STATE OF MICHIGAN

COURT OF APPEALS

ROBERT C. KNOTT and MICHELLE L. KNOTT,

Plaintiffs-Appellants,

v

COMMERCE CONSTRUCTION INC, d/b/a FOUNTAIN HOMES, SPRINGGATE LLC, d/b/a FOUNTAIN HOMES METRO LLC, RODNEY J. WALKER, KENNETH F. ROSS, K ROSS ENTERPRISES, K ROSS CORPORATION, KELLY PILLON, and LINDA K PALERMO,

Defendants-Appellees.

UNPUBLISHED
May 4, 2004

No. 245388
Wayne Circuit Court
LC No. 00-024066-CZ

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying plaintiffs summary disposition and granting defendants summary disposition. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

This case stems from a real estate construction project gone bad. In November 1998, plaintiffs signed an agreement with defendant Fountain Homes for the purchase of a home to be constructed in a subdivision in Brownstown. The parties also signed a work order that provided a list of extras to be added to plaintiffs' home, including a 2½-car garage as opposed to a 2-car garage and three rough plumbing openings in the basement. Plaintiffs put down a $1,000 deposit and later a $9,000 deposit for a total deposit of $10,000. Over the course of months of construction, the parties signed several more work orders requesting additions or modifications to be made to the home.

Plaintiffs claim that sometime in August 1999, when the house was substantially completed, while doing a walk through of the home, they learned that they had not received the 2½-car garage they requested but instead had received the standard 2-car garage. By that time, they had also learned that they did not receive the three rough plumbing openings in the basement. Plaintiffs claim that when they complained about the home not conforming to their requests, defendant Kenneth Ross informed them that it was too late to make the changes, and he

authorized to refund plaintiffs their $10,000 deposit plus an additional $5,000 for a total of $15,000. But when plaintiffs requested the refund, a release for only $10,000 was prepared.

Plaintiffs filed the instant suit on October 25, 1999.[1] Plaintiffs' first amended complaint alleged defendants violated the Michigan Consumer Protection Act (MCPA), MCL 445.903 *et seq*, the Michigan Builders Trust Fund Act, MCL 570.151 *et seq*, and the Michigan Real Estate Brokers and Salespersons Act, MCL 339.2501 *et seq*, and alleged that defendants wrongfully converted plaintiffs' funds, which entitled plaintiffs to treble damages under MCL 600.2919a. Following discovery, the parties filed respective motions for summary disposition that were argued on May 24, 2002. By written opinion entered October 1, 2002, the trial court denied plaintiffs' motion for summary disposition and granted defendants' motion. In its opinion, the court found defendants did not violate the MCPA because, while the original work orders for the house ordered a 2½-car garage, a novation occurred through subsequent work orders signed by the parties, which showed only a 2-car garage. With regard to plaintiffs' claim of conversion under the Builders Trust Fund Act and the Real Estate Brokers and Salespersons Act, the court found that it was undisputed that plaintiffs' deposit was used to pay the contractors and other laborers, and even though the funds were not deposited into a trust account, because the funds were paid for the construction of the house, plaintiffs could not establish damages through conversion. Plaintiffs now appeal.

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). We review de novo the trial court's grant of summary disposition on this ground. *Beaty v Hertberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). A motion brought under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion on this ground, the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). We also review de novo the trial court's grant of summary disposition on this ground. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

We first address plaintiffs' claim that the trial court erred in finding that there had been a novation of the contract between the parties and that defendants were entitled to summary disposition based on the novation. Finding that a novation occurred, the trial court dismissed plaintiffs' claims brought under the MCPA.

The record establishes that when the parties signed the purchase agreement for the house, the parties also signed a work order that provided for modifications including the disputed 2½-car garage and three rough plumbing openings. The work order provided for an additional charge of $3,500 for the 2½-car garage and an additional $600 for the three rough plumbing openings. A subsequent work order dated February 7, 1999, also provided for the additions.

---

[1] Plaintiffs originally filed suit in district court, but the action was transferred to circuit court in June of 2000, based on plaintiffs' first amended complaint.

However, throughout the ensuing months, several "site plans" were signed by the parties, which showed a 2-car garage. These plans were signed or initialed by plaintiff Robert Knott on February 24, 1999, June 13, 1999, and June 19, 1999. Apparently, the trial court concluded that these subsequent "site plans" or work order changes constituted a novation to the original contract. We disagree.

Four elements are required to establish a valid novation: (1) parties capable of contracting, (2) a valid prior obligation to be displaced, (3) the consent of all parties to the substitution based upon sufficient consideration, and (4) the extinction of the old obligation and the creation of a valid new one. *Devitt v Quirk*, 105 Mich App 94, 97; 306 NW2d 405 (1981), citing *National Premium Budget Plan Corp v Siegel Agency, Inc*, 43 Mich App 29, 35; 204 NW2d 30 (1972); *Harrington-Wiard Co v Blomstrom Manufacturing Co*, 166 Mich 276, 286-288; 131 NW 559 (1911). In determining whether a novation occurred "[t]he question rests in the intention of the parties as it may be gathered from the surrounding facts and circumstances and conduct." *Gorman v Butzel*, 272 Mich 525, 529; 262 NW 302 (1935) (citations omitted).

We agree with the trial court that the first two elements were undisputedly met, but we cannot agree that the evidence conclusively supports a finding that the third and fourth elements were met. The original purchase agreement provided

> (c) Purchaser understands and agrees that any extras or additional items shall be subject to the Seller's approval and shall be confirmed by a memorandum in writing signed by both parties at an agreed upon price which shall be paid for at time of closing in addition to the purchase price stipulated in the Agreement of Sale.

The written work order signed by both plaintiffs on February 7, 1999, explicitly provided for additional payment of $3,500 for a 2½-car garage and $600 for three rough plumbing openings. The subsequent "site plan" signed by both plaintiffs on February 27, 1999, shows the dimensions of the house and states "48'4" W/EXTRA WIDTH GARAGE" but does not explicitly state that this is an agreed upon modification from a 2½-car garage to a 2-car garage. The subsequent "site plans" initialed only by plaintiff Robert Knott appear to be general floor plans of the home with handwritten changes providing for things such as an "extra hose bib." These floor plans provide for a 2-car garage. However, these plans appear to be the general plans that are provided for any model home in a new construction subdivision. While the plan shows a 2-car garage, there is no evidence that this was a subsequent change made in exchange for the requisite consideration. Defendants point to plaintiff Robert Knott's deposition in which he stated that defendant Ross offered to credit plaintiffs' account; however, this happened after the 2-car garage was already built instead of the requested 2½-car garage, which supports a finding that the parties did not mutually agree to the modification in exchange for consideration. A strict reading of the work orders and "site plans" alone does not evidence an unambiguous contract calling for a 2-car garage. The record demonstrates that plaintiffs initially requested a 2½-car garage, but for some reason, only a 2-car garage was built. The trial court erred in finding no factual dispute as to whether there was a valid novation for purposes of plaintiffs' claims brought under the MCPA.

Thus, while the trial court correctly denied plaintiffs' motion for summary disposition, the trial court erred in granting defendants summary disposition on this basis.[2]

The trial court summarily dismissed plaintiffs' conversion claims brought under the Builders Trust Fund Act and the Real Estate Brokers and Salespersons Act, finding that because plaintiffs' deposit money was used to pay the contractors and builders, plaintiffs could not prove damages by conversion. With this, we agree.

MCL 600.2919a provides:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

Plaintiffs' amended complaint alleged that defendants violated the Michigan Builders Trust Fund Act by "retaining and exercising control over the $10,000 deposit paid to them for purposes other than the purposes provided for in the Act, and with the intent to defraud."

MCL 570.151 provides:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

MCL 570.152 further provides:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefore, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use . . . .

As the trial court correctly noted, "[t]he purpose of the [Builders Trust Fund Act] is to create a trust fund for the benefit of materialmen and others under private construction contracts."

---

[2] Because the trial court did not address the merits of plaintiffs' claims brought under the MCPA, we decline to do so in this appeal.

Weathervane Window, Inc v White Lake Construction Co, 192 Mich App 316, 325; 480 NW2d 337 (1991). Thus, "[t]he primary duty of the trustee is to ensure that trust funds are spent on the particular project for which the trust funds were deposited." *Id*.

Defendants presented evidence that showed more than $45,000 in expenses that had been paid for the construction of plaintiffs' house. Plaintiffs presented no evidence that the expenses had not been paid. Thus, the trial court did not err in granting defendants summary disposition of plaintiffs' claim of conversion arising under the Builders Trust Fund Act.

Plaintiffs' amended complaint also alleged that defendants Pillon and Palermo, in the capacity of licensed real estate brokers or salespersons, in accepting plaintiffs' deposit violated various provisions of the Real Estate Brokers and Salespersons Act. Plaintiffs further allege that defendant Commerce Construction committed conversion by receiving funds that Pillon and Palermo obtained in violation of the act. According to plaintiffs, it is undisputed that Palermo and Pillon turned over the deposit money directly to defendant Commerce Construction and that those funds were deposited into Commerce Construction's account; thus, according to plaintiffs, defendants Pillon and Palermo effectively converted the funds by failing to comply with the requirements of the statutes.

MCL 339.2512 reads in pertinent part:

> A licensee who commits 1 or more of the following is subject to the penalties set forth in article 6 . . .
>
> (d) fails to account for or to remit money coming into the licensee's possession which belongs to others
>
> (j) except in the case of property management accounts, fails to deposit in a custodial trust or escrow account money belonging to others coming into the hands of the licensee in compliance with the following:
>
> (i) a real estate broker shall retain a deposit or other money accepted by a person, partnership, corporation, or association holding a real estate broker's license under this article pending consummation or termination of the transaction involved and shall account for the full amount of the money at the time of the consummation or termination of the transaction.
>
> (ii) a real estate sales person shall pay over to the real estate broker, upon receipt, a deposit or other money on a transaction in which the real estate sales person is engaged on behalf of the real estate broker.
>
> (iii) a real estate broker shall not permit an advance payment of funds belonging to others to be deposited in the real estate broker's business or personal account or to be commingled with funds on deposit belonging to the real estate broker.
>
> (iv) a real estate broker shall deposit, within 2 banking days after the broker has received notice that an offer to purchase is accepted by all parties,

> money belonging to others in a separate custodial trust or escrow account maintained by the real estate broker with a bank, savings and loan association, credit union, or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received.
>
> (v) a real estate broker shall keep a record of funds deposited in a custodial trust or escrow account, which records shall indicate clearly the date and from whom the money was received, the date deposited, the date of withdrawal, and other pertinent information concerning the transaction, and shall clearly show for whose account the money is deposited and to whom the money belongs . . .

Provided that the act applies to these defendants, we agree with the trial court that Palermo and Pillon are not liable for conversion because it is undisputed that the deposit money was used to pay the contractors, subcontractors, laborers and other materialmen on the project. As the trial court pointed out in its opinion, defendants pose the salient question "In the event that the deposit monies were required to be deposited into a brokers account and only dispersed at closing as argued by plaintiffs, why would there even be the necessity of the Builders Trust Fund Act which addresses how certain deposit monies are to be used?" Under the circumstances, we find the trial court correctly granted defendants summary disposition of plaintiffs' conversion claim under the Real Estate Brokers and Salespersons Act.

Finally, plaintiffs request that in the event of a remand, they should be given the opportunity to file a second amended complaint to raise the issue of economic and non-economic damages for emotional and mental pain and suffering. We note that it appears that throughout this case plaintiffs use somewhat of a shotgun approach in their pleadings, spouting out a variety of different theories of alleged statutory violations, without giving much support, and hoping that one of those theories might have some degree of merit. In lieu of granting plaintiffs' request to file a second amended complaint, on remand, we direct plaintiffs to reevaluate the merit of their claims, and if upon reevaluation they are so inclined to seek amendment of their complaint, we leave it to the discretion of the trial court whether to allow plaintiffs to file a second amended complaint.

In sum, we affirm the trial court's grant of summary disposition to defendants of plaintiffs' claims of conversion brought under the Builders Trust Fund Act and the Real Estate Brokers and Salespersons Act. Because the trial court improperly found that a novation had occurred, we reverse the court's grant of summary disposition to defendants of plaintiffs' claims brought under the MCPA. As questions of fact remain concerning these claims, we remand to the trial court for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood