000 was secured by an interest in the property, it falls within the statute of frauds under MCL 566.106. See *Schultz v Schultz*, 117 Mich App 454, 457; 324 NW2d 48 (1982).

"Michigan case law reveals two instances in which it is proper to declare an equitable mortgage" despite the writing requirement in the statute of frauds. *Id*. at 458. The first instance is "where one party stands in a relationship of trust or guidance to the other party, such as attorney to client, guardian to ward, or parent to child, and the relationship has been abused." *Id*. The second instance is where "a creditor abuses the 'power of coercion' which he may have, by the force of circumstances, over the debtor." *Id*. at 459. These two instances involve relationships where the parties are on unequal footing and one party takes advantage of this disparity by abusing a relationship of trust or by abusing coercive power. *Id*. at 458-459.

Here, it is undisputed that plaintiff is Blanchard's mother. However, in *Schultz* this Court indicated that "[t]he doctrine of equitable mortgage . . . is designed to protect the ward from his guardian, not the guardian from his ward." *Schultz*, 117 Mich App at 459. Applying this principle, while an equitable mortgage could be declared to protect Blanchard from plaintiff, one could not be declared to protect plaintiff from Blanchard. Similarly, the creditor-debtor exception does not apply because it is not alleged that the presumed creditor (plaintiff) is using her "power of coercion" to oppress the presumed debtor (Blanchard).

Plaintiff also claims that Blanchard's actions constitute fraud.

> 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,

[1] *Paxson v Cass Co Rd Comm*, 325 Mich 276, 282; 38 NW2d 315 (1949) (an employment contract to be performed within one year did not fall under the statute of frauds); *Winchell v Mixter*, 316 Mich 151, 163; 25 NW2d 147 (1946) (an oral settlement agreement regarding the division of testator's property could be performed within one year); *McIntyre v Smith-Bridgman & Co*, 301 Mich 629, 636; 4 NW2d 36 (1942) (an employment contract lasting only one year did not fall under the statute of frauds); *Ter Keurst v First State Bank*, 271 Mich 259, 264; 260 NW 158 (1935) (because a bank had only one year to purchase a bond under the contract, the contract did not fall within the statute of frauds).

> 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).]

Additionally, fraud must be pled with particularity. MCR 2.112(B)(1). The parties acknowledge the established law that the breach of a future promise does not constitute fraud. See, e.g., *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993).

Plaintiff alleged in her complaint that Blanchard "represented to Plaintiff that should she ever elect to sell the subject property that Plaintiff would be paid in full from the proceeds of that sale," and that Blanchard "understood that this was a loan and not a gift." Plaintiff claims that these statements were "false at the time that they were made," but fails to consider the nature of the representations that were allegedly made. The first "representation"—a promise conditional on her "elect[ion] to sell"—was clearly a promise of future action if Blanchard ever elected to sell, which she was not required to do. As for the allegation that Blanchard knew that the money was given as a loan, a loan is simply a formalized future promise made by the debtor to repay the creditor. See, e.g., *Scherer v Hellstrom*, 270 Mich App 458, 463; 716 NW2d 307 (2006). Both "representations" that Blanchard allegedly made are contractual, not tortious in nature. *Hi-Way Motor Co*, 398 Mich at 336. Therefore, plaintiff has failed to properly plead with particularity a claim of fraud.

Plaintiff argues, in the alternative, that this case falls under the "bad faith" exception to the rule that future promises cannot constitute fraud. The "bad faith" exception is applicable when there is "a fraudulent misrepresentation . . . based upon a promise made in bad faith without intention of performance." *Id*. at 337-338. "[E]vidence of fraudulent intent, to come within the exception, must relate to conduct of the actor 'at the very time of making the representations, or almost immediately thereafter.'" *Id*. at 338-339, quoting *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930).

According to plaintiff, because there has been no discovery, she has not had the opportunity to establish facts that would demonstrate that Blanchard made material misrepresentations at the time of or immediately after the representation. However, plaintiff raised only the general allegation that Blanchard "understood these representations to be false at the time that they were made" in her complaint. Again, fraud must be pled with particularity. MCR 2.112 (B)(1). Plaintiff's general allegation is not sufficient. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995).

Finally, we conclude that the court did not err in awarding sanctions to the Sentells. Both MCL 600.2591 and MCR 2.114 provide for the imposition of sanctions when a party is frivolously named in a lawsuit. Under MCL 600.2591, a lawsuit is frivolous when "[t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(*iii*). According to MCR 2.114, when an attorney signs a document he or she certifies, among other things, that "the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." MCR 2.114(D). Additionally, the

document cannot be "interposed for any improper purpose, such as . . . to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D).

The Sentells maintain that there was no reason for plaintiff to name them as defendants, and the circuit court agreed. Plaintiff, however, claims that MCL 600.2932 and MCR 3.411 required her to name the Sentells. MCL 600.2932 provides in relevant part as follows:

> (1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.
>
> (2) No action may be maintained under subsection (1) by a mortgagee, his assigns, or representatives for recovery of the mortgaged premises, until the title to the mortgaged premises has become absolute, or by a person for the recovery of possession of premises, which were sold on land contracted, to whom relief is available under subdivision (1) of section 5634.
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> (3) If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. In an appropriate case the court may issue a writ of possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated.

Plaintiff alleges that the Sentells were named because they have an interest in the property at issue. However, she has not demonstrated how her claim in the property is inconsistent with any claim of the Sentells. Plaintiff did not file a quiet title action against the Sentells, and nowhere in her complaint does she state that she is seeking to eject the Sentells. In fact, plaintiff maintains that she is not seeking to recover the property.

Additionally, because the interest that plaintiff claims would be in the form of a mortgage, plaintiff is barred from bringing an action against the Sentells until plaintiff's mortgage has become absolute. See MCL 600.2932(2).

Plaintiff also claims that under MCR 3.411(H) she was required to name the Sentells. MCR 3.411(H) provides as follows:

> Except for title acquired by adverse possession, the judgment determining a claim to title, equitable title, right to possession, or other interests in lands under this rule, determines only the rights and interests of the known and unknown persons who are parties to the action, and of persons claiming through those parties by title accruing after the commencement of the action.

MCR 3.411(A) states that "[t]his rule applies to actions to determine interests in land under MCL 600.2932." As MCL 600.2932 is inapplicable to this case, so is MCR 3.411.

Plaintiff also asserts that she properly named the Sentells as defendants in order to give them notice of pending litigation. As defendants point out, they have never made notice an issue

during this litigation. Additionally, the Sentells point out that notice of this litigation was given to the world when a lis pendens was filed.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen