# STATE OF MICHIGAN

# COURT OF APPEALS

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DALE A. BITYK and SUSAN ANN BITYK,

Plaintiffs-Appellants,

v

JOHN TUCKER, MICHAEL J. TUCKER, and RICK ASPDEN d/b/a JUST HOMES,

Defendants-Appellees,

and

BERNARD SABAROFF and ARNOLD SABAROFF d/b/a/ ASSOCIATES DESIGN GROUP,

Defendants.

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UNPUBLISHED
October 22, 1996

No. 186018
LC No. 94-488215-CK

Before: Neff, P.J., and Hoekstra and G. D. Lostracco,* JJ.

PER CURIAM.

In this breach of contract action, plaintiffs appeal as of right from an order granting summary disposition for defendants. We reverse.

In February 1994, plaintiffs and Just Homes entered into an oral contract whereby defendants were to design the blueprints for plaintiff's new home. The contract allegedly required defendants to provide plaintiffs with blueprints meeting their satisfaction, approved by a licensed architect, and conforming to all applicable state and local building codes. Defendants allegedly submitted five sets of non-conforming plans. Thereafter, plaintiffs brought suit against defendants Tucker, Tucker and Aspden, as well as Bernard Saberhoff, but did not sue Just Homes in its corporate capacity. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) arguing that the case should be dismissed since Just Homes was a Michigan Corporation and that they could not be held individually liable since plaintiffs contracted with the corporation. Plaintiffs responded by arguing that Just Homes

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* Circuit judge, sitting on the Court of Appeals by assignment.

held itself out to be a non-corporate entity. The trial court granted summary disposition, holding that defendants were not individually liable since Just Homes was a Michigan corporation in good standing.

We note first that although defendants moved for summary disposition pursuant to MCR 2.116(C)(8), both parties attached documentary evidence to their motions which the trial court considered. Because the court considered evidence outside the pleadings, which is not permitted when ruling on a motion under MCR 2.116(C)(8), MCR 2.116(G)(5), we will treat the motion as if brought under MCR 2.116(C)(10). If summary disposition was granted under the wrong subrule but is appropriate under another subrule, "the defect is not fatal and does not preclude appellate review if the record otherwise permits it." *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 143; 530 NW2d 510 (1995).

First, plaintiffs contend that the trial court erred in finding that Just Homes was a corporation thereby providing defendants with protection from individual liability. We agree. We review a trial court's grant or denial of a motion for summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *IBEW, Local 58 v McNulty*, 214 Mich App 437, 442; 543 NW2d 25 (1995). A motion brought under MCR 2.116(C)(10) may be granted when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *McNulty, supra*. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed leaving open an issue upon which reasonable minds could differ. *Id.*

In general, the law respects the corporate entity unless it is employed to achieve fraud or other purposes improper for the corporate form. *Regan v Carrigan*, 194 Mich App 35, 39; 486 NW2d 57 (1992). However, it is well established that corporate employees and officials are personally liable for all tortious and criminal acts in which they participate, regardless of whether they are acting on their own or on behalf of the corporation. *Joy Management v Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990). Moreover, where a party is contracting with an agent of a corporation and had notice that the agent is or may be contracting for a principal, but has no notice of the principal's identity, the principal is said to be partially disclosed. *Detroit Pure Milk Co v Patterson*, 138 Mich App 475, 478; 360 NW2d 221 (1984). Unless otherwise agreed, an agent contracting with a partially disclosed principal is a party to and personally liable on the contract. *Id.* In *Detroit Pure Milk Co v Farnsworth*, 114 Mich App 447, 449; 319 NW2d 557 (1981), this Court held that the defendants could be held personally liable where the facts revealed that they had failed to expressly disclose the existence of the corporate principal when contracting with the plaintiff and where the contracting company in question was transacting business without a designation indicative of its corporate status (such as "Inc"). See also *Baranowski v Strating*, 72 Mich App 548, 558-559; 250 NW2d 744 (1976).

In this case, when responding to defendants' motion, plaintiff set forth documentary evidence indicating that, while transacting business with them, defendants did not disclose that the principal, Just Homes, was a corporation. Therefore, a genuine issue of material fact existed as to whether defendants held themselves out as a corporation. Accordingly, the trial court erred in granting the motion because

even if Just Homes is in fact a corporation, defendants were still under a duty to properly disclosed the identity of the corporate principal in order to escape individual liability.

Reversed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Gerald D. Lostracco