STATE OF MICHIGAN

COURT OF APPEALS

DARRYL J. CHIMKO and SHERMETA CHIMKO & ADAMS, P.C.,

Plaintiffs-Appellants,

v

DOUGLASS H. SHERMETA and SHERMETA CHIMKO & ADAMS, P.C.,

Defendants-Appellees.

UNPUBLISHED
July 25, 2006

No. 264845
Oakland Circuit Court
LC No. 2003-054993-CK

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the trial court order granting, in part, defendants' motion for summary disposition. We affirm in part and reverse in part.

During the relevant time period, plaintiff Darryl Chimko ("Chimko") and defendant Douglass Shermeta ("Shermeta") were the only shareholders in defendant law firm Shermeta, Chimko & Adams, P.C., which specialized in debt collection and bankruptcy. Shermeta was the majority shareholder, with 77 percent of the shares, while Chimko held the remaining 23 percent. At issue in this case is Chimko's claim that Shermeta misled Chimko to believe that the law firm was in financial trouble, convinced Chimko to enter into a new stock agreement that reduced the valuation of the firm's stock, and then forced Chimko out of the firm, at which time, pursuant to the fraudulently obtained amended stock agreement, Chimko was paid only the reduced value of the shares he held in the firm.

According to Chimko, in 1999, Shermeta began to complain that the firm was no longer profitable and that the losses were due to Chimko's poor performance as head of the bankruptcy department. Chimko alleged that, in response, he requested access to the firm's financial records to better understand the situation, but his requests were denied by Shermeta. By 2003, based on Shermeta's continued complaints, Chimko became concerned that, if Shermeta were to die or leave the firm, the firm would be unable to buy his shares. Accordingly, Chimko agreed to enter into an amended stock agreement that reduced the total value of the stock to $5.52 million. Previously, pursuant to a 1994 stock agreement, the value of the stock was fixed at $12 million.

Chimko alleged that this revaluation was based solely on Shermeta's representations as to the firm's value and that Chimko, because he was denied access to the firm's financial records, was not able to confirm whether the revaluation was accurate. The effect of the 2003 agreement was to reduce Chimko's potential weekly payout from approximately $6,180 to $3,000. After the 2003 agreement was signed, according to the complaint, Shermeta took numerous steps to force Chimko out of the firm, and Chimko left in November 2003.

Plaintiffs then filed this suit, and at issue in this appeal are the claims of actual fraud, fraud in the inducement, innocent misrepresentation, and negligent misrepresentation, all stemming from Chimko's allegations that Shermeta defrauded him into undervaluing the firm's stock. Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) was granted as to the misrepresentation claims based on the trial court's conclusion that, in a transaction involving the revaluation of the corporation from $12 million to $5.52 million, "it would be unreasonable for the plaintiff to rely on comments made by defendant over the years in forming a value of the corporation."

Plaintiffs subsequently moved for reconsideration, arguing that the grant of summary disposition was premature because discovery was incomplete. Although plaintiffs were permitted to access the firm's financial records for the fiscal years ending on June 30, 2002, and June 30, 2003, all other discovery had been stayed by the trial court earlier in the proceedings. The trial court denied the motion, concluding that plaintiffs did "not need further discovery to explain why it would be reasonable to rely on the statements of a party with diametrically adverse interests in a transaction worth millions of dollars."

A trial court's ruling on a motion for summary disposition is reviewed de novo by this Court. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). Although the trial court did not specify the subsection under MCR 2.116(C) pursuant to which it granted defendants' motion, the ruling essentially reflected a position that, under the facts of the case, reasonable minds could not differ that Chimko's reliance on the statements made by Shermeta was unreasonable; therefore, review under MCR 2.116(C)(10) is appropriate.[1]

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[1] MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence
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Plaintiffs first argue that the trial court erred by concluding that, as a matter of law, Chimko's reliance on Shermeta's alleged misrepresentations could not have been reasonable. We agree.

A plaintiff claiming actual fraud, or fraudulent misrepresentation, must establish the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew the representation was false when it was made, or made it recklessly without any knowledge of its truth; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered injury due to his reliance on the representation. *Hord v Environmental Research Institute of Michigan* (*After Remand*), 463 Mich 399, 404; 617 NW2d 543 (2000); *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

Plaintiffs also make a claim of innocent misrepresentation, which exists when a party detrimentally relies on a false representation "in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). Unlike actual fraud, innocent misrepresentation does not require proof of a fraudulent purpose, i.e., it is not necessary to prove that the person making the misrepresentations knew that his statements were false. *Id.* at 212; *M & D, supra* at 28. Further, the false representation must be made in connection with the making of a contract, and the plaintiff and the defendant must be in privity of contract. *Id.*

This Court has also held that, to recover in an action for misrepresentation, a party's reliance on the false statements must be reasonable. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Plaintiffs, however, argue that a successful fraud claim requires only actual reliance, not reasonable reliance, citing *Phinney v Perlmutter*, 222 Mich App 513, 534-537; 564 NW2d 532 (1997), in which the Court concluded that a plaintiff claiming fraud need not show that his reliance was reasonable.

In *Novak, supra* at 690-691, however, the Court concluded that the *Phinney* panel had incorrectly determined that it was not bound to follow *Nieves*, which the *Novak* panel noted was the first case decided after 1990 that directly addressed this issue. It also pointed to another case, *Webb v First of Michigan Corp*, 195 Mich App 470, 474-475; 491 NW2d 851 (1992), binding under MCR 7.215 as well, which required reasonable reliance. *Novak, supra* at 690. Finally, the Court concluded that requiring reasonable reliance was the better view, because a person who unreasonably relies on false statements should not be entitled to damages. *Id.*

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establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "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 v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Since *Novak*, this Court has reiterated that, to sustain a fraud claim, the party claiming fraud must reasonably rely on a material misrepresentation. See *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005) (noting that the plaintiff was required to "show that any reliance on defendant's representations was reasonable"); *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004) (agreeing with the trial court that a party's reliance in a fraud action must be reasonable).

Therefore, we agree with the trial court that plaintiffs must demonstrate reasonable reliance as an element of the misrepresentation claims. We disagree, however, with the trial court's conclusion that, given the nature of the transaction, Chimko could not reasonably have relied on Shermeta's alleged misrepresentations. Reasonable minds could differ; therefore, summary disposition should not have been granted.[2]

It is clear that, as a matter of law, a plaintiff cannot reasonably rely on oral representations that are contradicted by a written contract between the parties or otherwise conflict with a written document that is readily available to the plaintiff. See, e.g., *Novak*, *supra* at 689-690; *Webb*, *supra* at 474 (concluding that "there 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").

Defendants argue that application of this rule defeats plaintiffs' claim because Chimko failed to independently evaluate the firm's finances, even though as a shareholder he was entitled by statute to review the firm's financial records. As noted in *Cleary Trust*, *supra* at 501, however, this rule has generally been applied only when "the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed."

Plaintiffs claim that Shermeta, as part of his scheme to defraud Chimko, withheld information regarding the firm's finances and instructed others to do the same. Plaintiffs further contend that Shermeta led Chimko to believe that no financial records existed because the firm could not afford to generate them. Chimko's affidavit supports these contentions. Reasonable minds could differ whether Chimko could have readily discovered the falsity of Shermeta's representations. Because Chimko asserts that he made diligent efforts to verify Shermeta's statements but was obstructed from doing so by Shermeta's own actions, it cannot be said that "the means of knowledge regarding the truthfulness of the representation [was] available to the plaintiff and the degree of their utilization [was] not . . . prohibited by the defendant." *Webb*, *supra* at 475.[3] We also reject defendants' repeated argument that Chimko conceded, in the

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[2] We also find that, because the court's ruling was akin to a dismissal under MCR 2.116(C)(10), summary disposition was premature where discovery had not yet been completed. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Further discovery could certainly have a bearing on whether Chimko's reliance on Shermeta's alleged misrepresentations was reasonable. Plaintiffs did submit Chimko's affidavit, which closely paralleled the allegations in the complaint.

[3] While defendants argue that Shermeta's refusal to provide Chimko with financial records and
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complaint and his affidavit, that Shermeta was guilty of wrongdoing, was deceitful, and that he hid the truth regarding the firm's finances; therefore, Chimko's reliance on Shermeta's statements was unreasonable. As indicated in plaintiffs' reply brief, the allegations and averments of wrongdoing and deceit are set forth from a hindsight perspective and do not suggest that Chimko was aware of wrongdoing and deceit at the time of the alleged misrepresentations.

Therefore, viewing the evidence in the light most favorable to plaintiffs, a question of fact exists regarding whether Chimko's reliance was reasonable, particularly in light of his close personal and professional relationship with Shermeta and the fact that Shermeta, as the firm's president and majority shareholder, owed fiduciary duties to plaintiff. See *Hayes Constr Co v Silverthorn*, 343 Mich 421, 426-427; 72 NW2d 190 (1955) (noting that the relationship between the parties may impose more stringent requirements on a party making representations). This was not a transaction conducted at arm's length, but one between friends and longtime business partners. Therefore, we conclude that the trial court erred by ruling that Chimko's reliance could not have been reasonable.[4]

We do find, however, that one of plaintiffs' fraud claims was properly dismissed, albeit on different grounds. Plaintiffs alleged fraud in the inducement, a theory that provides an exception to the general rule that a claim of fraud must be predicated on a statement relating to a past or existing fact, rather than a promise of future conduct. *Forge*, *supra* at 212; *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Under this theory, a party commits fraud if he or she "materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Id.* Although plaintiffs alleged fraud in the inducement, they do not identify any promise of future conduct made by Shermeta. Instead, the alleged misrepresentations related to the past and existing financial status of the firm. Therefore, plaintiffs have failed to state a claim for fraud in the inducement.[5]

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information should have made Chimko reluctant to agree to any stock revaluation such that his reliance on Shermeta's statements was unreasonable, we cannot conclude as a matter of law that Chimko's reliance was unreasonable, where Chimko's affidavit indicates that he was informed that the financial information requested was too difficult and costly to gather and prepare. For these reasons, along with the fact that Chimko and Shermeta had a longtime business relationship, we likewise decline to find that reliance was unreasonable as a matter of law, accepting that Chimko may have been able to acquire the financial information by way of a shareholder suit.

[4] In order to establish negligent misrepresentation, a plaintiff must show that he or she justifiably and detrimentally relied on information provided without reasonable care by one who owed the plaintiff a duty of care. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989). With respect to the element of "justifiable" reliance, we also find that an issue of fact exists for the reasons discussed in the context of reasonable reliance.

[5] To the extent that plaintiffs' breach of contract claim is predicated on fraud in the inducement, it is dismissed, but to the extent that it is based on misrepresentation, the cause of action survives.

Finally, we have reviewed defendants' alternative arguments in support of affirming the trial court's ruling, and we find that they lack merit. The complaint alleged a claim for fraud with sufficient specificity as required by MCR 2.112(B)(1). Further, the representations regarding the firm's profitability, financial status, and value can indeed constitute representations of material fact as opposed to opinions. See *Foreman*, *supra* at 142. Next, with regard to defendants' argument that Chimko is estopped from challenging the validity of the 2003 agreement because he signed it as a shareholder and corporate officer, the cases cited by defendants did not involve claims of fraud and are thus distinguishable. See *Wallad v Access BIDCO, Inc*, 236 Mich App 303; 600 NW2d 664 (1999); *Camden v Kaufman*, 240 Mich App 389; 613 NW2d 335 (2000). Defendants' contention that the fraud claims are barred by the merger and integration clauses contained in the agreements fails to appreciate the fact that the fraud claims are not premised on oral representations contradicted by the agreements, but rather on alleged false statements regarding the firm's value that led to Chimko agreeing to a stock devaluation. Finally, we reject defendants' argument that the innocent misrepresentation claim should be dismissed because Chimko's injury did not inure to Shermeta's benefit, i.e., Shermeta was not unjustly enriched. Considering the possibility that Chimko could leave the firm first, which in fact occurred, allegedly because of Shermeta's abusive behavior, one could find that Chimko's injury inured to Shermeta's benefit, where the firm had to pay Chimko a greatly reduced amount for his shares, thereby leaving the firm, with Shermeta as the sole shareholder, in a stronger financial position.

We affirm in part and reverse in part and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood