STATE OF MICHIGAN

COURT OF APPEALS

KHEDER HOMES AT CHARLESTON PARK, INC.,

Plaintiff/Counter-Defendant/Appellee,

v

CHARLESTON PARK SINGH, LLC and DARSHAN GREWAL,

Defendants-Appellants,

and

SINGH DEVELOPMENT, LLC and GURMALE GREWAL a/k/a GARY GREWAL,

Defendants,

and

SINGH HOMES CHARLESTON PARK, LLC,

Defendant/Counter-Plaintiff/Third-Party Plaintiff,

v

JOSEPH KHEDER,

Third-Party Defendant.

UNPUBLISHED
January 2, 2014

No. 307207
Oakland Circuit Court
LC No. 2010-110712-CK

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

In this case involving a claim of fraud made by plaintiff, Kheder Homes at Charleston Park, Inc., against defendants, Charleston Park Singh, LLC; Singh Homes Charleston Park, LLC; Singh Development, LLC; Darshan Grewal; and Gurmale "Gary" Grewal, Charleston Park Singh and Darshan Grewal appeal as of right the trial court's judgment of September 7, 2011, awarding plaintiff $2,502,338.71 in damages against Charleston Park Singh and Darshan Grewal after a

jury determined that Darshan Grewal, acting on behalf of Charleston Park Singh, fraudulently induced plaintiff to enter into an option agreement that allowed plaintiff to purchase, build homes on, and sell lots in a residential subdivision under development by defendants. We affirm.

I. BASIC FACTS

Singh Development is a real estate developer and the "face" of Singh Homes Charleston Park, Charleston Park Singh, and more than 100 other Singh companies involved in all aspects of residential and commercial real estate development. Gary Grewal is the chief executive officer of the Singh entities. Gary's nephew, Darshan Grewal, formed the two Charleston Park entities for the purpose of developing the residential Charleston Park subdivision in South Lyon, Michigan. Joseph Kheder, a self-described "small production builder," became interested in the Charleston Park subdivision in 2005 and formed plaintiff corporation to join defendants in developing the subdivision. According to Kheder, Gary and Darshan conveyed to him that they would develop Charleston Park as an upscale, sophisticated development to attract affluent clients; specifically, the subdivision would contain wrought iron fences surrounding detention ponds, fountains in detention ponds, ornate decorative light posts, a children's play area (or "tot lot") as a focal point, and landscaped irrigated common areas and cul-de-sac islands planted with grass from sod. According to Kheder, Gary and Darshan told him that they planned to spend more money on the details of the Charleston Park development than they had on any of their previous developments; Darshan encouraged Kheder to visit other Singh residential developments, Churchill Crossing and Tollgate Ravines/Woods in Novi, to see "the flavor" of the Charleston Park project. Kheder envisioned selling homes in Charleston Park for about $300,000 to $400,000 each.

On September 7, 2005, plaintiff and Singh Homes Charleston Park entered into an option agreement with a commencement date of September 21, 2005. Under the option agreement, in which Charleston Park Singh undertook certain duties as "the Developer," plaintiff paid an option fee of $1,500,000 for the right to purchase 96 lots in phase 1 of the Charleston Park subdivision. Plaintiff was to build homes on the lots and sell the lots to home buyers. Kheder believed, based on his negotiations with Darshan, that Singh's initial development work on the subdivision, including fencing, landscaping, lighting, and the tot lot, would be completed within 30 to 60 days. According to Kheder, Singh never developed the Charleston Park subdivision as promised despite his repeated requests; the various amenities were either never provided or provided in an unsatisfactory manner below the standards promised for an upscale development. Although plaintiff sold a few homes, plaintiff's venture, the timing of which corresponded with the fall of the real-estate market in the United States, was ultimately unsuccessful. In correspondence dated August 26, 2009, Darshan, signing as manager for Singh Homes Charleston Park, notified Kheder that he was terminating the option agreement between plaintiff and Singh Homes Charleston Park.

Plaintiff brought this action against defendants for fraud in the inducement, and the trial court conducted a jury trial.[1] The jury found that Darshan, acting on behalf of Singh Homes Charleston Park and Charleston Park Singh, made a promise to plaintiff, intending that plaintiff rely on it, and knowing that Singh Homes Charleston Park and Charleston Park Singh did not intend to keep the promise. The jury found that plaintiff relied on the promise, that Charleston Park Singh breached the promise, and that the breach caused damage to plaintiff. The jury found that plaintiff did not prove that Darshan made a false promise on his own behalf or that Gary made a false promise on behalf of a corporate defendant or on his own behalf. The jury awarded damages to plaintiff in the amount of $2,502,338.71. The trial court entered a judgment in favor of plaintiff on the basis of its fraud claim "against Charleston Park Singh, L.L.C. (pursuant to vicarious liability) and Darshan Grewal, in the total amount of $2,502,338.71." Defendants moved the trial court for a new trial or, alternatively, for judgment notwithstanding the verdict (JNOV) or remittitur. The trial court denied the motion.

II. ANALYSIS

A. DIRECTED VERDICT AND JNOV

Charleston Park Singh and Darshan Grewal first argue that the trial court erred by failing to grant defendants' motions for directed verdict and JNOV. We disagree.

We review de novo a trial court's denial of a motion for a directed verdict or a motion for JNOV. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). We must consider the evidence presented up to the point of the motion and all legitimate inferences from the evidence in the light most favorable to the nonmoving party to determine whether a factual question existed. *Id.*; *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009). A trial court properly grants a directed verdict or a motion for JNOV only when no factual question exists upon which reasonable persons could differ. *Abke*, 239 Mich App at 361; see also *Taylor v Kent Radiology*, 286 Mich App 490, 499-500; 780 NW2d 900 (2009).

Generally, a claim for fraud requires proof of a material misrepresentation relating to a past or present fact, but a misrepresentation may also be based on "a promise made in bad faith without intention of performance." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 337-338; 247 NW2d 813 (1976). "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Fraud in the inducement occurs when a party knows the contents of an instrument but was induced by fraud to execute the instrument. *Stefanac v Cranbrook Ed Community*, 435 Mich 155, 165-166; 458 NW2d 56 (1990). To prove fraud in the inducement, a plaintiff must establish the following elements:

[1] Plaintiff also asserted claims for breach of contract and negligent misrepresentation, and Singh Homes Charleston Park filed a counter-complaint against plaintiff and a third-party complaint against Kheder for breach of contract and slander of title; however, these claims are not at issue in this appeal.

> (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 and 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. [*Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 161; 742 NW2d 409 (2007) (citations and quotation marks omitted).]

A plaintiff must prove that the fraud committed actually and proximately caused the damages suffered; the damage must be the natural and proximate consequence of the fraud. *Rosenblatt v John F Ivory Storage Co*, 262 Mich 513, 516-517; 247 NW 733 (1933); *Findlater v Dorland*, 152 Mich 301, 308; 116 NW 410 (1908). "Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Samuel D Begola*, 210 Mich App at 640. However, the defrauded party may elect to proceed under the contract and recover damages. *Nowicki v Podgorski*, 359 Mich 18, 25; 101 NW2d 371 (1960).

Insisting that plaintiff's damages were caused by the collapse of the real estate market, defendants argue that plaintiff failed to establish that its losses were causally related to any act or omission by defendants. Viewing the evidence presented at the time of both motions in a light most favorable to plaintiff, we conclude that a factual question existed regarding whether the fraud caused plaintiff's damages. More specifically, we conclude that a reasonable person could find that the loss of plaintiff's investment in the Charleston Park subdivision was the natural and proximate consequence of the misrepresentation that defendants would develop the subdivision as an upscale development (with amenities) comparable to other upscale Singh residential developments, particularly Churchill Crossing and Tollgate in Novi. See *Rosenblatt*, 262 Mich at 516-517; *Findlater*, 152 Mich at 308; see also, generally, *Mosher v Sawyer-Weber Tool Mfg Co*, 224 Mich 303, 305-307; 194 NW 979 (1923). Kheder testified extensively at trial that Darshan represented that defendants would develop Charleston Park subdivision as an upscale, sophisticated development to attract affluent clients. Kheder was provided with site plans, bylaws, and a budget reflecting various amenities for Charleston Park. The subdivision would contain wrought iron fences surrounding detention ponds, fountains in detention ponds, ornate decorative light posts, a "tot lot" as a focal point, and landscaped irrigated common areas and cul-de-sac islands planted with grass from sod. Kheder testified that Darshan even recommended that he visit the other Singh residential developments of Churchill Crossing and Tollgate in Novi to see "the flavor" of the Charleston Park project. Thus, Kheder envisioned selling homes in Charleston Park for about $300,000 to $400,000.

There was abundant evidence at trial that defendants did not develop Charleston Park into an upscale subdivision as promised. Instead of wrought iron fencing, chain link fencing surrounded the detention pound. No fountains were installed. And the subdivision did not have light posts, let alone light posts of the ornate decorative variety. Although a tot lot was provided, it was installed much later than expected. Not all common areas and islands were irrigated and landscaped with grass from sod. And there was trial testimony that the tot lot and common areas were not satisfactory. Todd Hallett and Joseph Ricardi testified at trial about their impression of the Charleston Park Development. Hallett, the architect who designed the homes to be built at Charleston Park, testified that at the time of Charleston Park's grand opening in May 2006, the

condition of the development was not of a quality that he expected for the homes he had designed for such "an upscale community." Ricardi, the president of an excavating contractor who performed work at Charleston Park, Tollgate, and other Singh residential developments from 1998 until 2008 or 2009, testified that Charleston Park did not appear "to the standard of a Novi-type project" developed by Singh. Significantly, plaintiffs introduced as evidence for the jury many photographs—that we have reviewed—of Churchill Crossing, Tollgate, and Charleston Park. Taking into consideration the fact that the photographs of Churchill Crossing and Tollgate depict subdivisions that are substantially filled with homes whereas the photographs of Charleston Park depict a subdivision with many empty lots and, at times, ongoing construction, the photographs evidence great disparity in the quality of development at Charleston Park when compared to Churchill Crossing and Tollgate. The photographs of Churchill Crossing and Tollgate depict subdivisions containing what a reasonable person would consider to be beautiful common areas (parks, tot lot, islands, etc.) that are well-landscaped and obviously maintained. The photographs of Charleston Park depict a subdivision with what a reasonable person would consider to be beautiful homes but common areas (tot lot, islands, etc.) that are poorly landscaped and obviously unmaintained. Indeed, a reasonable person could categorize many of the common areas in Charleston Park as "eye sores" and find that people did not want to buy a home in Charleston Park solely because they were turned off by these poorly landscaped and unmaintained common areas.

Furthermore, there was testimony at trial from Kheder and the Grewals that the upscale amenities discussed above convey a certain image to home buyers and, thus, add value to and are a factor in pricing a home. Indeed, there was evidence at trial that homeowners in Charleston Park were required to install irrigation systems and prohibited from having chain link fences. Kheder designed, priced, and built what Darshan described as "fancy, nicer custom homes" under the belief that defendants would deliver an upscale subdivision to match the homes. Defendants did not do so, and plaintiff's business venture in Charleston Park failed. Although defendants insist that Charleston Park failed because of the economic recession and fall of the housing market, trial testimony established that Churchill Crossing—a Singh residential development with upscale amenities and maintained, well-landscaped common areas that Darshan represented Charleston Park would be akin to—did not suffer as Charleston Park did. Viewing the evidence in a light most favorable to plaintiff, a reasonable person could find that people did not want to buy a $300,000 to $400,000 home in Charleston Park because the lack of amenities and the poorly landscaped, unmaintained common areas did not coincide with an upscale subdivision to justify building an upscale home.

Accordingly, a reasonable person could find that the loss of plaintiff's investment in the Charleston Park subdivision was the natural and proximate consequence of the misrepresentation that defendants would develop the subdivision as an upscale development (with amenities) comparable to other upscale Singh residential developments. Thus, a factual question existed regarding whether the fraud caused plaintiff's damages.

Defendants also argue that all of the representations made to plaintiff forming the basis of its fraud claim are non-actionable statements of opinion or "puffing." "An action for fraud may not be predicated upon the expression of an opinion or salesmen's talk in promoting a sale, referred to as puffing." *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987). However, there were representations made to Kheder in this case that were not a mere

statement of opinion or "puffing" but, rather, an actionable "statement of positive fact." *Hayes Constr Co v Silverthorn*, 343 Mich 421, 428; 72 NW2d 190 (1955). For instance, there was testimony that defendants provided Kheder with a site plan, bylaws, and a budget for Charleston Park that illustrated the inclusion of such amenities as ornate lighting, landscaped areas, irrigation, fountains, and a tot lot. There was also testimony that at the time of the agreement, Darshan had told Kheder that the initial development work on the subdivision, including fencing, landscaping, lighting, and the tot lot, would be completed within 30 to 60 days. Finally, Darshan advised Kheder to visit Churchill Crossing and Tollgate in Novi so that he could obtain an understanding of the quality of the Charleston Park development; this was not "a salesman's praise of his own property, involving matters of estimate or judgment upon which reasonable men may differ"; rather, it was a factual statement of future conduct: the image and quality of the Charleston Park development would be comparable to Churchill Crossing and Tollgate. See *id.* at 426.

Defendants also argue that plaintiff failed to establish that defendants harbored bad-faith intent at the time the promises were made. We disagree. Kheder testified that Darshan referred him to Churchill Crossing and Tollgate to visualize the general appearance and character of Charleston Park. Kheder testified regarding specific landscaping and other details that he saw at these developments, including sod lawns watered by irrigation systems, fountains, and decorative fencing and light posts. Expenses for installing and operating these features were included in defendants' proposed operating budget for Charleston Park. Defendants' failure to implement these features as plaintiff progressed with the option agreement, despite Kheder's urging, supports a reasonable inference that defendants never intended to develop Charleston Park on par with Churchill Crossing and Tollgate. Gary and Darshan did not offer any explanation for why they delayed implementing these features, but only contradicted Kheder's testimony by saying that these features are never implemented until several homes are built. Moreover, Darshan testified that he delegated responsibility for landscaping and community features to Michael Kahm, vice president of development and planning. The jury could reasonably infer that Darshan made representations about the quality of the subdivision's amenities despite his uncertainty of what Kahm would do. The jury could reasonably find that Darshan acted in bad faith when he caused Kheder to believe that Charleston Park's landscaping, amenities, and community features would be similar to what Kheder saw at Churchill Crossing and Tollgate.

Finally, defendants argue that the trial court erred by not granting their motion for JNOV because plaintiff waived its fraud claim by entering into an amendment of the option agreement. We conclude that the trial court properly rejected this argument as untimely. A litigant must raise and frame their arguments at a time when their opponent has a meaningful opportunity to respond. *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). Defendants did not raise their waiver defense until after trial. Waiver is an affirmative defense. *Burke v River Rouge*, 240 Mich 12, 14; 215 NW 18 (1927); see also MCR 2.111(F)(3). "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). Under MCR 2.111(F)(2), "[a] defense not asserted in the responsive pleading or by motion as provided by these rules is waived . . . ." Defendants waived their waiver defense because they did not assert it as provided by MCR 2.111(F).

Accordingly, we conclude that the trial court did not err by denying the motions for directed verdict and JNOV.

B. GREAT WEIGHT OF THE EVIDENCE

Defendants also argue that the trial court abused its discretion by denying their motion for a new trial because the jury's verdict was against the great weight of the evidence. Defendants merely repeat the arguments regarding causation, "puffing," and bad faith that they raised with respect to their motions for directed verdict and JNOV. On the basis of the record evidence and the reasons discussed in section A, *supra*, we conclude that the trial court did not abuse its discretion by denying defendants' motion for a new trial. See, generally, *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Dawe v Bar-Levav & Assoc, PC (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010). "But a jury's verdict should not be set aside if there is competent evidence to support it." *Dawe*, 289 Mich App at 401. The evidence discussed in section A, *supra*, is competent evidence supporting the jury's verdict. See *id.* The record does not reveal "that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003), superseded on other grounds by MCL 600.2919a.

C. PERSONAL LIABILITY OF DARSHAN GREWAL

Darshan contends that the trial court erred by entering a judgment for damages against him when the jury specifically found that he did not commit fraud in his individual capacity. We disagree.

We review de novo whether the trial court properly assessed damages against Darshan. See *Price v High Pointe Oil Co*, 493 Mich 238, 242; 828 NW2d 660 (2013).

In *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 17; 779 NW2d 237 (2010), our Supreme Court explained that "Michigan law has long provided that corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit." In support of this principle, the Court cited, among other authorities, *Moore v Andrews*, 203 Mich 219; 168 NW 1037 (1918) and 2 Restatement Agency, 3d, § 7.01, p 115. *Appletree*, 485 Mich at 17 n 39. In *Moore*, the Supreme Court held that an action for conversion may lie against directors, officers, or agents of a corporation to a person injured by their torts. *Moore*, 203 Mich at 232-233. The pertinent language of the Restatement states, "An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment." 2 Restatement Agency, 3d, § 7.01, p 115.

As previously discussed, the elements of fraud are as follows:

> (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 and 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. [*Rooyakker & Sitz*, 276 Mich App at 161.]

In the instant case, the jury answered "Yes" to the follow question on the special verdict form:

> 15. Did the plaintiff prove, by clear and convincing evidence, that Darshan Grewal acting on behalf of any of the corporate defendants, made a promise to Kheder Homes, intending that Kheder Homes rely on it and knowing, at the time he made the promise, that any corporate defendant did not intend to keep it?

The jury then identified Singh Homes Charleston Park and Charleston Park Singh as the corporate defendants on whose behalf Darshan made the promise. The jury found that plaintiff relied on the promise, that Charleston Park Singh breached the promise, and that plaintiff suffered damages in the amount of $2,502,338.71 as a result of the breach of the promise. In their totality, these findings by the jury illustrate that the jury found that each element of fraud had been established and, thus, that Darshan committed fraud. See *id.*

Darshan insists that the jury's answer of "No" to the following question on the verdict form prohibits an entry of judgment for damages against him:

> 31. Did the plaintiff prove, by clear and convincing evidence, that Darshan Grewal individually and on his own behalf made a promise to Kheder Homes, intending that Kheder Homes rely on it and knowing, at the time he made the promise, that he personally did not intend to keep it?

Darshan misconstrues the legal meaning of the factual distinction in questions 15 and 31. Whether Darshan acted on his own behalf or on behalf of one of the corporate defendants is legally significant for purposes of determining whether Darshan was acting as an agent of one of the corporate defendants such that liability could be imposed on a corporate defendant. Whether Darshan committed fraud does not depend on this factual inquiry—Darshan could commit and be liable for fraud by acting on either his own behalf or on behalf of one of the corporate defendants. See *Appletree*, 485 Mich at 17 & n 39. Notwithstanding the jury's finding in question 31, the jury found that Darshan committed fraud while acting in an agency capacity such that both Darshan and Charleston Park Singh were liable for the fraud.

Accordingly, the trial court did not err by entering a judgment for damages against both Darshan and Charleston Park Singh.

D. PLAINTIFF'S CLOSING ARGUMENT

Defendants' final argument is that plaintiff, by analogizing defendants to an insurance company during closing argument, violated the prohibition of MCL 500.3030 and MRE 411 that a party's liability insurance coverage may not be referenced at trial. According to defendants, plaintiff's analogy implied that a judgment against defendants is the same as a judgment against an insurance company, which equates to a direct reference to insurance held by defendants. We reject this unpreserved argument. Having reviewed the protested portion of plaintiff's closing argument, it is plain that the purpose of the insurance analogy was to illustrate that plaintiff was

not the first party to breach the option agreement. The analogy neither supported an inference that defendants carried liability insurance coverage nor implied that the jury should award plaintiff damages because the damages would be paid by a liability insurer. The argument did not improperly interject information about defendants' insurance status.

Affirmed.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro