

STATE OF MICHIGAN
COURT OF APPEALS

LUEVINA DOYLE,

Plaintiff-Appellant,

v

DETROIT DEVELOPMENT REAL ESTATE,
L.L.C., ZEVC0, L.L.C., and MENECEM Z.
COHEN,

Defendants-Appellees.

UNPUBLISHED

August 16, 2011

No. 298354

Wayne Circuit Court

LC No. 09-010590-CH

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in this action involving claims for fraud, misrepresentation, and other statutory violations arising from a real estate transaction. We affirm.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). Although the trial court stated that it was granting summary disposition pursuant to both MCR 2.116(C)(8) and (10), it gave as the reason for its decision that there were no genuine issues of material fact, which is relevant to subrule (C)(10) only. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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 which reasonable minds might differ." *West*, 469 Mich at 183.

In her first two counts, plaintiff sought damages for fraud and fraudulent inducement. Plaintiff contends that she was defrauded into entering into a rental agreement, under which she acquired no ownership interest in the property, based on representations that she would receive

title to the property under the terms of a special government program for senior citizens after making payments for only three to six months. Because plaintiff admitted that she did not speak with defendant Cohen before she allegedly entered into the special government program, he could not have made any fraudulent representations to her and the trial court properly dismissed the claims with respect to him. Plaintiff appears to seek to hold the corporate defendants liable for the acts of their agent, Cleopatra Dampier.

The basic elements of fraud are the same for both claims: (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation was false or made it recklessly as a positive assertion without knowledge of its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff was injured as a result of such reliance. *Hord v Environmental Research Institute of Mich (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000); *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006). Fraud cannot be presumed but must be proven by clear and convincing evidence. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

In this case, plaintiff is unable to prove the element of reliance. “[T]o establish a claim of fraudulent misrepresentation, 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.” *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009) (citations and internal quotation marks omitted). In particular, a “misrepresentation regarding the terms of written documents that are available to the plaintiff cannot support the element of reasonable reliance.” *Id.* at 698. The evidence shows that the rental agreement was available to plaintiff because she signed it (and there is no claim that defendants prevented her from reading the document). The document is entitled “Rental Agreement” and gives plaintiff a month-to-month tenancy in exchange for the payment of rent, gives DDRE the right to sell the property at any time, requires plaintiff to vacate the premises at the end of the lease term, and says nothing about plaintiff acquiring title to the property at any time. A person who signs a written agreement is presumed to know the nature of the document and to understand its contents. *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000). Therefore, plaintiff cannot establish the element of reasonable reliance and the trial court properly dismissed these counts.

Plaintiff’s next claim, entitled “Concert of Action,” alleges that all three defendants “acted in concert pursuant to a common design to plan to induce Plaintiff into a contractual relationship” by making the same fraudulent misrepresentations on which counts I and II are based. A concert of action claim exists if the plaintiff can prove “that all defendants acted tortiously pursuant to a common design” that caused harm to the plaintiff. *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984). However, the claim does not exist in a vacuum; the plaintiff must prove the underlying tortious conduct. *Jodway v Kennametal, Inc*, 207 Mich App 622, 631-632; 525 NW2d 883 (1994). Because plaintiff’s concert of action claim is based on her fraud claims and she cannot prove fraud due to the absence of reasonable reliance, this claim must fail as well.

Plaintiff's next claim is based on the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, which prohibits unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. MCL 445.903(1). Such practices include (1) "[c]ausing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction," MCL 445.903(1)(n), (2) "[c]ausing a probability of confusion or of misunderstanding as to the terms or conditions of credit if credit is extended in a transaction," MCL 445.903(1)(o), (3) "[f]ailing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer," MCL 445.903(1)(s), and (4) "[t]aking advantage of the consumer's inability reasonably to protect his or her interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer's inability," MCL 445.903(1)(x).

Plaintiff alleged in her complaint that defendants violated § 3(1)(n) by misrepresenting "that a government program would allow [plaintiff] to acquire real property through a mortgage transaction without the Plaintiff having any prior ownership of the real property," that defendants violated § 3(1)(o) by misrepresenting that they "could legally provide a mortgage on real property not owned by the Plaintiff," that defendants violated § 3(1)(s) by failing to reveal that they "had no power or authority to represent it [sic] was a part of a government program to provide mortgages to seniors for home ownership," and that defendants violated § 3(1)(x) by taking advantage of her "inability reasonably to protect her interests." However, plaintiff admitted that defendants never spoke to her about financing and "never explained to Plaintiff that she would be involved in a mortgage transaction[.]" There is no evidence that the rental agreement involved the extension of credit to plaintiff. The agreement requires that rent for the month be paid by the first of the month. Finally, while plaintiff believes that defendants took advantage of her, there is no evidence that she was disabled, illiterate, or otherwise unable to understand the language of the lease agreement such that she was unable to protect her own interests in the leasing transaction. Therefore, the trial court properly dismissed this count.

Plaintiff's next claim is based on the Identity Theft Protection Act, MCL 445.61 *et seq.*, which prohibits certain types of conduct. In particular, it provides that (1) a person shall not, (a) with intent to defraud or violate the law, or (b) by concealing, withholding, or misrepresenting his or her identity, (2) use or attempt to use the personal identifying information of another person to (a) "[o]btain credit, goods, services, money, property, a vital record, a confidential telephone record, medical records or information, or employment" or (b) commit any other unlawful act. MCL 445.65(1). The act further provides that a person shall not "[o]btain or possess, or attempt to obtain or possess, personal identifying information of another person with the intent to use that information to commit identity theft or another crime." MCL 445.67(d). Identity theft is conduct prohibited under § 5(1). MCL 445.63(k).

Plaintiff contends that defendants used her personal information obtained during the rental process to apply for a mortgage in her name. However, the only mortgage application in plaintiff's name was prepared by Michael Kidder of Generation Mortgage and there is no evidence that defendants have any affiliation with Kidder or his company or used Kidder's name. The only connections to defendants are (1) they owned and leased the property that was the subject of the application (2) Lendguy.com was identified as a creditor holding a lien against the property and Cohen used to work with a person from Lendguy.com, and (3) Frank Lovasco is

named on an FHA record regarding the application and Cohen had worked with Lovasco. These connections are too tenuous to prove that any of the defendants sought to obtain a loan under plaintiff's name. The jury is not permitted to guess, *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957), and a plaintiff cannot prove causation "by showing only that the defendant *may* have caused [her] injuries." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004) (emphasis in original). A theory of causation must be based on reasonable inferences from established facts, not on mere speculation. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). "And while the evidence need not negate all other possible causes, this Court has consistently required that the evidence exclude other reasonable hypotheses with a fair amount of certainty." *Craig*, 471 Mich at 87-88 (internal quotation marks and footnote omitted). Therefore, the trial court properly dismissed this count.

Lastly, because plaintiff's various claims were properly dismissed, she is not entitled to damages. Therefore, the trial court properly dismissed her claim for exemplary damages.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens