

STATE OF MICHIGAN
COURT OF APPEALS

JACK LONDON and BARBARA LONDON,
Plaintiffs-Appellants,

UNPUBLISHED
January 8, 2013

v

LORRIE GLASSFORD,

No. 306251
Oakland Circuit Court
LC No. 2010-111666-CZ

Defendant-Appellee,

and

ROYAL MORTGAGE, INC., BORROWERS
NETWORK, LLC, INVESTORS NETWORK
FUND, LLC, A3 LENDING, LLC, and
RANDALL L. SHAW,

Defendants.

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant Lorrie Glassford on their claims of innocent/negligent misrepresentation and breach of fiduciary duty.¹ We affirm.

In 2004, plaintiffs were advised, through a friend, of a business opportunity to invest monies in a mortgage pool run by defendant Randall Shaw. Plaintiffs thereafter loaned approximately \$250,000.00 to defendant Royal Mortgage, Inc., a company owned by Shaw, in two separate transactions in 2004. At least one of those transactions was governed by a written loan agreement providing for the monthly payment of 11% interest on the loan to plaintiffs. On May 13, 2005, plaintiffs made a \$300,000.00 investment into "the 11% pooled mortgage fund" of defendant Borrowers Network, LLC, another company owned by Shaw, and made yet another

¹ Plaintiffs' complaint contained several additional counts against defendant Glassford as well as the other defendants in this matter, none of which are challenged in the instant appeal.

\$50,000.00 investment into the same fund of Borrowers Network on February 21, 2006. Plaintiffs received certificates detailing the investments. Lorrie Glassford, an employee of Royal Mortgage and Borrowers Network who was in charge of running the day to day operations of the companies, signed the written loan agreement governing plaintiffs' loan transaction(s) as well as the certificates confirming plaintiffs' investments in Borrowers Network. Plaintiffs initiated the instant action when, as of March 2008, defendants failed to pay the 11% return on the sums loaned/invested by plaintiffs and further failed to return the \$500,000.00 initially invested/loaned by plaintiffs.

Defendant Lorrie Glassford ("Glassford") moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that she was employed by Borrowers Network in an administrative capacity only and that plaintiffs' complaint makes no specific allegations against her. Glassford pointed out that plaintiff Jack London admitted that she never made any false representations to him and does not believe she owes him any money. Glassford also pointed out that all other defendants had been dismissed from the case or are in bankruptcy and that plaintiffs' business losses had nothing to do with her in her administrative position at one of the companies.

Plaintiffs responded that Glassford's position went far beyond merely administrative. Plaintiffs also asserted that Glassford unilaterally decided which investors would get their money back, giving money to some while defrauding others, such as plaintiffs. Plaintiffs also emphasized that on several occasions, Glassford misrepresented the financial stability of the companies, reassuring Jack London that the companies were doing fine and his money was safe when, in fact, the companies were in dire straits and losing money for years. The trial court ultimately dismissed all of plaintiffs' claims. This appeal followed.

We review de novo a circuit court's summary disposition ruling. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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 General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion under subrule (C)(10), we must consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party" to determine whether any genuine issue of material fact exists to warrant a trial. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "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. A motion for summary disposition under MCR 2.116(C)(10) must be supported by documentary evidence. MCR 2.116(G)(3)(b). When the motion is properly supported, the nonmoving party may not then rest on mere allegations or denials but must present "documentary evidence establishing the existence of a material factual dispute" for trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiffs first argue on appeal that Glassford's motion should have been summarily denied because she did not, in her motion, articulate relevant law, highlight undisputed facts applicable to the law, and, instead, merely summarily concluded that plaintiffs' claim should be

dismissed. Plaintiffs argue, then, that Glassford's motion was essentially noncompliant with the requirements of MCR 2.116(G)(3)(b). We disagree.

Plaintiffs are correct that Glassford cited essentially no legal authority in her motion for summary disposition. She did, however, indicate that her defense was that plaintiffs had no real complaints against her specifically, that she worked in an administrative capacity only, and that plaintiffs had no proof to support any claims that they may have against her. Glassford also highlighted undisputed facts and referenced three documents in support of her motion: an affidavit prepared by her, plaintiffs' complaint, and Jack London's deposition.

Plaintiff swore in her affidavit that she was employed by Borrowers Network as an administrator and Glassford swore that she was not personally involved with and did not participate in the transactions between plaintiffs and Royal Mortgage and Borrowers Network. Glassford indicated that she never met plaintiffs and that the few times she spoke to Jack London on the phone pertained to administrative matters. Glassford swore she never made representations to plaintiffs about the suitability of their transactions and never personally received any of plaintiffs' money.

With respect to plaintiffs' complaint, Glassford detailed that she was not generally accused of engaging in the acts complained of, but simply lumped in with other defendants, with certain exceptions. Glassford notes that in plaintiffs' complaint, they do allege in their innocent/negligent misrepresentation claim that she made a specific representation that they would receive an 11% return on their investment. Glassford also noted, however, that this allegation presents a statement of a future event which is not actionable as fraud (she also makes her sole reference to authority to support this statement).

Glassford points out that in his deposition, Jack London stated that Glassford made no representations to him contemporaneous with him signing his first loan agreement that were false or untrue. Jack London also stated that he never thought that Glassford owed him money. He thought that Glassford was a pawn of Randall Shaw's and was unsure why she was named as a defendant in the lawsuit other than that she did Randall Shaw's bidding.

The above presents sufficient support for plaintiff's motion, such that the trial court did not err in failing to deny it outright based on noncompliance with MCR 2.116(G)(3)(b).

Plaintiffs next contend that the trial court erred in granting summary disposition in Glassford's favor on their innocent/negligent misrepresentation claim because genuine issues of material fact exist on this issue. We disagree.

To establish a claim of innocent misrepresentation, the plaintiff must show that the defendant: "(1) made a false statement in a transaction with plaintiffs, (2) without knowledge of that statement's falsity, (3) which statement actually deceived plaintiffs, and (4) on which plaintiffs detrimentally relied, with the benefit inuring to defendants." *Roberts v Saffell*, 483 Mich 1089, 1090; 766 NW2d 288 (2009). Thus, "[a] claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury . . . inures to the benefit of the party who made the representation." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009), quoting *M & D, Inc v McConkey*,

231 Mich App 22, 27; 585 NW2d 33 (1998). Notably, the representation must be material. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 39; 761 NW2d 151 (2008). A plaintiff need not show that the representation was intentionally fraudulent, but must show privity of contract existed between the parties. *Unibar Maintenance Servs, Inc*, 283 Mich App at 621. Moreover, “[a] promise regarding the future cannot form the basis of a misrepresentation claim.” *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998).

Here, plaintiffs provided the deposition testimony of Jack London, wherein he stated that Glassford made representations to him that his money was safe, that everything was good, and that Randall Shaw was “on top of it.” Jack London testified that despite these assurances, he never got his money back. According to plaintiffs, they relied on this information from Glassford regarding the health of the company, she had a duty to use reasonable care in giving information regarding the assets to plaintiffs, and plaintiffs suffered the detriment of losing all of their investments as a result of the misrepresentations.

We would first note that, as pointed out by Glassford, Jack London was unable to articulate when any of these conversations with Glassford actually took place. It is difficult, at best, to establish reliance on a statement without providing a date on which the conversations took place. Additionally, in their complaint, plaintiffs cite to only one misrepresentation—that plaintiffs would get an 11% return on their investment. To the extent that this was a contractual interest rate agreement between plaintiffs and the corporate defendant to whom plaintiffs loaned money, the action would appropriately be for breach of contract, which plaintiffs brought. Otherwise, the statement concerns a promise of future conduct, which is not actionable under a misrepresentation theory. A false statement of fact, made without knowledge of its falsity, is actionable under the doctrine of innocent misrepresentation if the misrepresentation relates to a past or existing fact and is not promissory in nature. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

In any event, plaintiffs cannot establish the elements necessary for an innocent misrepresentation claim. Assuming Glassford made all of the statements pertaining to the safety of plaintiffs’ money and that business was good, plaintiffs have failed to assert or establish a benefit inuring to Glassford. *Roberts*, 483 Mich at 1090. Plaintiffs’ loans were made to the companies, not to Glassford. More importantly, innocent misrepresentation requires privity of contract between the parties. *Unibar Maintenance Servs, Inc*, 283 Mich App at 621. Plaintiffs have not alleged, nor have they established privity of contract between them and Glassford. As the trial court stated, “[t]he transactions entered into by the Plaintiffs were with the corporate defendants and no basis has been shown to create liability on behalf of [] Ms. Glassford individually.”

Although plaintiffs classify them as one, a claim of negligent misrepresentation is slightly different than that of innocent misrepresentation. But, as with the claim of innocent misrepresentation, plaintiffs also cannot establish or support a claim of negligent misrepresentation. Negligent misrepresentation requires proof that that the plaintiff justifiably relied to its detriment on information prepared without reasonable care by one who owes a duty of care to the plaintiff. *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006). This theory of relief is a means for holding a party liable for the negligent performance of a

contract to third parties who are foreseeably injured by the negligent performance. See *Williams v Polgar*, 391 Mich 6, 20-23, 215 NW2d 149 (1974).

As previously indicated, plaintiffs made loans to/invested with corporate defendants. There is no indication that Glassford owned or invested in the corporations. She was, by all indications, an employee with inside knowledge of the workings and likely the fiscal health of the corporations. However, plaintiffs have provided this Court with no authority establishing a duty on the part of a corporate employee to an individual who had made a loan to/investment with the company to disclose the financial situation of the corporation. And, as explained below, the record evidence does not support imposing a fiduciary duty upon Glassford. As a result, the trial court did not err in granting summary disposition in Glassford's favor on plaintiffs' innocent/negligent misrepresentation claim.

Finally, plaintiffs assert that questions of fact existed with respect to their claim of breach of fiduciary duty claim against Glassford such that summary disposition in her favor was inappropriate. We disagree.

“A fiduciary relationship arises from the reposing of faith, confidence, and trust, and the reliance of one upon the judgment and advice of another.” *Ulrich v Fed Land Bank of St. Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). Our Supreme Court has recognized that a fiduciary relationship usually arises in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003). Other common examples of fiduciary relationships include a trustee to a beneficiary, a guardian to a ward, attorney to client, and a doctor to a patient. *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999).

Fatal to this claim is the fact that plaintiffs did not allege any breach of fiduciary duty on Glassford's part in their complaint. Instead, plaintiffs' claim was very specifically and pointedly directed at defendant Shaw. All allegations in this claim referred to Shaw by name and plaintiffs having not even alleged a breach of fiduciary duty on Glassford's part in the first instance, they cannot now maintain one on appeal.

Moreover, both parties admit that Jack London's contacts with Glassford were few, occurred by phone, and were unable to be dated. Jack London indicated that his initial investment was made because of his conversations with a friend, not because of conversations with Glassford, he did not write checks or loan money to Glassford and, according to his deposition testimony, and he was a sophisticated businessman with years of investing and business experience, and with a long-standing relationship with defendant Shaw and his family. Any claim that plaintiffs and Glassford had a relationship that would give rise to a fiduciary relationship is untenable based on the record evidence presented. Because plaintiffs did not

allege a breach of fiduciary relationship as it pertains to Glassford in their complaint and have not supported such a claim, summary disposition was appropriate in Glassford's favor on this claim.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro