

STATE OF MICHIGAN
COURT OF APPEALS

JENNAVIEVE KORTE, minor by her next friend,
LAURIE KORTE,

UNPUBLISHED
July 24, 2012

Plaintiff-Appellee,

v

No. 303738
Wayne Circuit Court
LC No. 09-003191-NO

BLONDIES ENTERTAINMENT, L.L.C.,
MARCO COLON, and RUZVELT
STEVANOSKI,

Defendants,

and

FGR ENTERPRISES, L.L.C.,

Defendant-Appellant.

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

FGR Enterprises, L.L.C. (“FGR”) appeals as of right from the trial court’s order rescinding an agreement between FGR and plaintiff. The agreement assigned to plaintiff all of FGR’s rights to an insurance claim against North Pointe Insurance Company (“NPIC”). We vacate the order rescinding the agreement.

I. BASIC FACTS

The minor plaintiff, through her mother as next friend, brought the underlying premises liability suit against defendants after she fell through a hole in the second floor of a building owned by FGR (“the premises”).¹ During the course of discovery, plaintiff served FGR with interrogatories in accordance with MCR 2.309. One interrogatory question and answer are at issue on appeal:

¹ The other defendants are not involved in this appeal.

25. Please indicate whether the Defendant had liability coverage for the alleged occurrence? If so, please state:

- (a) Name and address of all insurers;
- (b) Type of policy;
- (c) Policy number(s);
- (d) Policy limits.

ANSWER: Yes.

- (a) North Point Insurance Company, Southfield, MI;**
- (b) General Commercial Liability;**
- (c) NPD33566**
- (d) \$500,000.00**

After this interrogatory answer had been provided by FGR, NPIC advised FGR that in its view, plaintiff's accident was not covered under the terms of FGR's policy. FGR's attorney later communicated to plaintiff by e-mail that, because of NPIC's decision to not cover the incident, FGR was "without insurance." Plaintiff then filed an action against NPIC, seeking a declaratory ruling that her accident was covered by the insurance policy. In response to NPIC's motion to dismiss plaintiff's action on the basis of standing, plaintiff reached an agreement with FGR in which, in consideration of plaintiff's agreement to "forego[] all collection methods against [FGR]," FGR assigned its rights under the NPIC insurance policy to plaintiff. Additionally, the agreement between plaintiff and FGR contained a "merger" clause that provided, in part, that "no representation, inducement, or condition not set forth in this Agreement has been made or relied on by either party."

In plaintiff's declaratory action against NPIC, the trial court agreed with NPIC that the policy's plain and unambiguous language did not provide coverage for the incident and granted NPIC's motion for summary disposition. However, during the pendency of plaintiff's case against NPIC, plaintiff learned that another insurance policy, issued by Grange Insurance Company of Michigan ("Grange"), covered the premises. The insured parties on the Grange policy were "The Realty Company," "The Realty Company 2411 Vinewood, Inc.," and "The Realty Company 21730 Groesbeck, Inc." FGR does not appear on any policy or declaration form related to this Grange policy.

After learning of the Grange policy, plaintiff moved at the trial court to rescind her assignment agreement with FGR on the basis that FGR had made fraudulent misrepresentations to secure the agreement. Plaintiff argued regarding interrogatory 25 that FGR "either intentionally misrepresented the fact that they had no other insurance at the time of this accident or acted recklessly when they stated under oath that there was no other insurance coverage." In opposing the motion to rescind, FGR argued that, because FGR was only insured under the NPIC policy, plaintiff's claim of fraud must fail because it had made no material misrepresentation. Specifically, FGR contended that it truthfully answered interrogatory 25 as to what liability insurance "the defendant" (i.e., FGR) had. FGR also argued that the merger clause in the assignment agreement precluded plaintiff from asserting a reliance on anything outside the four corners of the agreement itself.

Without making any explicit factual findings, the trial court granted plaintiff's motion and rescinded the assignment agreement.

Plaintiff also moved to dismiss its action against FGR without prejudice. After FGR did not specifically object to this motion, plaintiff's motion to dismiss the action was granted by the trial court.

II. STANDARD OF REVIEW

A trial court's factual findings are reviewed for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* Additionally, we review the trial court's ultimate decision in this motion under the "default" standard of review, which is an abuse of discretion standard. See *In re King*, 186 Mich App 456, 466; 465 NW2d 1 (1990). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

III. ANALYSIS

In order to prove that FGR made fraudulent misrepresentations to secure the assignment agreement, plaintiff was required to show the following:

- (1) the defendant made a material representation;
- (2) the representation was false;
- (3) when the defendant made the representation the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion;
- (4) the defendant made the representation with the intention that the plaintiff would act upon it;
- (5) the plaintiff acted in reliance upon it; and
- (6) the plaintiff suffered damage. [*Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004) (quotations omitted).]

On the basis of the record before us, we agree with FGR that the trial court erred in granting plaintiff's motion to rescind the assignment agreement because plaintiff failed to establish that FGR made false representations. Interrogatory 25 specifically requested FGR to list all of the insurance coverage that FGR had, and FGR truthfully supplied this information. Plaintiff did not ask FGR to disclose any and all insurance that did or might cover *the premises* where plaintiff was injured, and FGR cannot be faulted for failing to answer a question that plaintiff did not ask. Likewise, FGR's attorney truthfully represented that *FGR* was "without insurance." Because the trial court's implicit finding that FGR made false representations to plaintiff is clearly erroneous, the trial court erred by rescinding the assignment agreement.

In light of our disposition of plaintiff's claim of fraudulent misrepresentation, we need not address FGR's remaining claims on appeal.

We vacate the order rescinding the assignment agreement. FGR, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder