

STATE OF MICHIGAN
COURT OF APPEALS

NATIONAL CITY MORTGAGE, INC.,

Plaintiff-Appellant,

v

CAPITAL MORTGAGE COMPANY, d/b/a
AMERICAN GENERAL FINANCE, d/b/a
AMERICAN CAPITAL MORTGAGE
COMPANY, MARVIN FRIED, ANTHONY L.
BROWN, and JOHN COLLISION,

Defendants-Appellees,

and

SAMUEL P. DEKELATA, ANNIE CLICKNER,
PATRICK JEFFRIES, and JULIE JEFFRIES,

Defendants.

UNPUBLISHED

September 27, 2007

No. 269166

Oakland Circuit Court

LC No. 2003-054424-CK

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

This action arises out of residential mortgage loans made by plaintiff to several individual defendants who defaulted on the loans. Plaintiff proceeded to trial on a claim for fraud against defendant Marvin Fried, who acted as a loan officer on behalf of defendant Capital Mortgage Company (Capital Mortgage), doing business as American Capital Mortgage Company (American Capital), an entity with whom plaintiff had a broker agreement. Plaintiff alleged that Fried, who had acquired several properties through another corporate entity before selling the properties to the individual defendants who defaulted on the mortgage loans, had fraudulently allowed appraisals for the properties to be inflated. Following a bench trial, the trial court found that plaintiff failed to establish a cause of action for fraud and entered a judgment in favor of Fried. Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court erred by denying its motion to amend the pleadings to conform to the evidence at trial in order to allow plaintiff to pursue a theory based on Fried's alleged misrepresentations that he was an owner of American Capital. This Court reviews a trial court's decision on a motion to amend the pleadings for an abuse of discretion.

Zdrojewski v Murphy, 254 Mich App 50, 60-61; 657 NW2d 721 (2002); *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). Any factual findings underlying the amendment ruling are, however, reviewed for clear error. MCR 2.613(C). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *Boyd v Civil Service Comm*, 220 Mich App 226, 235; 559 NW2d 342 (1996).

After trial began, plaintiff attempted to offer evidence that Fried had earlier represented that he was the owner of American Capital, and argued that Fried should be estopped from denying at trial that he was the owner of American Capital. According to Greg Contos, the owner of Capital Mortgage, American Capital was an entity formed by Capital Mortgage to conduct business in Michigan. Fried was the branch manager and resident agent of American Capital, but Contos denied that Fried was an owner of American Capital. On the second day of trial, plaintiff moved to amend its complaint to add a new theory of recovery based on this evidence. The trial court initially denied the motion without prejudice, but allowed plaintiff to develop the matter at trial. After hearing all the proofs, the trial court denied plaintiff's motion to amend on the ground that (1) the issues raised by the proposed amendment were not tried with Fried's express or implied consent, and (2) it was not convinced that Fried would not be prejudiced by the late amendment. We find neither clear error nor an abuse of the trial court's discretion in this ruling.

MCR 2.118(C) governs the amendment of complaints at trial and provides:

(1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

(2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

Contrary to plaintiff's assertion on appeal, the record reveals that Fried objected to the trial of any claim not set forth in plaintiff's complaint. The record shows that plaintiff first broached the subject of Fried's ownership misrepresentations during its opening statement, in an effort to hold Fried personally liable for alleged breaches of the contractual agreement between it and American Capital. In response, Fried's counsel noted that plaintiff had alleged in its complaint only that Fried had fraudulently allowed appraisals for the properties to be inflated. Thus, counsel argued, plaintiff was estopped from "now arguing that the agreement was in fact with Mr. Fried and not with American Capital" because Fried had "no way" to properly defend against such a claim at trial. Shortly after proofs began, counsel also forcefully objected to any "line of inquiry" regarding Fried's representations of ownership on the ground that plaintiff was attempting to introduce a new claim in the middle of trial. The trial court, however, although

recognizing Fried as having levied a continuing objection, permitted evidence of Fried's alleged misrepresentations to be developed at trial. On these facts, we cannot conclude that the trial court clearly erred in finding that plaintiff's theory concerning ownership misrepresentation was not tried with Fried's express or implied consent.

Because plaintiff's new theory was not tried with Fried's express or implied consent, amendment was not justified under MCR 2.118(C)(1). Thus, the trial court could only permit the amendment under MCR 2.118(C)(2). However, while leave to amend before trial should generally be freely granted, "MCR 2.118(C)(2) establishes strict requirements for amending a pleading during trial." *Dacon v Transue*, 441 Mich 315, 333; 490 NW2d 369 (1992). One such requirement is that the party requesting amendment demonstrate that the amendment will not prejudice the opposing party. *Id.* With regard to this requirement, the trial court found that allowing the proposed amendment after the start of trial "would be highly prejudicial, rendering [Fried] incapable of mounting a proper defense." We again find no clear error in the trial court's findings.

As previously noted, the record shows that plaintiff did not set forth its new theory in any pretrial pleadings, but rather raised it only after trial began. Consequently, Fried did not have notice before trial that plaintiff would be enlarging its theory of recovery and had no opportunity to conduct discovery on plaintiff's new theory. As argued by Fried at the outset of trial, plaintiff's complaint alleged only that Fried had fraudulently allowed appraisals for the properties to be inflated. The theory of recovery underlying plaintiff's proposed amendment, however, sought to hold Fried personally liable for the alleged breaches of American Capital and thus materially altered the case against which Fried was called to defend at trial. Under such circumstances, the trial court did not clearly err in finding that the amendment would be "highly prejudicial" to Fried, or abuse its discretion in denying plaintiff's motion on that ground. To the contrary, we find that the trial court's decision to deny plaintiff's motion to amend the pleadings was within the range of reasonable and principled outcomes. *Maldonado, supra*.

In reaching this conclusion, we reject plaintiff's claim that it could not have known about its new theory until Fried testified at trial in a manner inconsistent with his prior deposition testimony. Contos had testified in his pretrial deposition, conducted eleven days before trial, that Fried acted without authority from Capital Mortgage and was not an owner of American Capital. Moreover, plaintiff had set forth the factual basis for its amended claim in its opening statement. Thus, it is apparent that plaintiff was aware of the facts supporting its new theory before trial.¹

¹ Also, we similarly attach no material relevance to the fact that the trial court erroneously stated that plaintiff had moved to amend its theory of recovery in its opening statement. Although plaintiff correctly notes that it did not formally move to amend its pleadings until the second day of trial, this Court will not disturb a lower court's ruling on the ground of defect or error by the trial court unless failure to do so would be "inconsistent with substantial justice." MCR 2.613(A). Plaintiff does not assert, and we are unable to discern, any harm resulting from the trial court's erroneous statement. Relief is not, therefore, required. *Id.* For this same reason, the trial court's initial characterization of plaintiff's motion to amend as premature also does not

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Plaintiff also argues that the trial court erred in finding that it failed to establish its claim for fraud based on Fried withholding sales information from the appraisers, resulting in inflated appraised values for the properties in question. A trial court's findings of fact in a bench trial are reviewed by this Court under the clearly erroneous standard. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005).

As this Court has noted,

[a]ctionable fraud consists of the following elements: (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 and 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. [*Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003) (citation and internal quotation marks omitted).]

Fraud, however, must be established by clear and convincing evidence, rather than a preponderance of the evidence, and may never be presumed. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457, 459; 559 NW2d 379 (1996).

Our review of the record supports the trial court's conclusion that plaintiff had not established its claim for fraud based on Fried withholding sales information from the appraisers. Although finding that much of Fried's testimony was dubious, the trial court correctly noted that Fried had denied withholding information about the prior sales of the properties from the appraisers and that even if the information was improperly withheld, plaintiff had failed to offer testimony rebutting Fried's claims that he did not influence the appraisals that were conducted. The trial court also correctly noted that plaintiff did not call an appraiser to challenge the accuracy of the appraisals at issue, but instead relied on the testimony of its investigator, who lacked sufficient knowledge in this area to offer an opinion regarding whether the appraisals were inaccurate as a result of the appraisers' purported lack of prior sales knowledge. In other words, plaintiff failed to put forth any evidence showing that the appraisals were affected by Fried's alleged conduct. Given the absence of such evidence, the trial court did not clearly err in finding that plaintiff's claim that Fried had fraudulently allowed appraisals for the properties to be inflated had not been proven by clear and convincing evidence. *Id.*

Plaintiff nonetheless asserts that the evidence established that Fried actively concealed his involvement in the sales by signing Yale Weiner's name to various documents, and that the trial court thus erred in failing to find fraud on this ground. A plaintiff may not, however, recover on a theory that is not contained in its complaint. See, e.g., *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App. 583, 591-592; 349 NW2d 529 (1984); see also 61A Am Jur 2d § 137, pp 136

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require reversal. Indeed, despite this characterization the trial court allowed plaintiff to make a record to support the motion, which it denied on the merits only after a proper record was fully developed.

(a plaintiff may not “recover upon a theory of fact different from that pleaded, or that is not contained in his or her complaint . . .”). As already noted, plaintiff alleged in its complaint only that Fried had fraudulently allowed appraisals for the properties to be inflated. The trial court’s finding that Fried’s signing of Weiner’s name to various documents was not outcome determinative to the theory of fraud alleged by plaintiff in its complaint was not, therefore, clearly erroneous.

Plaintiff similarly argues that the trial court erred in finding that Fried did not collude with the Jeffries defendants, who purchased several of the properties at issue from Fried’s real estate company. However, although there was evidence that Fried had loaned money to the Jeffries to make improvements to the properties, plaintiff again failed to offer any evidence to show that this conduct was related to the allegedly inflated appraisals. In the absence of such evidence, the trial court did not clearly err in rejecting plaintiff’s claim for fraud on this ground. *Foodland Distributors, supra.*

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter