STATE OF MICHIGAN

COURT OF APPEALS

SUJATA K. NICHANI,

Plaintiff-Appellant,

v

SCHROEDER HOMES and BLAKE MOSSHOLDER,

Defendants-Appellants .

UNPUBLISHED
July 20, 2006

No. 267688
Ingham Circuit Court
LC No. 05-0009-CK

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from trial court orders granting summary disposition in favor of defendants Schroeder and Mossholder. Because the trial court properly determined that this action involved contractual duties and plaintiff failed to establish a duty separate and distinct from those in the contract, we affirm.

In March, 2004 plaintiff entered into an agreement to purchase a home owned by Gail Glassbrook-Chamberlain and built by defendant Schroeder Homes. Shortly after entering into the agreement (but after the period to rescind the agreement had expired) plaintiff became aware of damage to the home, due in large part to synthetic stucco siding installed on portions of the home's exterior. According to plaintiff, though the home was still under warranty and she was assured the builder would correct the problems, the problems were not remedied. Plaintiff thereafter filed a two-count complaint against Chamberlain, Schroeder, and Blake Mossholder (the subcontractor hired by Schroeder to clad the home in synthetic stucco). Plaintiff's allegations as they relate to Schroeder and Mossholder were premised upon negligent and improper installation of a defective product (synthetic stucco) on the home. Defendants moved for summary disposition relying upon MCR 2.116(C)(8) and (10).

We review de novo a trial court's order granting summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). In assessing a motion brought under MCR 2.116(C)(8), all factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*,

439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In reviewing such a motion, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted under this court rule when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

On appeal, plaintiff asserts that the trial court erred in finding that she failed to establish a (and that defendants owed no) legal duty separate and distinct from a contractual duty when her allegations did not originate from nor were premised upon any breach of contract. Instead, plaintiff claims her complaint is premised upon negligence and implied warranty theories recoverable under products liability and that the trial court's finding that her claims were barred was thus in error.

While plaintiff may characterize her claims as sounding in products liability, a review of her complaint reveals allegations premised almost entirely on the negligent installation of siding on the home. Plaintiff entitled her claim against Schroeder and Mossholder "negligence" and alleged that defendants, among other things, failed to properly seal joints between the siding and window frames, left the siding in contact with the ground, and failed to install the siding according to plans and specifications for the home. In other words, plaintiff claims defendants did not perform portions of the home construction properly. Given that to perform with ordinary care the thing to be done is implicit in every contract (*Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004)), and that installation of siding was part of the construction contract, it would stand to reason that plaintiff's claims are based upon the Schroeder-Chamberlain contract governing construction of the house.

Fultz v Union-Commerce Associates, *supra*, directs us to analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. In *Fultz*, the plaintiff slipped and fell in an icy parking lot, incurring injuries. The plaintiff asserted a claim of negligence against the contractor hired by the parking lot owner to salt and plow the lot, asserting that the contractor owed her a common law duty to exercise reasonable care in performing its contractual duties. Our Supreme Court held that "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id.* at 467. The *Fultz* court determined that because plaintiff alleged only that the contractor breached its contract with the parking lot owner by failing to perform its contractual duty of plowing or salting the parking lot but alleged no duty owed to her independent of the contract, plaintiff's claim must fail.

The facts before this court lead to the same conclusion. Plaintiff is not a party to the Schroeder-Chamberlain contract, nor does she claim to be a third-party beneficiary of the contract. As in *Fultz*, plaintiff has also alleged no duty owed to her independent of the

Chamberlain-Schroeder contract. Rather, plaintiff asserts that defendants performed duties they were contractually bound to perform in a negligent manner. Because no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made, the trial court properly granted defendants' motions for summary disposition.

The Court finds further ample reason to determine that plaintiff's action is not based upon products liability. A product liability action is "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." MCL 600.2945(h). "Product" includes any and all component parts to a product (MCL 600.2945(g)) and "production" means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling. MCL 600.2945(i). To proceed with a products liability claim against defendants, then, plaintiff must establish that they were involved in the production of a product that caused injury to a person or damage to property. Plaintiff devotes much of her time relating the history of synthetic stucco and how it has proven itself to be intrinsically defective, indicating that the defective stucco itself caused damage to her home. However, there is no allegation that either defendant manufactured, constructed, or designed the synthetic stucco siding.

In addition, where, as here, the defendant uses an allegedly defective product in the course of providing a service, the courts must decide whether the transaction is primarily a sale or a service. "If the relationship of defendant to plaintiff is seller to buyer, then products liability theories will apply. On the other hand, if the relationship of defendant to plaintiff is service provided to one served, then negligence theories will apply." *Ayyash v Henry Ford Health Systems*, 210 Mich App 142, 145-146; 533 NW2d 353 (1995). There being no buyer-seller relationship between plaintiff and defendants, products liability theories do not apply.

Finally, were this Court to find a proper products liability claim, summary disposition would nevertheless be appropriate. Michigan recognizes negligence and breach of implied warranty as theories of recovery in the area of products liability. See, *Lemire v Garrard Drugs*, 95 Mich App 520, 523; 291 NW2d 103 (1980). "A cause of action for breach of implied warranty is established upon proof of injury caused by a defect in the product that made it not reasonably fit for its intended or reasonably foreseeable use." *Vincent v Allen Bradley Co*, 95 Mich App 426, 429; 291 NW2d 66 (1980). However, it has been held that warranties of fitness and merchantability run only to the first purchaser of a home. *Weeks v Slavic Builders, Inc*, 24 Mich App 621; 180 NW2d 503 (1970), aff'd 384 Mich 257, 181 NW2d 271 (1970); *McCann v Brody-Built Const Co, Inc*, 197 Mich App 512, 516; 496 NW2d 349 (1992). Plaintiff not being the first purchaser of the home, liability premised upon such breaches does not attach.

When a plaintiff bases his products liability claim on a negligence theory, as opposed to one sounding in implied warranty, he must "make out a prima facie case establishing that the manufacturer breached its duty to use reasonable and ordinary care under the circumstances in planning or designing his product so that it is reasonably safe for the purposes for which it is intended." *Bullock v Gulf & Western Mfg*, 128 Mich App 316; 340 NW2d 294 (1983). Again, plaintiff has failed to establish defendants as manufacturers of a product under products liability,

and the duties plaintiff claims were breached relate solely to faulty construction of the home, such that a negligence claimed based upon products liability would fail.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto