

STATE OF MICHIGAN
COURT OF APPEALS

CECIL R. CUNNINGHAM and ROBIN S.
CUNNINGHAM,

UNPUBLISHED
February 24, 2004

Plaintiffs-Appellants,

v

No. 241909
Kent Circuit Court
LC No. 01-000164-NZ

MICHAEL J. CHARBONNEAU,

Defendant/Cross-Defendant-
Appellee,

and

NORTH AMERICAN MORTGAGE COMPANY
and OLD KENT BANK MORTGAGE
COMPANY,

Defendants/Cross-Plaintiffs-
Appellees.

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We affirm.

I. Facts and Procedural History

This case arises out of plaintiffs' failed attempt to obtain a mortgage. In May 2000 plaintiff Cecil R. Cunningham met with defendant Michael J. Charbonneau, a loan officer employed at that time by defendant North American Mortgage Company (North American), to discuss the possibility of obtaining financing to purchase a horse farm in Lowell. Plaintiff and his wife, plaintiff Robin S. Cunningham, intended to finance the \$290,000 purchase price by providing a \$30,000 down payment and obtaining a \$260,000 mortgage loan. The May 29, 2000, formal offer to purchase the property provided that "[f]ailure to obtain mortgage approval within 30 days shall cause this agreement to be null and void at the option of either party and all deposits will be returned."

On June 28, 2000, Northpointe Bank issued a conditional loan approval in the amount of \$203,000. Upon plaintiffs' request, defendant Charbonneau, who by that time was acting as a loan agent for both defendants North American and Old Kent Mortgage Company (Old Kent) delivered a letter to the sellers dated June 29, 2000, stating in relevant part:

Confirming our telephone conversation of this date, please be advised that the Cunningham's have received a mortgage commitment from Northpointe for the purchase of the above-captioned property. In accordance with the Purchase Agreement, we have until August 1 to complete the closing, although I anticipate it will be sooner than that

As I indicated, we are still negotiating some of the terms of the commitment from Northpointe, however, that does not detract from its firmness. . . .

Assuming everything else falls into place as planned, we should have title work, the appraisal and mortgage terms completed about the same time, and we can schedule the closing accordingly.

On July 2, 2000, the seller sent plaintiffs a letter indicating that the agreement was null and void because, among other things, plaintiffs failed to obtain a mortgage according to the terms of the offer. Plaintiffs executed a mutual release of purchase agreement and recouped their \$5,000 in earnest money.

Plaintiffs subsequently filed their complaint, alleging fraud against the loan officer, breach of fiduciary duties, violations of Michigan's Consumer Protection Act, and intentional infliction of emotional distress. Plaintiffs essentially claimed that defendants misled them into believing that they were approved for a mortgage in the amount of \$260,000. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10).

II. Analysis

Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, review under (C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In reviewing an order granting summary disposition under MCR 2.116(C)(10), a reviewing court examines all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Id.* at 454; *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

Plaintiffs first argue that they presented some evidence to support their position and, therefore, the trial court erred by finding that no genuine issues of fact existed for trial. However, the mere fact that plaintiffs presented some evidence does not automatically equate to a showing of genuine issues of material fact. The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Maiden v*

Rozwood, 461 Mich 109, 121; 597 NW2d 817 (1999). A genuine issue of material fact is not established by the mere presentation of some evidence; rather, a genuine issue of material fact exists only when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *West v Gen'l Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We find no error in the standard applied by the trial court in deciding defendants' motion for summary disposition.

Plaintiffs argue that there were genuine issues of material fact regarding their fraudulent misrepresentation claim. To prove fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, it knew that it was false, or the defendant made the representation recklessly, without any knowledge of its truth, and as a positive assertion; (4) the defendant made the representation with the intention that it should be acted on by the plaintiff; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered injury due to his reliance on the representation. *Hord v ERIM (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (1998).

Generally, fraud without damage cannot serve as a basis for an action of deceit because a showing of detrimental reliance is an essential element of the action. *Mallick v Migut*, 22 Mich App 140, 144; 177 NW2d 200 (1970). Thus, there must be proof that fraud actually caused the damage allegedly suffered. *Rosenblatt v John F Ivory Storage Co*, 262 Mich 513, 517; 247 NW 733 (1933); *Gretchell v Dusenbury*, 145 Mich 197, 202; 108 NW 723 (1906). Proving damages for fraud is akin to proving breach of contract where a party has the burden to prove his damages with reasonable certainty, and may recover only those damages, which are the direct, natural, and proximate result of the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 505 (2003).

Here, plaintiffs sought damages for the difference between the purchase price of the property and its actual fair market value. But plaintiffs never demonstrated that they could have obtained the \$260,000 loan amount from another lender. It is purely speculation to assume that plaintiffs could have obtained the necessary financing from another lending institution. See, e.g., *Mallick v Migut*, 22 Mich App 140; 177 NW2d 200 (1970). Therefore, the trial court did not err in granting defendants' motion for summary disposition on plaintiffs' fraud claim because there are no genuine issues of material fact regarding the element of damages.

Next, plaintiffs argue the trial court erred in determining that the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, is not applicable in this case. Plaintiffs' argument with regard to this issue is not clear.

Nonetheless, the MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. MCL 445.903(1). "Trade or commerce" is defined as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes." MCL 445.902(d). If an item is purchased primarily for business or commercial rather than personal purposes, the MCPA does not provide protection. *Zine v Chrysler Corp*, 236 Mich App 261, 273; 600 NW2d 384 (1999). Here, it is undisputed that plaintiffs intended to live at the horse farm and conduct a horse-boarding business for profit, a commercial purpose. Thus, the MCPA does not provide protection.

Finally, plaintiffs argue that there are genuine issues of material fact regarding their breach of fiduciary duty claim. They contend that a fiduciary relationship existed between themselves and defendant Charbonneau because he kept in regular contact with the seller, was actively involved in the negotiation of the offer to purchase, and visited the property with plaintiffs. A fiduciary relationship exists when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680-681; 591 NW2d 438 (1998). However, a fiduciary relationship generally does not arise within the lender-borrower context. *Id.*

In this case, the evidence of the relationship between plaintiffs and defendant Charbonneau fails to demonstrate a relationship of faith, confidence and trust. A borrower's allegations of inexperience and reliance on the lender are insufficient to establish a fiduciary relationship. *Ulrich v Fed'l Land Bank of St. Paul*, 192 Mich App 194, 196-197; 480 NW2d 910 (1991). The mere fact that Charbonneau was present at the time plaintiffs submitted their offer to the seller and that he assisted them in negotiating the details of the purchase does not demonstrate genuine issues of material fact that a fiduciary relationship existed here. Moreover, even if plaintiffs could have established that a fiduciary duty existed, plaintiffs have not established that they suffered any damages. As we concluded, *supra*, without evidence that plaintiffs could have ever received a \$260,000 loan from any source, the damages alleged are too speculative to sustain a breach of fiduciary duty claim.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot