

STATE OF MICHIGAN
COURT OF APPEALS

LaSALLE BANK MIDWEST NA,
a/k/a BANK OF AMERICA, NA,

UNPUBLISHED
July 26, 2012

Plaintiff-Appellee,

v

No. 304111
Macomb Circuit Court
LC No. 2010-2353-CH

JOEL ABERNATHY and
CARMEN D. ABERNATHY,

Defendant-Appellants.

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendants appeal by right from the order of the trial court granting summary disposition to plaintiff (and denying summary disposition to defendants) on plaintiff's reformation claim, and denying as moot the parties' motions for summary disposition on plaintiff's claim for unjust enrichment. We reverse and remand for entry of judgment in favor of defendants.

I. BASIC FACTS AND PROCEDURAL HISTORY

In June of 2000, Joel Abernathy ("Joel") was preapproved for a \$145,000 mortgage loan by ABN AMRO Mortgage Group, Inc. ("ABN AMRO"), a subsidiary of Standard Federal Bank ("Standard Federal"). Joel made a purchase offer on certain real property in St. Clair Shores. After the offer was accepted, Joel applied for a mortgage loan (for which he had been pre-approved) with Standard Federal. Standard Federal used a Uniform Residential Loan Application form for that purpose, on which it identified "JOEL ABERNATHY" as the "Borrower." It additionally indicated on that form, however, that title to the property would held in the name of "JOEL ABERNATHY AND CARMEN D. ABERNATHY, HIS WIFE" as "JTWROS" (joint tenants with right of survivorship). Carmen Abernathy ("Carmen") did not accompany Joel to apply for the mortgage loan.¹

¹ The following day, Carmen did sign a Standard Federal form entitled "Information on Mortgagor"; this document identified Carmen as "Mortgagor," referenced her marital status as "Married," and like the Standard Federal Loan Application form, indicated that title to the

Mortgagor on October 28, 2000 that identified her as a mortgagor and in which she “acknowledge[d] Standard Federal will place a mortgage on the property should the credit application of the borrower(s) be approved.” Defendant Carmen Abernathy believed she would be able to own the home with defendant Joel Abernathy but not be legally responsible for the loan payments.

* * *

Consequently, Standard Federal Bank clearly intended to have a valid and enforceable Mortgage on the subject property that would allow it to foreclose the property in the event of a default. Defendants Joel Abernathy and Carmen Abernathy clearly intended to jointly own the property although only Joel Abernathy would be liable for repayment of the loan. Defendant Carmen Abernathy also clearly intended to subject her interest in the property to the Mortgage. However, it is evident a mistake occurred when defendant Carmen Abernathy obtained her interest in the property but did not co-sign the Mortgage.

Therefore plaintiff is entitled to reformation of the Mortgage to include defendant Carmen Abernathy as a co-signer. Defendant Carmen Abernathy shall have no personal liability for any deficiency from a foreclosure sale by virtue of being a co-signer of the Mortgage.

For reasons that are unclear, the trial court entered a further order dated May 13, 2011 that restated the court’s summary disposition order, and further provided that Carmen’s “right, title to and/or interest” in the subject property be subordinate to the mortgage.

II. STANDARD OF REVIEW

We review a trial court’s decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Because the parties relied on information beyond the pleadings, the trial court properly analyzed the parties’ motions as being brought pursuant to MCR 2.116(C)(10). *Huff v Ford Motor Co*, 127 Mich App 287, 293; 338 NW2d 387 (1983). Motions brought under this subrule test the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(g)(3)(b); MCR 2.116(g)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, MCR 2.116(g)(4); *Coblentz*, 475 Mich at 569. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Martin v Ledingham*, 282 Mich App 158, 160; 774 NW2d 328 (2009).

III. REFORMATION OF THE MORTGAGE

Michigan courts possess the equitable power to “reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise.” *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371-372; 761 NW2d 353 (2008), citing *Scott v Grow*, 301 Mich 226, 238-239; 3 NW2d254 (1942). This power to reform an instrument is not limited to ambiguous documents, but may be applied to unambiguous documents that nonetheless fail to “express the obvious intention of the parties.” *Johnson*, 281 Mich App at 372-373, citing *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943).

The party seeking reformation of a document on the basis of mutual mistake has the burden of proving the mutual mistake by clear and convincing evidence. *Johnson*, 281 Mich App at 379. A mutual mistake may be one of fact or law. Mistakes of law may be either “mistakes regarding the legal effect of the contract actually made [or] mistakes in reducing the instrument to writing.” *Id.*; citing *Schmalzriedt v Titsworth*, 305 Mich 109, 118-120; 9 NW2d 24 (1943). But mistakes as to the legal effect of a contract actually made will rarely, if ever, warrant reformation. *Id.* at 380, quoting *Schmalzriedt*, 305 Mich at 120. Reformation is appropriate to correct a mutual mistake of fact or a mistake of the scrivener. *Id.*

A court may also reform a contract on the basis of a unilateral mistake. *Id.* at 380. Such a reformation usually requires evidence that the mistake was induced by fraud. *Id.*, citing *Windham v Morris*, 370 Mich 188, 193; 121 NW2d 479 (1963). However, a court may also reform on the basis of unilateral mistake if one party, at the time of execution, “knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, but knows what that intention is.” *Id.*, quoting *Woolner v Layne*, 384 Mich 316, 318-319; 181 NW2d 907 (1970).

In granting reformation of the mortgage in this case, the trial court found that “it is evident that a mistake occurred when defendant Carmen Abernathy obtained her interest in the property but did not co-sign the Mortgage.” The court did not specify, however, whether it found this “mistake” to be a “mutual” mistake or a “unilateral” one.

This Court addressed a situation very similar to this one in *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133; 657 NW2d 741 (2002). In *Townsend*, the plaintiff and his mother purchased property as joint tenants with full rights of survivorship; that same day, the plaintiff’s mother alone executed a mortgage on the property. *Id.* at 134. Following the mortgagee’s death, the plaintiff made no payments on the mortgage. *Id.* Defendant foreclosed and conducted a foreclosure sale, prompting plaintiff to file suit to have the foreclosure set aside. *Id.* This Court determined that the plaintiff did not encumber his interest in the property, noting that:

[p]laintiff’s name was on both the purchase agreement and the deed, therefore defendant’s predecessor in interest, Amerifirst Home Mortgage, was presumably aware of plaintiff’s interest in the property but, for whatever reason, did not require that plaintiff pledge his interest in the property. Further, there is no

indication that Mrs. Townsend had the authority to pledge her son's interest in the property. [*Id.* at 136.]

The Court in *Townsend* thus determined that the plaintiff's interest in the property was unencumbered, and that, upon his mother's death, the plaintiff thus took the estate in fee simple unencumbered by the mortgage. *Id.* at 137. The Court declined to reform the mortgage to encumber the plaintiff's interest, *Id.* at 138, stating:

[t]he only equity that defendant seeks to have done here is to save defendant from the mistake of the original mortgagee in not insisting that plaintiff pledge his interest in the property to secure the loan, a mistake that defendant could easily have discovered by comparing the names on the deed with the names on the mortgage before it purchased the mortgage. We think it insufficient to invoke equity to save the mortgagee from its own mistake, particularly where the mortgagee is a sophisticated commercial lender. [*Id.* at 139-140.]

The Court further stated in *Townsend* that the "defendant's predecessor in interest could have avoided this problem simply by having plaintiff pledge his interest in the property to secure the mortgage." *Id.* at 140.

Here plaintiff claims that the mistake was either (a) a mutual mistake of fact, because all parties believed that Joel would be the sole owner of the property; or, (b) a unilateral mistake on plaintiff's part, caused by defendants' misrepresentation that Joel would be the sole owner of the property. We do not find clear and convincing evidence of either a mutual or a unilateral mistake that warrants reformation.

The Uniform Residential Loan Application form, which was prepared by Standard Federal and signed by Joel, clearly indicated, at the outset of the parties' business dealings, that title to the property would be held in the names of "JOEL ABERNATHY AND CARMEN D. ABERNATHY, HIS WIFE", and further that it would be held jointly, as "JTWROS." Thus, Standard Federal was on notice at all times that defendants intended to be co-owners of the property, particularly since it was Standard Federal who prepared the Loan Application form in this manner. This Court therefore rejects plaintiff's contention that in acquiring the property jointly, defendants failed to acquire it "in the manner they promised."

Joel indeed testified that he believed that the bank could foreclose on the home if he did not pay the mortgage. However Carmen testified that while she knew that a "foreclosure" is "something mortgage companies do when you don't pay your mortgage," she understood that consequences would arise only "against [her] husband" if the mortgage was not paid. She also testified that she did not know the difference between a mortgage and a promissory note.

Based on the totality of the record, we conclude, contrary to the trial court's finding, that it is not clear that Carmen intended to subject her interest in the property to the mortgage. Nor is it clear that all parties intended that Joel would be the "sole owner" of the property. Nor does it appear that Carmen and Joel intentionally misled plaintiff about how they intended to purchase the property. To the contrary, it was the bank who prepared the Loan Application and the mortgage forms that described, from the beginning, that Joel was to be the Borrower and the only

signor of the mortgage (even though, as he always fully disclosed, he was “A MARRIED PERSON”), but that Joel and Carmen would be acquiring the property jointly, as “JTWR0S”. While Carmen testified that she understood that Joel was to be the “purchaser” of the property, it is far from clear that she understood that to mean anything more than that Joel was obtaining the loan and signing the mortgage. Carmen also was present at the closing, and available to sign any documents that the bank may have required, but the evidence reflects that it was the bank that dictated who signed which documents at the closing, and that the bank “for whatever reason” directed Carmen that she did not need to sign the mortgage.

As in *Townsend*, plaintiff was a sophisticated mortgage lender who had an opportunity to correct any mistake by requiring Carmen to co-sign the mortgage. “We think it insufficient to invoke equity to save the mortgagee from its own mistake, particularly where the mortgagee is a sophisticated commercial lender.” *Townsend*, 254 Mich App at 140.

We find *Johnson* (on which the trial court relied) distinguishable. *Johnson* involved two commercial entities that negotiated the purchase of a parcel of real property. *Id.*, 281 Mich App at 367. The parties entered into a purchase agreement that indicated that the deed to be executed would contain certain restrictive covenants. *Id.* The closing occurred with neither party in attendance. *Id.* at 368. The title agency prepared the deed, and did not include the restrictions. *Id.* In finding evidence of a mutual mistake warranting reformation, this Court noted that (1) both parties had signed the purchase agreement containing language regarding the restrictive covenants, (2) deposition testimony established that the restrictions were an important part of the negotiations between the parties, and (3) the evidence showed that the preparer of the deed was aware that the deed should have contained the restrictions. *Id.* at 381-382. This Court also found that, notwithstanding a mutual mistake, the plaintiff would have been entitled to reformation of the deed by virtue of a unilateral mistake, because the evidence in that case supported an inference that the defendants knew that the plaintiff had intended the deed to contain those restrictions and yet remained silent about the mistake. *Id.*

Here, there was no agreement between plaintiff and defendants indicating that Joel would purchase the property as a sole owner or that Carmen would be subject to the mortgage. While the trial court made reference to an “estoppel certificate” signed by Joel, no such document was made a part of the record, either in the trial court or on appeal. Michigan’s “best evidence rule” provides that “[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph, the original writing, recording, or photograph is required.” MRE 1002. Testimony as to the content of a document at issue should thus not be admitted when document itself is available for admission. See *Michigan Bankers Ass’n v Ocean Acc & Guaranty Corp*, 274 Mich 470, 481; 264 NW 868 (1936). In the context of a (C)(10) motion, generally the existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).³

³ Further, at summary disposition, an adverse inference may be drawn against a party who fails to produce evidence within his control. *Grossheim v Associated Truck Lines, Inc*, 181 Mich App

To the extent that Joel acknowledged signing the estoppel certificate, he testified that his understanding of the document was that it was stating that the full sum of the mortgage was his responsibility as mortgagor. This understanding of the estoppel certificate is not in conflict with Joel's intention to purchase the property jointly with his wife, as the Loan Application stated from the outset. Based on the record before us, we are unable to determine the contents of the "estoppel certificate," if it in fact existed, and cannot find that it contained a promise from Joel that the property would be titled in his name alone. This is particularly true because it was the bank who prepared other documentation reflecting precisely the opposite.

In fact, the record reflects that Joel and Carmen repeatedly expressed that they would hold the property as joint tenants, that Standard Federal was aware of this at all times, and that Carmen never applied for a loan or expressed any intent to be a party to a mortgage. There is no evidence that ownership interests, or Carmen's pledge of her interest, were the subject of any negotiations. Standard Federal prepared the Loan Application and mortgage forms that repeatedly identified that Joel (only) was to be the "Borrower" even though he was "A MARRIED PERSON", but that title would be held jointly by Joel and Carmen, as "JTWROS". Testimony of the deed preparer indicated that she prepared the deed according to the instructions she was given from the bank. The parties were all in attendance at the closing, presenting the bank with a further opportunity to have Carmen co-sign the mortgage, if desired. Further, there is no evidence that at the time of execution, defendants knew that the mortgage did not express the bank's intention.

We suspect that what may have occurred here was that, in 2000, Standard Federal was content to make the loan to Joel only, and to accept the risk of having a security instrument signed only by Joel, even though he held the property jointly with Carmen. That risk paid off for many years, as the bank received approximately 80 mortgage payments (of principal and interest) from Joel. When Joel could no longer make payments in 2008, in an economy that had fallen into a tailspin, plaintiff understandably desired additional security. But this change in circumstances does not warrant reformation under the circumstances presented.

We conclude that the trial court erred in finding that plaintiff carried its burden of showing, by clear and convincing evidence, the existence of either a mutual or unilateral mistake warranting reformation. Although the bank may have intended to grant Joel a mortgage upon which it could foreclose, its "mistake," if any, appears to have been merely as to the legal effect of the contractual documents that it prepared. As relatively unsophisticated parties acting without legal counsel, Joel and Carmen may also have not fully understood or appreciated the legal effects of the documents they signed. But this is insufficient to grant reformation. *Johnson*, 281 Mich App at 379. Moreover, "[c]ourts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of error." *Holda v Glick*, 312 Mich 394, 404; 20 NW2d 248 (1945) (citations omitted). We are unable to make such a finding here.

712, 715; 450 NW2d 40 (1989). As the assignee of Standard Federal, plaintiff should have had possession of this evidence, but did not produce it.

III. UNJUST ENRICHMENT

Plaintiff additionally argues that defendants will be unjustly enriched if the mortgage is not reformed. The trial court did not reach this claim, having determined that its decision on Count I of plaintiff's complaint rendered the parties' motions moot in that respect. The issue is thus not preserved for appeal. *Polkton Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). However, this Court may grant review if consideration of the issue is necessary to a proper determination of the case or if the question is one of law concerning which the necessary facts have been presented. *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217, lv den 480 Mich 990 (2007). Whether a claim for unjust enrichment can be maintained is a question of law which this Court reviews de novo. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003).

To prevail on a claim for unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting from the retention of the benefit by defendant. *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999). If a plaintiff establishes these two elements, a contract will be implied by law to prevent unjust enrichment. *Liggett*, 260 Mich App at 137. However, "a contract cannot be implied when an express contract already addresses the pertinent subject matter." *Id.*; see also *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). Thus, a claim for unjust enrichment can only lie, if at all, against Carmen, as it is undisputed that an express contract exists between Joel and plaintiff. See *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006).

We agree with plaintiff that the first prong of unjust enrichment is satisfied with respect to Carmen. Carmen has received a benefit as a result of the contract between Joel and plaintiff, as she has acquired an interest in the property that she could not have acquired absent the loan and the mortgage.

However, plaintiff has not supported the second element of unjust enrichment. "[N]ot all enrichment is necessarily unjust in nature." *Morris Pumps*, 273 Mich App at 196.

A third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefited has not requested the benefit or misled the other parties.... Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. [*Id.*, quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628.]

In this case, there is no evidence that Carmen requested the benefit from the bank or misled any of the parties to acquire the benefit. As stated above, documents provided to the bank (and in fact prepared by the bank) indicated that defendants planned to purchase the property jointly. Carmen did not sign the loan application or mortgage, and no evidence suggests that she

participated in any negotiations or requested (or was requested) to be a party to, or receive benefit from, the contract between plaintiff and Joel. The only document signed by Carmen, presumably at the request of the bank, was the “Information on Mortgagor” form. But this form is inconsistent with all of the other forms prepared by the bank, the bank later opted not to require Carmen to sign the mortgage at the closing, and we deem the totality of the circumstances insufficient for a finding of unjust enrichment. Thus, although Carmen did benefit from plaintiff’s contract with Joel, we find that she was not unjustly enriched.

Reversed and remanded for entry of judgment in favor of defendants. As the prevailing parties, Joel and Carmen Abernathy may tax their costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra