STATE OF MICHIGAN

COURT OF APPEALS

KENNETH EVANS and GLORIA EVANS,

Plaintiffs-Appellants,

v

AMERIQUEST MORTGAGE COMPANY and OCWEN FEDERAL BANK,

Defendants-Appellees.

UNPUBLISHED
March 4, 2003

No. 233115
Ingham Circuit Court
LC No. 00-092060-NZ

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition.[1] This case arose from a home refinancing with the workout of two existing mortgages and payment of property tax arrearage. Plaintiffs Kenneth Evans and Gloria Evans seek damages under allegations of fraud, breach of contract, and violations of the federal Truth in Lending Act (TILA) and the Michigan Consumer Protection Act (CPA). We affirm in part, reverse in part, and remand.

I

Plaintiffs first argue that the trial court erred in granting summary disposition to defendants on their claim of fraud. A trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Generally, to establish actionable fraud, a plaintiff must show that: (1) the defendant made a material representation; (2) it was false; (3) when made by the defendant, the defendant knew that the statement was false, or made it recklessly without knowledge of its truth and as a positive assertion; (4) the defendant made it with the intent that it would be acted on by the plaintiff; (5) the plaintiff acted in reliance on the statement; and (6) the plaintiff consequently

[1] Defendant Ocwen Federal Bank is the assignee of defendant Ameriquest Mortgage Company's mortgage.

suffered injury. *Webb v First of Michigan Corp*, 195 Mich App 470, 473; 491 NW2d 851 (1992).

Plaintiffs argue that the summary of debts and disbursements document and alleged oral representations by Ameriquest indicated that both existing mortgages[2] would be paid off with the Ameriquest loan proceeds. However, even a cursory review of the documents signed by plaintiffs at closing would have revealed they continued to have a remaining balance on one of the existing mortgages after the refinancing. "[T]here can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Id*. at 474. Because defendants did not prohibit plaintiffs from reading the documents, plaintiffs cannot claim fraud based on an alleged misrepresentation clearly contradicted by the documents.

Plaintiffs also argue that defendants induced them not to read the documents. When a party's general fraudulent scheme prohibits the signer from reading the contract, then the signer's failure to read the contract provides no defense to the first party's fraud. *Otto Baedeker & Associates, Inc v Hamtramck State Bank*, 257 Mich 435, 441; 241 NW 249 (1932). However, taking plaintiffs' claim in the light most favorable to them, *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002), they have not shown a fraudulent scheme that induced them to sign the contract without reading the documents. Accordingly, summary disposition with respect to the count of fraud was proper.

II

Plaintiffs next argue that the trial court erred in dismissing the breach of contract claim. Plaintiffs contend that Ameriquest's alleged oral representation that the loan would resolve all of plaintiffs' indebtedness constituted an oral contract. We disagree.

Plaintiffs failed to establish the existence of a valid oral contract. "A valid contract requires mutual consent on all essential terms." *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). A contract also requires both an offer and an acceptance. "Mere discussions and negotiations cannot be a substitute for the formal requirements of a contract." *Id*. Moreover, even if an oral agreement existed as plaintiffs allege, it would have resulted in a lien on plaintiffs' property. Oral agreements that relate to an interest in land are unenforceable under the statute of frauds. MCL 566.106; *Schultz v Schultz*, 117 Mich App 454, 457; 324 NW2d 48 (1982). The trial court's grant of summary disposition with regard to this issue was proper.

III

Plaintiffs next claim that Ameriquest violated the provisions of the Truth in Lending Act (TILA), 15 USC 1601 *et seq*., that require that each borrower be provided two completed copies of the notice of the right to cancel the transaction. 15 USC 1635(a); 12 CFR 226.15(b). In this

[2]At the time plaintiffs applied for the loan through Ameriquest, plaintiffs were in default on two existing mortgages, one with Commercial Credit Corporation and one with Contimortgage Corporation.

case, plaintiffs both signed an acknowledgment stating: "The undersigned each acknowledge receipt of two copies of this NOTICE OF RIGHT TO CANCEL" (emphases in original). This acknowledgement creates a presumption that the forms were in fact provided. 15 USC 1635(c). While the presumption can be rebutted, plaintiffs failed to do so here.

Although plaintiffs provided an affidavit that they received only two completed copies total rather than two each, plus several "blank"[3] copies, Kenneth also provided deposition testimony that he did not read the documents given to him at closing. At one point in his deposition, he was shown a form with his signature, acknowledged the signature as his, but said he did not recall seeing it before. Kenneth stated that there were many documents at the closing, the process went very quickly, and that he signed the documents as they were put before him. Because Kenneth admits to not reading documents and to blindly signing documents, an affidavit that plaintiffs did not receive the correct number of completed right-to-cancel forms carries little weight and is insufficient to rebut the presumption created by the acknowledgement. See *id*. That plaintiffs may have received additional partially completed forms is not determinative of whether they received the correct number of completed forms.

Plaintiffs also argue that Ameriquest violated § 1638(a) of the TILA by failing to disclose an existing security interest on their property already held and retained by prior lender. 15 USC 1638(a). Plaintiffs argue that this previous loan was restructured in a way that created a larger balance and a higher rate; thus, it qualified as a "refinancing" defined in 12 CFR 226.20(a)(4), which requires defendants' disclosure of the security interest on the TILA disclosure statement. We disagree. The balance of the loan was lower and the interest rate did not increase; therefore, the restructuring of this existing loan did not qualify as a "refinancing" under 12 CFR 226.20(a)(4) and consequently was not required to be included on the disclosure statement.

Next, plaintiffs argue that the summary of debts and disbursements document, the TILA disclosure form, and the loan modification agreement are inconsistent with each other and thus violate the underlying purpose of the TILA. 15 USC 1601. Plaintiffs' complaint did not allege this violation, and defendants were not reasonably informed of this claim against them. See MCR 2.111(B)(1). Nevertheless, in the interest of judicial economy, we will review this unpreserved issue for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). While it is true that the documents cited do not contain identical information, neither do they contradict one another. None of the forms indicates that the existing balance of the prior mortgage would be paid off in full by this transaction. Accordingly, plaintiffs fail to demonstrate plain error. See *id*. Thus the trial court's grant of summary disposition regarding the TILA claims was proper.

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[3] Although plaintiffs use the word "blank" in their argument, it should be noted that the documents referred to are not in fact blank. Rather, they are complete with the exception of the date of the transaction and the final date to cancel. They include the name of the borrower, the address of the property in question, the name and address of the lender, the date, the loan number, the type of loan, and the contact information in the event the borrower wishes to exercise his right to cancel. In addition, although the final date to cancel is not specified, the documents state "or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above" (emphasis in the original), one of which is receipt of the document by the buyer.

IV

Finally, plaintiffs argue that alleged misrepresentations by Ameriquest violated nine provisions of the Michigan Consumer Protection Act (MCPA), specifically MCL 445.903(1)(n), (o), (s), (v), (w), (x), (y), (bb), and (cc).[4] While we affirm the trial court's grant of summary disposition regarding MCL 445.903(1)(n), (o), (v), (w), (x), and (bb), we reverse regarding MCL 445.903(1)(y) and (cc).

Summary disposition under MCR 2.116(C)(10) tests the factual support of a claim and is proper only where there is no genuine issue concerning any material fact. *De Sanchez v State*, 467 Mich 231, 235; 651 NW2d 59 (2002). "In ruling on such a motion, a trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and . . . be liberal in finding a genuine issue of material fact." *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

In granting summary disposition in this case, the trial court summarily concluded that a claim under the MCPA was analogous to a claim of fraud and subject to the same analysis. We disagree. 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); *Zine*, *supra*. While a cause of action under the MCPA has similarities to a fraud claim, the MCPA captures more conduct within its sweep and offers greater protection to consumers. See *Dix v American Bankers Life Assurance Co*, 429 Mich 410; 415 NW2d 206 (1987).

Not all provisions of the MCPA require that a plaintiff establish each of the elements of fraud in order to be successful. Section 3 of the MCPA includes 33 separate "unfair, unconscionable or deceptive methods, acts or practices" sufficient to establish a violation of the statute, the majority of which are based on some form of misrepresentation. While a common law fraud claim based on misrepresentation requires that the plaintiff show reasonable reliance on misrepresentation, *Webb*, *supra*, only two of the MCPA's thirty-three "unfair, unconscionable, or deceptive methods, acts or practices" expressly require some form of reasonable reliance by the consumer. See MCL 445.903(1)(s) ("which fact could not be reasonably known by the consumer"), and (bb) ("a person reasonably believes"). Indeed, if reasonable reliance were required, plaintiffs' claim would fail for the same reason the fraud claim failed. The plaintiffs were provided and signed a written contract stating the terms of the agreement. As stated above, reliance is not reasonable "where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the plaintiff." *Webb*, *supra*. For this reason, we affirm the trial court's grant of summary disposition as it relates to MCL 445.903(1)(s) and (bb).

In addition, we affirm the trial court's grant of summary disposition as it relates to MCL 445.903(1)(n) and (o) for similar reasons. Both subsections (1)(n) and (o) prohibit acts that "[c]aus[e] a probability of confusion or of misunderstanding." The use of the word probability implies an objective standard. In other words, these provisions prohibit acts that result in a probability of confusion or misunderstanding *in a reasonable person*. To hold otherwise would

[4] This statute has been amended since the present case was decided below.

result in an impossible standard and *any act* that would result in a probability that *any consumer* would be confused or misunderstand would be prohibited. In this case, while plaintiffs may have subjectively misunderstood or been confused by the transaction entered into with defendant, that is not the relevant inquiry. The record does not support a probability of confusion or misunderstanding by a reasonable person. For that reason, plaintiffs have failed to establish a genuine issue of material fact as it relates to MCPA subsections (1)(n) and (o) and summary disposition of those claims was proper. MCR 2.119(C)(10); *De Sanchez*, *supra*.

Further, we find that summary disposition of the MCPA claims under subsections (1)(v), (w), and (x) was proper. There is simply no factual support on the record to establish a violation of the MCPA on those grounds. Thus, the trial court did not err is dismissing those claims. MCR 2.116(C)(10).

However, we disagree with the trial court's grant of summary disposition as it relates to plaintiff's MCPA claims under subsections (1)(y) and (cc). The prohibited acts under these provisions consist of:

> (y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.
>
> * * *
>
> (cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner. [MCL 445.903(1).]

In this case, plaintiffs claim – with supporting deposition testimony – that they were told by defendant that the two preexisting mortgages would be paid off as a result of the transaction between plaintiffs and defendant. Plaintiffs also claim that defendant failed to reveal the mortgage with Contimortgage would be only *partially* paid off and that once the transaction was completed, plaintiffs would be indebted to both Contimortgage and Ameriquest. As part of the support for these claims, Kenneth provided the following deposition testimony:

> No. She told me she was going to pay off Conti Mortgage. Not part of it. She told me they was [sic] going to pay off Conti Mortgage. They was [sic] going to pay off Commercial Credit. They was [sic] going to pay my taxes. And she said that I would have the one mortgage because I asked her, I said, ["][N]ow, is this one mortgage, one payment[?]["] She said, ["][S]ure, this is one payment, Mr. Evans.["]

Defendants deny these assertions by plaintiffs. Therefore, there exists a genuine issue of material fact regarding MCPA subsections (1)(y) and (cc) and summary disposition of these claims was improper. *Steward v Panek*, 251 Mich App 546, 556-557; 652 NW2d 232 (2002). Whether these claims can be sufficiently proven at trial is a question for the finder of fact.

In conclusion, we affirm the trial court's grant of summary disposition regarding the fraud, breach of contract, TILA claims, and the MCPA claims under subsections (1)(n), (o), (s), (v), (w), (x), and (bb). We reverse regarding the MCPA claims under subsections (1)(y) and (cc) and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

Affirmed in part, reversed in part, and remanded.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey