

STATE OF MICHIGAN
COURT OF APPEALS

HERRICK FOUNDATION,

Plaintiff-Appellee,

v

C. JAMES WELLMAN,

Defendant-Appellant,

and

CYNTHIA A. SHUBERG and JAN PIERRE C. QUIVEY,

Defendants-Appellees,

and

NATIONAL AEROSPACE CADETS, KEN
BEATTY, GERALD GOOD and RON WAGNER,

Defendants.

UNPUBLISHED

October 7, 1997

No. 190914

Jackson Circuit Court

LC No. 94-069073 CZ

HERRICK FOUNDATION,

Plaintiff-Appellee,

v

CYNTHIA A. SHUBERG and JAN PIERRE C.
QUIVEY,

Defendants-Appellants,

and

No. 190930

Jackson Circuit Court

LC No. 94-069073 CZ

C. JAMES WELLMAN,

Defendant-Appellee,

and

NATIONAL AEROSPACE CADETS, KEN BEATTY,
GERALD GOOD and RON WAGNER,

Defendants.

Before: Doctoroff, P.J., and Kelly and Young, JJ.

PER CURIAM.

In Docket No. 190930, defendants Cynthia A. Shuberg and Jan Pierre C. Quivey appeal as of right the trial court's order granting plaintiff's motion for summary disposition in this action for fraud and misrepresentation. In Docket No. 190914, defendant C. James Wellman appeals as of right the trial court's order granting plaintiff's motion for summary disposition. We affirm in part and reverse in part.

I

The Herrick Foundation (Foundation) had pledged to donate \$200,000 to defendant National Aerospace Cadets (NAC) if NAC could acquire a like amount in matching funds. These consolidated cases arise from the successful effort of NAC and the other defendants to cause the Foundation to make its contribution without actually raising the matching contribution of \$200,000. Defendants accomplished this fraud by creating a phantom donation associated with the sale of an eighty-acre parcel of land by defendants Shuberg and Quivey to NAC. Defendant Wellman, a real estate broker, was the Quivey/Shuberg real estate broker in the transaction with NAC. The asking price for the property was \$160,000; however, NAC, through its president, defendant Ken Beatty, proposed that NAC purchase the property for an inflated price of \$350,000 and that Shuberg and Quivey, in turn, would "donate" \$200,000 of the purchase price to NAC. Because defendants Shuberg and Quivey both knew that they did not have sufficient funds to cover such a donation, the arrangement was to make it "appear" as though the donation was made.

NAC's interest in paying the vastly inflated price of \$350,000 for the property, and thereby "financing" its own donation, was evident. As stated previously, plaintiff had, prior to the sale, pledged \$200,000 to NAC if it could acquire matching funds. NAC used the Shuberg/Quivey sham donation to induce plaintiff to make its \$200,000 donation. Upon discovering the sham, plaintiff sued defendants for fraud, and sought the imposition of a constructive trust on the property in question for plaintiff's benefit. Plaintiff eventually moved for summary disposition, which the trial court granted, finding that defendants

had engaged in a civil fraudulent conspiracy. The trial court also granted plaintiff's request for a constructive trust on the property. This appeal ensued.

II

On appeal, defendants Shuberg and Quivey in Docket No. 190914 and defendant Wellman in Docket No. 190930 claim that the trial court erred in granting summary disposition to plaintiff because a genuine issue of material fact exists regarding whether any of these defendants had the requisite intent to support liability for fraud or misrepresentation.

A trial court's decision to grant a motion for summary disposition is reviewed de novo by this Court to determine if the defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court construes the evidence in favor of the nonmovant. *Shirilla v City of Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). All relevant affidavits, depositions, admissions, and other admissible evidence are examined. *Id.* The party opposing the motion must set forth specific facts demonstrating that there is a genuine issue of material fact. *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 622; 478 NW2d 893 (1991). This Court then determines, based on review of the record evidence, and all reasonable inferences therefrom, whether a genuine issue of material fact exists on which reasonable minds could differ to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). All reasonable inferences must be made in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

In order to demonstrate fraud or misrepresentation, a plaintiff must prove: (1) that the defendant made a material representation; (2) that the representation was false; (3) that when the defendant made the representation, the defendant knew it was false, or made it recklessly without knowledge of its truth or falsity; (4) that the defendant made it with the intent that the plaintiff would act upon it; (5) that the plaintiff acted in reliance upon it; and (6) that the plaintiff suffered injury. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208; 544 NW2d 727 (1996), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Having reviewed the record, we conclude that the trial court properly granted summary disposition to plaintiff in Docket No. 190914 on its fraud claim against defendants Shuberg and Quivey. With respect to defendant Shuberg, she testified at her deposition that defendant Quivey wrote a check on their joint account so that NAC could show plaintiff that it had received a matching donation. Based on this statement, none of the testimony or documentary evidence raised a reasonable inference that Shuberg did not intend plaintiff to act upon the representation that Quivey and Shuberg donated \$200,000. Shuberg admitted in her deposition that she understood the nature of the transaction, namely, that NAC would use the phantom donation to induce plaintiff to make a matching grant to NAC.

Defendant Shuberg alleged in a post-deposition affidavit that because she believed that plaintiff would receive full disclosure, she had no intent to defraud. However, in light of her deposition testimony, defendant Shuberg cannot now assert, relying on a self-serving affidavit, that a genuine issue of material fact exists regarding her intent because she believed that plaintiff would receive full disclosure. See *Stefan v White*, 76 Mich App 654, 660; 257 NW2d 206 (1977). To the contrary, the only reasonable inference from the evidence is that defendant Shuberg intended that plaintiff rely on the false representation that she and defendant Quivey donated \$200,000 to NAC.

By the same token, defendant Quivey testified in his deposition that the transaction was structured so that NAC could falsely represent to plaintiff that he and defendant Shuberg donated \$200,000 to NAC, and so that plaintiff would, in turn, match that contribution by donating \$200,000. In light of this testimony, none of the other testimony or documentary evidence raised a reasonable inference that defendant Quivey did not intend plaintiff to act upon the misrepresentation. Therefore, no genuine issue of material fact exists upon which reasonable minds could differ regarding defendants Shuberg and Quiveys' intent. The trial court did not err in granting summary disposition in plaintiff's favor as to those defendants.

However, we believe that the trial court did err in Docket No. 190930 in granting summary disposition to plaintiff on its fraud claim against defendant Wellman. While defendants Shuberg and Quivey conceded in their respective depositions that they were aware that their NAC transaction was structured in such a way as to induce plaintiff to rely upon the fact that \$200,000 had apparently been donated to NAC, defendant Wellman took an entirely different tack in his deposition. Defendant Wellman denied that he was aware of the nature of the fraudulent scheme. In effect, defendant Wellman contends that he was an innocent scrivener in the transaction which led Herrick to make its \$200,000 matching grant to NAC.

Although defendant Wellman's denial of an intent to defraud appears, given the record, to be inherently incredible, we believe, nevertheless, that summary disposition was premature. Plaintiff's evidence showed that defendant Wellman:

- (1) Drafted the addendum to the Shuberg/Quivey-NAC buy-sell agreement, which made it clear that defendants Shuberg and Quivey were to "donate" \$200,000 at closing and that the entire transaction between NAC and Shuberg/Quivey was contingent upon NAC receiving the Herrick grant; and
- (2) Signed an affidavit attesting that he personally witnessed the placement in escrow of a \$200,000 check issued to NAC by defendants Shuberg and Quivey at closing despite the fact that he knew both that the check was worthless and that it would not be escrowed.¹

Defendant Wellman also testified that he knew that his escrow affidavit was necessary to facilitate the closing, and that he attended the NAC board meeting at which Beatty made it known that the Shuberg/Quivey \$200,000 "donation" was a prerequisite to NAC's receipt of plaintiff's matching

contribution, and that NAC's ability to purchase the Shuberg/Quivey land was in fact dependent upon receipt of that grant.²

On the other hand, defendant Wellman testified that another document signed by defendants Quivey and Beatty that same day indicated that, regardless of what had been previously attested to, no funds would be held in escrow. Defendant Wellman argues that because he did not know that his previous affidavit would be used to confirm that the \$200,000 check had been placed in escrow, he lacked the requisite intent for plaintiff to rely on the statement. Defendant Wellman also relies on an affidavit he filed in opposition to the motion for summary disposition wherein he stated that he did not understand and did not participate in developing the terms of the sale.

Drawing all reasonable inferences in defendant Wellman's favor, we conclude that a genuine issue of material fact exists concerning whether defendant Wellman intended that plaintiff rely on a misrepresentation. Although it is apparent from the record evidence that defendant Wellman understood that the transaction would make it appear that Shuberg and Quivey donated \$200,000 to NAC, his general denial that he understood that the sham donation was structured to defraud plaintiff creates a material question of fact. As preposterous as defendant Wellman's explanation of his conduct appears, the credibility of witnesses is for the trier of fact to ascertain. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

Consequently, the trial court erred in granting summary disposition to plaintiff on its fraud claim against defendant Wellman.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Michael J. Kelly

/s/ Robert P. Young, Jr.

¹ Plaintiff's evidence also showed: (a) defendant Wellman is a licensed real estate broker who had been in the real estate business for about 18 years and a broker for approximately 14 years; (b) in 1992 defendant Wellman advised defendants Shuberg and Quivey in their original purchase of the property they eventually sold to NAC and advised them that the purchase price of \$83,300 was a good price; (c) defendant Wellman knew that defendants Shuberg and Quivey bought the property on a land contract, and was aware that they were in default on their land contract before they decided to sell the property in 1993 and before NAC purchase deal was conceived; (d) defendant Wellman originally listed the property for defendants Shuberg and Quivey for a sale price of \$160,000 which he thought was a fair price for the property; (f) defendant Wellman brought defendant Beatty to defendants Shuberg and Quivey for the purpose of initiating purchase discussions; (g) defendant Wellman was involved in negotiations with defendants Beatty, Quivey and Shuberg during which defendant Beatty suggested that the purchase price be *increased* from the asking price of \$160,000 to \$350,000, and that, in exchange for the increased purchase price, the sellers would have to make a "donation" to NAC

of \$200,000; (h) defendant Wellman discussed the “donation” aspect of the transaction several times with defendant Quivey before the closing; and (i) the only purchase offer the sellers received during the fifteen months their property was listed was the one made by NAC.

² NAC’s board minutes and the testimony of defendant Beatty establish that defendant Wellman brought the addendum to the meeting and discussed it in relation to the Quivey/Shuberg donation and Herrick grant quid pro quo. Defendant Wellman admitted to attending the meeting, but denied any recollection of the discussion.