STATE OF MICHIGAN

COURT OF APPEALS

SHARON BEAR,

Plaintiff-Appellant,

v

LEE S. RUHL and RUHL REAL-ESTATE INVESTMENTS,

Defendants,

and

GOLDEN MORTGAGE CORPORATION,

Defendant-Appellee.

UNPUBLISHED
January 27, 2011

No. 294839
Oakland Circuit Court
LC No. 2008-092247-CK

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

PER CURIAM.

Plaintiff Sharon Bear appeals as of right from an order denying her motion to set aside the trial court's prior opinion and order granting defendant-appellee Golden Mortgage Corporation's (Golden's) motion for summary disposition in this action arising out of conduct engaged in by defendant Lee. S. Ruhl (Ruhl) during the time that he was employed as a loan officer for Golden. We affirm.

I

This action stems from investment transactions Bear made with Ruhl and his company, Ruhl Real-Estate Investments (RREI), in the fall of 2006.[1] Bear was introduced to Ruhl in the summer of 2006. According to Bear, Ruhl offered her a plan whereby she could use the

[1] RREI was formed by Ruhl while he was employed by Golden, but before Ruhl became acquainted with Bear.

substantial equity in her home[2] to generate income via guaranteed investments in RREI, and then use that income to qualify for a new mortgage.

On October 27, 2006, Bear filled out a residential mortgage application with Ruhl's assistance, stating income reflecting the earnings expected from Bear's investment in RREI.[3] On October 31, 2006, Bear invested $100,000 with Ruhl pursuant to a contract backdated to October 9, 2006. According to this contract, RREI was to repay Bear $2,783.07 per month for 48 months, or a total of $133,587.36.

On or about November 30, 2006, Bear signed an income certification, from New Century Mortgage Corporation (New Century), indicating that her gross monthly income would be at least $8,500. On December 5, 2006, Bear closed on a new 30-year adjustable rate mortgage with New Century, brokered by Golden, in the amount of $347,400. Among the loan documents Bear signed was a document titled "Prepayment Rider Adjustable Rate Loan." This Rider provided in part that Bear had the right to make a full or partial prepayment of the loan at any time, but that if she were to do so in the first two years of the loan, she was required to pay a prepayment charge equal to one percent of the amount of the prepayment. As broker of Bear's New Century mortgage, Golden was paid $5,219.00, of which $4,309 was identified as an origination fee and $595 as a processing fee.

After paying the balance of her existing mortgage, closing fees and settlement charges, Bear received net proceeds of approximately $171,000 from the refinancing. She then invested an additional $162,000 with Ruhl and RREI. Pursuant to this second investment contract, Ruhl and RREI were to repay Bear $4,508.58 per month for 48 months, or a total of $216,426.24.

Bear states that all of her communications with Ruhl occurred by way of Golden phone numbers and email addresses, and that all of their meetings were held at Ruhl's Golden office. Bear signed the investment contracts at Ruhl's Golden office and the signatures were witnessed by Golden employees. Bear also states that Ruhl advised her she could speak to his Golden assistant, Kelly Sharrow, regarding any questions she might have. Additionally, according to Bear, Ruhl kept her investment portfolio in his Golden office, the RREI checks Bear received bore the Golden address, and she picked up payments from RREI at Golden's offices, from Ruhl or another Golden employee.

RREI made monthly payments to Bear on the investment contracts through December 2007. [4] On January 8, 2008, Ruhl signed an agreement promising to pay Bear the full balance

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[2] At the time, Bear's home was valued at approximately $376,000, and her mortgage balance was approximately $168,675.

[3] According to Bear, her residential mortgage application stated monthly income of $8,500. Bear reported income of approximately $1,000 per month on her previous year's income tax return.

[4] RREI made 14 payments to Bear on her first investment contract, leaving a balance owing of $76,602.81, and 12 payments on the second contract, leaving a balance owing of $130,060.25

owed to her on the two contracts, together with penalty surcharges of $10,000 per contract, within 60 to 90 days.[5] Ruhl/RREI did not make any additional payments thereafter.

In June 2008, Bear filed suit against Ruhl and RREI, alleging breach of contract, unjust enrichment, breach of fiduciary duty, and fraud. Bear also alleged claims against Golden for fraud, breach of fiduciary duty, vicarious liability, and respondeat superior.

Discovery closed on May 29, 2009. Bear's claims against Ruhl and RREI were resolved when she and Ruhl each accepted the June 25, 2009 case evaluation award. Accordingly, judgment was entered in Bear's favor against Ruhl and RREI in the amount of $300,000. The case proceeded as to Bear's claims against Golden.

In July 2009, Golden moved for summary disposition of the claims against it under MCR 2.116(C)(8) and (10). Golden asserted that it was not a party to any of the contracts, agreements, investments or ventures entered into by Bear and Ruhl/RREI, that it did not have any knowledge of Ruhl's conduct in forming or operating RREI or in inducing Bear to invest in RREI, that it did not make any misrepresentations or engage in any deceitful or fraudulent conduct in connection with any of the transactions at issue, and that Ruhl' conduct in inducing Bear to invest money in RREI was outside his employment with Golden. In support of its motion, Golden relied on portions of the depositions of its president and owner, Richard Ruby, and of Ruhl, both of whom denied that Golden had any involvement in, or knowledge of, Ruhl's activities.

In response to Golden's motion, Bear first observed that discovery was not complete, reminding the court that she was awaiting answers to outstanding interrogatories and document production requests from Ruhl.[6] Additionally, she asserted that there were genuine issues of material fact precluding summary disposition, including: (1) the terms and conditions of Ruhl's employment, what position(s) he held with Golden, the terms of any employment contract, and the extent of his authority and job responsibilities with Golden; (2) whether Ruhl was acting within the scope of his employment when he persuaded Bear to invest with RREI so as to qualify for a new mortgage brokered by Golden; (3) whether Ruhl was acting within the scope of his employment when he assisted Bear in preparing the loan application and income verification documents, establishing that she had earnings of $8,500 per month, in order to qualify for the

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[5] This agreement also addresses an additional $30,000 investment made by Bear, on August 27, 2007, for the purchase of property on Fordham Street, in Detroit, by Ruhl/RREI with the intentions of reselling the property at a later date for a profit. This investment is mentioned as additional factual support for Bear's claims, but is not directly at issue here.

[6] By stipulated order entered June 17, 2009, Ruhl was required to completely answer the interrogatories and request for production of documents directed to him on or before June 26, 2009, and to appear for his deposition on June 30, 2009. That same order directed Golden to provide supplemental answers to certain interrogatories also by June 29, 2009. Bear did not indicate at any time that Golden had failed to comply with the order. Ruhl was deposed on June 30, 2009.

new mortgage brokered by Golden; (4) whether Golden's receipt of an origination fee for Bear's mortgage implicates Golden in the investment scheme "masterminded" by Ruhl; and (5) whether Golden should be estopped from denying liability to Bear based on her loss of her investment. Bear asserted that Golden employees were aware Ruhl and RREI were conducting investment business at Golden's offices. She also asserted that Ruhl was acting as an employee, agent and representative of Golden when entering into investment agreements with her, in order to provide her with substantial investment returns so that she could qualify for a new mortgage brokered by Golden. Bear relied on her own affidavit as evidence in opposition to Golden's motion.

Following a hearing, the trial court granted Golden's motion for summary disposition on Bear's claims for fraud and breach of fiduciary duty under MCR 2.116(C)(8). The trial court concluded that Bear failed to allege any fraudulent or deceitful statement or representation made by Golden sufficient to state a claim on either of these grounds. The trial court also granted Golden's motion for summary disposition of Bear's claims arising under principles of respondeat superior and vicarious liability pursuant to MCR 2.116(C)(10). The trial court held that Bear had not established any question of fact regarding any involvement in, or knowledge of Ruhl's investment activities by Golden, or that Ruhl had acted within the scope of his employment with Golden when procuring Bear's investment in RREI.

Thereafter, Bear moved the trial court to amend its opinion pursuant to MCR 2.517(B)[7] and set aside its order granting Golden's motion for summary disposition. In support of her motion, Bear attached four new affidavits[8] and an addendum to her own previous affidavit. She also argued that the trial court erred by granting Golden's motion for summary disposition before the completion of discovery because additional discovery from Ruhl was material to the issues presented. Bear asked the court to modify its previous opinion to conclude that there was a question of fact as to whether Golden was aware of, and is thus liable for, Ruhl's investment activities and to set aside the order granting summary disposition. Bear also asked that the order

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[7] As discussed further *infra*, MCR 2.517 addresses findings by a court, and MCR 2.517(B), which governs the amendment of a court's findings, provides:

> **(B) Amendment.** On motion of a party made within 21 days after entry of judgment, the court may amend its findings or make additional findings, and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to MCR 2.611. When findings of fact are made in an action tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether the party has moved to amend them or for judgment.

[8] All four affiants were identified on Bear's witness list, which she filed with the court on April 30, 2009.

be amended to require the provision of outstanding discovery from Ruhl, permit her to take additional discovery from other Golden employees,[9] and allow her to amend her complaint.

In response, Golden asserted that MCR 2.517(B) does not apply to decisions relating to summary disposition. Golden characterized Bear's motion as a meritless motion for reconsideration. Golden further argued that Bear's attempt to submit additional evidence was improper. Finally, Golden argued that further discovery from Ruhl and/or Ruby would be repetitive and would not "stand a fair chance of uncovering factual support" for Bear's claims.

Following a hearing, the trial court denied Bear's motion. The trial court concurred with Golden that MCR 2.517 was not applicable to Bear's attempt to revisit the court's prior order. The trial court further held that reconsideration of its prior decision granting summary disposition was not warranted.

II

Bear first argues that the trial court erred by summarily disposing of her claims against Golden arising under principles of respondeat superior and vicarious liability. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Review is limited to the evidence presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

Because the trial court relied on evidence outside of the pleadings in granting Golden's motion as to these two claims, this Court will review the trial court's decision as granting the motion under MCR 2.116(C)(10). *Spiek v Dep't of Transp*, 456 Mich 331, 338 and n 9; 572 NW2d 201 (1998); *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). When reviewing a motion under MCR 2.116(C)(10), this Court must consider all of the substantively admissible evidence submitted by the parties at the time of the motion in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 119-120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon

[9] Other than seeking to compel outstanding discovery requests from Ruhl, and thereafter possibly continue the depositions of Ruhl and Ruby, there is no record that Bear sought to re-open discovery or depose other witnesses until after the trial court had granted summary disposition.

which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

As a preliminary matter, Bear is correct that, generally, summary disposition is premature if granted before discovery on a disputed issue is complete, *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), unless further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position, *Liparoto Constr Co v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). Bear argues that such was the case here. However, Golden's motion for summary disposition was granted well after discovery had closed. While responses to interrogatories and requests to produce remained outstanding from Ruhl, and possibly also from Ruby, Bear has not indicated what this further discovery is expected to have disclosed or how it may have affected the outcome of the motion. Bear notes only that she "had not yet had an opportunity to question [Ruhl] regarding [] other affiants" who were indicating that Ruhl also contacted them "seeking the same type of investment scheme perpetrated on Plaintiff." But, Bear knew the identity of each of these other affiants prior to the close of discovery, as evidenced by their inclusion on her witness list filed April 30, 2009. Bear did not depose the affiants or procure affidavits from them in response to Golden's motion for summary disposition. Likewise, she did not seek to depose, or take discovery from other Golden employees, such as Sharrow or Grant Gerhard, at any time. Under these circumstances, the trial court's decision was not premature.

Turning to the substance of the issue, liability under principles of respondeat superior or the imposition of vicarious liability against an employer "is based upon principal-agent and master-servant relationships and involves the imputation of [fault] of the agent or servant to the principal or master without regard to the fault of the principal or master." *McClaine v Alger*, 150 Mich App 306, 316-317; 388 NW2d 349 (1986). Generally, "'a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment.'" *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002), quoting *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928); *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). However, an employer is not liable for an employee's tortious acts committed outside the scope of employment. *Rogers*, 466 Mich at 651; *Salinas v Genesys Health System*, 263 Mich App 315, 317; 688 NW2d 112 (2004); *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989). An act is considered to be outside the scope of employment if the employee acts outside his employment to accomplish a purpose of his own. *Id*. at 446-447; 450 NW2d 50 (1989), citing *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942).

Nevertheless, vicarious liability may arise where the employee's action was not specifically authorized if the act is similar or incidental to conduct that is authorized, considering factors such as whether the act is commonly done by the employee or whether the employee could in some way have been promoting or furthering the employer's business. *Bryant v Brannen*, 180 Mich App 87, 98-100; 446 NW2d 847 (1989), citing 1 Restatement Agency, 2d, § 229, p 506. Vicarious liability may also be imposed where the employee commits the act while involved in a service of benefit to the employer. *Kester v Mattis, Inc*, 44 Mich App 22, 24; 204 NW2d 741 (1972). "While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it

is clear that the employee was acting to accomplish some purpose of his own." *Bryant*, 180 Mich App at 98.

As this Court noted in *Bryant*, 180 Mich App at 99-100, 1 Restatement Agency, 2d, § 229, p 506, provides:

> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
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> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
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> (a) whether or not the act is one commonly done by such servants;
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> (b) the time, place and purpose of the act;
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> (c) the previous relations between the master and the servant;
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> (d) the extent to which the business of the master is apportioned between different servants;
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> (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
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> (f) whether or not the master has reason to expect that such an act will be done;
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> (g) the similarity in quality of the act done to the act authorized;
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> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
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> (i) the extent of departure from the normal method of accomplishing an authorized result; and
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> (j) whether or not the act is seriously criminal.

As noted by the trial court, Bear's argument that Golden is liable for Ruhl's conduct under principles of respondeat superior or vicarious liability is premised on the notion that Ruhl was acting within the scope of his employment with Golden, and/or that Golden was aware of his investment activities. Bear's affidavit indicates that her contact with Ruhl was via a Golden email account and Golden telephone numbers, and that documents were signed at Golden's offices, and her signature on those documents witnessed by Golden employees. However, both Ruhl and Ruby indicated unequivocally that Golden had no knowledge of Ruhl's investment activities and that those activities were not within the scope of his Golden employment. And, Bear did not submit any evidence other than her own affidavit to establish otherwise. The assertions she did make in her affidavit were either conclusory or lacked a sufficient factual basis

to establish such knowledge. The fact that the transactions were conducted at Ruhl's Golden office does not indicate that Ruhl's conduct in securing investments from Bear were of the "same general nature as" or "incidental to" the conduct authorized by Ruhl's employment as a loan officer. *Bryant*, 180 Mich App at 99-100, quoting 1 Restatement Agency, 2d § 229, 9 506. None of the investment documents mention Golden or refer to Bear obtaining a mortgage or to mortgage loans. Further, only one of the three investments Bear would ultimately make with Ruhl was made with funds obtained from her refinancing. There was no evidence that Golden employees commonly engaged in offering investment services or advice to clients, or that the offering of investment advice was within Golden's "enterprise." *Id.* Rather, the only evidence produced indicated the opposite. Likewise, the "instrumentality by which the harm is done" was not furnished by Golden and, again, was not within the usual operations of Golden as a mortgage company. *Id.*

The only Restatement factors set forth in *Bryant*, 180 Mich App at 99-100, that might favor a finding that Ruhl was acting within the scope of his employment at the time he garnered Bear's investments in RREI are the "time, place and purpose of the act" and "whether or not [Golden] has reason to expect that such an act will be done." The time and place of Ruhl's conduct in entering into the two investment contracts at issue here can fairly be said to be Golden's offices. The purpose of that conduct was to get Bear to enter into the investment contracts with RREI. As for whether Golden had reason to expect that Ruhl would seek to have Bear invest in his separate company, again both Ruhl and Ruby testified that such conduct was outside the scope of Ruhl's authority and Golden's business. Assuming as true that Bear communicated with Ruhl through his personal Golden telephone number and email account, that she executed the investment contracts at Golden's offices and they were witnessed by Golden employees[10], and that Ruhl kept her investment "portfolio" in his Golden office, Bear produced no evidence establishing that anyone at Golden knew what Ruhl was doing. Given the unequivocal testimony of Ruhl and Ruby to the opposite effect, Bear has failed to establish a genuine issue of material fact.

As Bear notes, vicarious liability can arise where an employee's conduct outside of his employment is performed in a manner that it in some way promotes or furthers the employer's business, or where the employee commits the act while involved in a service of benefit to the employer. *Bryant*, 180 Mich App 98-100, *Kester*, 44 Mich App at 24. Bear argues that Ruhl's conduct in garnering her investments in RREI was undertaken as part of his efforts to convince her to refinance her mortgage and that as a consequence of Ruhl's conduct, Golden obtained the benefit of earning an origination fee. However, the documentation in the record demonstrates that the financing of the mortgage was a means to further Bear's ability to invest with RREI. That is, it is clear that Ruhl "was acting to accomplish some purpose of his own," by convincing Bear to invest additional funds with RREI, however those funds might be obtained. *Bryant*, 180 Mich App at 98. There is no evidence that Ruhl's investment scheme was undertaken in order

[10] Bear did not allege or produce evidence establishing that the witnesses knew the content of the documents upon which they were witnessing the authenticity of the signatures.

to generate a refinancing for the purpose of benefitting Golden. Therefore, the trial court did not err by granting Golden's motions on these claims.

III

Bear next argues that the trial court erred by dismissing her claims against Golden sounding in fraud and breach of fiduciary duty. We disagree.

The trial court granted Golden's motion for summary disposition of Bear's fraud and breach of fiduciary duty claims pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone and may not be supported with documentary evidence. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010). All factual allegations in support of the claim are accepted as true, together with any reasonable inferences or conclusions that can be drawn from the facts, and are construed in the light most favorable to the nonmoving party. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Cummins v Robinson Twp*, 283 Mich App 677, 689; 770 NW2d 421 (2009); *Detroit Internat'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair*, 470 Mich at 119; *Dalley*, 287 Mich App at 305. If the trial court relied on evidence outside of the pleadings in rendering its decision, this Court will review the trial court's decision as granting the motion under MCR 2.116(C)(10). *Spiek*, 456 Mich at 338 and n 9; *Hughes*, 277 Mich App at 273.

As this Court explained in *1031 Lapeer LLC v Rice*, ___ Mich App ___; ___ NW2d ___ (2010)

> To establish actionable fraud, a plaintiff must show that: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew the representation was false or recklessly made the representation without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and, (6) the plaintiff suffered injury.

See also, *Johnson v Wausau Ins Co*, 283 Mich App 636, 643; 769 NW2d 755 (2009); *Webb v First of Michigan Corp*, 195 Mich App 470, 473; 491 NW2d 851 (1992). As this Court pointed out in *1031 Lapeer*, ___ Mich App at ___, quoting *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994), "[i]mportantly, to sustain a claim of fraud, the plaintiff must have reasonably relied on the false representation. 'There can be no fraud where a person has the means to determine that a representation is not true.'" See also *Webb*, 195 Mich App 474 ("[T]here can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.")

The only allegation of a material misrepresentation against Golden is Bear's assertion that Ruhl and/or Sharrow misrepresented to her that the interest rate on her mortgage would be temporary because the mortgage could later be refinanced at a lower rate, but that instead, the mortgage carried a prepayment penalty. However, plainly, Bear had the "means to determine that [the purported mis]representation [was] not true" because she signed the prepayment penalty rider which specifically stated that there was a penalty for any prepayment of the mortgage within the first two years after the note was signed. Bear does not indicate that she was prevented or inhibited in any way from reading the document before signing it. Therefore, she cannot establish that she reasonably relied on any assertion to the contrary. *1031 Lapeer*, ___ Mich at ___; *Nieves*, 204 Mich App at 464; *Webb*, 195 Mich App at 475. Even a cursory review of the prepayment penalty rider would have plainly indicated that the mortgage could not simply be refinanced at a lower interest rate within six months without payment of a prepayment penalty. Therefore, any reliance Bear placed on representations otherwise was not reasonable. Thus, the trial court properly granted Golden's motion for summary disposition of Bear's claim for fraud.

The same is true of Bear's breach of fiduciary duty claim. Bear alleged that Golden breached its fiduciary duty to her by violating MCL 445.1672. That statute provides:

> It is a violation of this act for a licensee or registrant to do any of the following:
>
> (a) Fail to conduct the business in accordance with law, this act, or a rule promulgated or order issued under this act.
>
> (*b) Engage in fraud, deceit, or material misrepresentation in connection with any transaction governed by this act*.
>
> (c) Intentionally or due to gross or wanton negligence, repeatedly fail to provide borrowers material disclosures of information as required by law.
>
> (d) Suppress or withhold from the commissioner any information that the licensee or registrant possesses and that, if submitted, would have made the licensee or registrant ineligible for licensing or registration under this act or would have warranted the commissioner's denial of a license application or refusal to accept a registration.
>
> (e) Fail to comply with 1966 PA 125, MCL 565.161 to 565.164, regulating the handling of mortgage escrow accounts by mortgagees.
>
> (f) Until proper disbursement is made, fail to place in a trust or escrow account held by a federally insured depository financial institution in a manner approved by the commissioner any money, funds, deposits, checks, drafts, or other negotiable instruments received by the licensee that the borrower is obligated to pay to a third party, including amounts paid to the holder of the mortgage loan, amounts for property taxes and insurance premiums, or amounts paid under an agreement that requires if the mortgage loan is not closed the amounts paid shall be refunded to the prospective borrower or if the mortgage

loan is closed the amounts paid shall be applied to fees and costs incurred at the time the mortgage loan is closed. Fees and costs include, but are not limited to, title insurance premiums and recording fees. Fees and costs do not include amounts paid to cover costs incurred to process the mortgage loan application, to obtain an appraisal, or to receive a credit report.

(g) Refuse to permit an examination or investigation by the commissioner of the books and affairs of the licensee or registrant, or has refused or failed, within a reasonable time, to furnish any information or make any report that may be required by the commissioner under this act.

(h) To be convicted of a felony, or any misdemeanor of which an essential element is fraud.

(i) Refuse or fail to pay, within a reasonable time, those expenses assessed to the licensee or registrant under this act.

(j) Fail to make restitution after having been ordered to do so by the commissioner or an administrative agency, or fail to make restitution or pay damages to persons injured by the licensee's or registrant's business transactions after having been ordered to do so by a court.

(k) Fail to make a mortgage loan in accordance with a written commitment to make a mortgage loan issued to, and accepted by, a person when the person has timely and completely satisfied all the conditions of the commitment before the expiration of the commitment.

(l) Require a prospective borrower to deal exclusively with the licensee or registrant in regard to a mortgage loan application.

(m) Take a security interest in real property before closing the mortgage loan to secure payment of fees assessed in connection with a mortgage loan application.

(n) Except as provided under section 18e, [MCL 445.1668e] knowingly permit a person to violate an order that has been issued under this act or any other financial licensing act that prohibits that person from being employed by, an agent of, or a control person of the licensee or registrant. [Emphasis added.]

The only subsection of MCL 445.1672 implicated by Bear's allegations is subsection (b), which prohibits Golden from engaging in "fraud, deceit, or material misrepresentation in connection with" any mortgage transaction. Again, as noted above, the only allegation suggesting "fraud, deceit or material misrepresentation" in the mortgage transaction is Bear's assertion that Ruhl and/or Sharrow misrepresented to her that the interest rate on her mortgage would be

"temporary."[11] However, Bear does not deny that she signed the prepayment penalty rider, which clearly states that there is a penalty for any prepayment within the first two years after the mortgage is obtained. Thus, as discussed above, she cannot establish any fraud or "material misrepresentation" by Golden contrary to this document. Consequently, the trial court properly granted Golden's motion for summary disposition of Bear's breach of fiduciary duty claim as well.

IV

Finally, Bear argues that the trial court erred by denying her Motion to Amend Opinion and Set Aside Order Granting Defendant-Golden Mortgage Corporation's Motion for Summary Disposition pursuant to MCR 2.517(B), We disagree.

The interpretation and application of a court rule presents a question of law that this Court reviews de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Id*. at 605-606.

MCR 2.517 addresses findings by a trial court. It provides:

> **(A) Requirements.**
>
> (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.
>
> (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.

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[11] Bear also alleges that she "relied on the knowledge, skills, experience, recommendations, reputation and direction of Co-Defendants Ruhl, RREI and Golden Mortgage and [when entering] into the First and Second [investment] Contract with the Co-Defendants," and that "Co-Defendants breached their fiduciary duties and obligations owed to the Plaintiff intentionally, maliciously, fraudulently, and with a conscious disregard for the rights and likelihood of economic injury to the Plaintiff, and acted at all times to further their own economic interest at the expense of the Plaintiff." However, to the extent that Bear's allegations pertain to the investment contracts, they are beyond the scope of MCL 445.1672. Similarly, Bear alleges that the prepayment penalty and "increasing the APR" benefitted Golden. However, Golden does not hold Bear's mortgage note, and all payments (including the payment of any prepayment penalty) are made to New Century; thus, the factual assumption underlying this allegation is patently false.

(3) The court may state the findings and conclusions on the record or include them in a written opinion.

(4) Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule. See, e.g., MCR 2.504(B).

(5) The clerk shall notify the attorneys for the parties of the findings of the court.

(6) Requests for findings are not necessary for purposes of review.

(7) No exception need be taken to a finding or decision.

(B) Amendment. On motion of a party made within 21 days after entry of judgment, the court may amend its findings or make additional findings, and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to MCR 2.611. When findings of fact are made in an action tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether the party raising the question has objected to the findings or has moved to amend them or for judgment.

By its terms, MCR 2.517 addresses findings *of fact* by a trial court; it sets forth when such findings of fact are required and the manner in which they are to be set forth. Thus, that MCR 2.517(B) is not applicable to a challenge to a trial court's decision on a motion for summary disposition is patently clear: a trial court is not permitted to make findings of fact when deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). If the court *may not make* factual findings when deciding a motion for summary disposition, then there necessarily cannot be any factual findings subject to amendment in the course of such a decision.[12]

In essence, Bear's motion asked the trial court to reconsider its decision granting Golden's motion for summary disposition, based in part on additional evidence purporting to support her claims that was not previously presented to the trial court. Bear's motion did not offer any new arguments, nor assert any new issues, not previously addressed to the trial court. The additional evidence presented consisted of affidavits from four witnesses that were listed on Bear's witness list, which she filed three months before she responded to Golden's motion for

[12] Indeed, if a trial court were to make findings of fact when deciding a motion for summary disposition (as opposed to reciting undisputed facts in support of that decision), the proper course of action would be to appeal the decision on the basis that there were genuine issues of material fact precluding summary disposition. See *Amerisure*, 282 Mich App 431-432.

summary disposition. Bear offered no reason why these affidavits were not, or could not have been, attached to her response in opposition to Golden's motion for summary disposition.

"Generally . . . a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." *Woods v SLB Property Management, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008), quoting MCR 2.119(F)(3). "The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id.* A trial court does not abuse its discretion by denying a motion for reconsideration that rests on testimony or evidence that could have been presented the first time the issue was argued. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Such is the case here. Bear apparently thought she had presented enough evidence, relying on her affidavit alone, to survive a motion for summary disposition. When the trial court concluded otherwise, she attempted to reargue the motion with additional, belated evidentiary support that could have been obtained, but was not offered, in the first instance. Under these circumstances, we cannot conclude that the trial court abused its discretion by denying Bear's motion to amend its opinion and set aside the order granting Golden's motion for summary disposition. *Churchman*, 240 Mich App 233; *Charbeneau*, 158 Mich App 733.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering