STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JAMES P. HARPER, an individual,

Plaintiff,

v

File No. 00-20291-CH
HON. PHILIP E. RODGERS, JR.

HEATHER LYNN FRANCISCO,

Defendant.
_____/

Eric W. Phelps (P55375)
Attorney for Plaintiff

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Attorney for Defendant

DECISION AND ORDER REGARDING THE PARTIES' CROSS-MOTIONS FOR SUMMARY DISPOSITION

Introduction

The Plaintiff is a 51-year-old male and the Defendant is a 26-year-old female. It is undisputed that the parties had an intimate adult relationship during which the Defendant became pregnant with the Plaintiff's child. It is undisputed that the home in which the Defendant now resides with her child from a previous marriage and her child with the Plaintiff was purchased during that relationship. The parties were never married, although they were at times engaged. Prior to the purchase of the home, the parties did not discuss the deed to the home or whose name would be on it. (Plaintiff's deposition at pp 24-25 and pp 37-38; Defendant's deposition at pp 25 and 29). The Plaintiff "owned numerous rental properties" and provided all of the funds for the purchase of the home by mortgaging other properties that he owned. (Plaintiff's motion paragraph 5; Plaintiff's Brief in Support, p 2; Defendant's deposition at p 24). At the closing, the warranty deed that had

been prepared by the title company was solely in the Defendant's name. The Plaintiff admits he knew that the deed was solely in the Defendant's name before he financed the purchase. (Plaintiff's deposition at p 39).

The Plaintiff claims, however, that when he discovered at the closing that the deed was solely in the Defendant's name, the Defendant promised to execute a quit claim deed "to rectify this" and that only then did he finance the purchase. (Plaintiff's deposition at p 39). The Defendant, on the other hand, claims that when she brought it to the Plaintiff's attention that the deed was only in her name, the Plaintiff assured her, "That's okay." (Defendant's deposition at p 29).

It is undisputed that the parties' relationship broke down during the summer of 1999 and that, between the time of the closing on September 28, 1998 and the date of the filing of this action on April 4, 2000, the parties did not discuss nor take any steps to put the Plaintiff's name on the deed. (Plaintiff's deposition at p 27).

The Plaintiff's five count complaint herein alleges fraudulent misrepresentation, innocent misrepresentation, mistake, equitable mortgage and unjust enrichment. The Plaintiff seeks to have "all of the value of the benefit he conferred upon [the Defendant]" restored to him.

Pursuant to a scheduling order issued by the Court on December 5, 2000, the parties have filed cross-motions for summary disposition. The Plaintiff's motion is brought pursuant to MCR 2.116(C)(10). The Plaintiff claims that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law on his claim under Count III of unjust enrichment. The Plaintiff does not seek summary disposition under any of the other counts. The Defendant, on the other hand, claims that she is entitled to judgment as a matter of law on all counts because the Plaintiff has failed to state a cause of action upon which relief can be granted, MCR 2.116(C)(8), and there is no genuine issue of material fact, MCR 2.116(C)(10). The parties each responded to the other's motion. On February 5, 2001, the Court heard the arguments of counsel and took these matters under advisement. The Court now issues this written decision and order regarding the cross-motions. Each count of the complaint will be addressed separately.

STANDARDS OF REVIEW

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988).

MCR 2.116(C)(10)

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was recently set forth in *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* 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 pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J.*

Walter Thompson, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

I

Fraudulent Misrepresentation

The Plaintiff alleges that the Defendant represented to him that "the property would be acquired for use as their residence, and that this arrangement was not contingent upon Plaintiff's agreement to marry her," and, at closing, that "Plaintiff's name would be added to the Deed." The Plaintiff further alleges that these representations were false and that the Defendant knew they were false, or made them recklessly without knowledge of their truth, intending that Plaintiff would act upon them by providing the funds for the purchase of the property. The Plaintiff relied upon these representations and provided the funds for the purchase of the property. Therefore, the Plaintiff contends that he is entitled to recovery of the sum he paid for the property.

The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. *M&D, Inc v W. B. McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

It is undisputed that the parties did, in fact, live together in the home prior to the deterioration of their relationship. Consequently, any representation by the Defendant that the home would be used as their residence was true and cannot be the basis for a claim of fraudulent misrepresentation.

Further, the Plaintiff testified during his deposition that he knew his name was not on the deed before he "handed over the check to the title company" and that the only time the Defendant ever said anything about putting his name on the deed was at the closing. (Plaintiff's deposition at p 37-39). The Plaintiff has not submitted any affidavits, depositions, admissions or other documentary evidence to corroborate his testimony. The Defendant, on the other hand, testified that no such discussion took place at the closing and she submitted affidavits from other people who were present at the closing who state that there was no discussion between the parties or promise made

by the Defendant to add the Plaintiff's name to the deed. (See affidavits of Mid-American Title Company closing manager Charlene Hunt and realtor Ann Marie Doyle).

The Plaintiff's claim of fraudulent misrepresentation must fail. First, the parties did live together in the home before the deterioration of their relationship and the Plaintiff knew that his name was not on the deed before he financed the purchase. Thus, he could not have been deceived.[1]

In addition, the Statute of Frauds, being MCL 566.108; MSA 26.908, requires that a land transaction be in writing. In the instant case, the Defendant's alleged promise to execute a quit claim deed was not reduced to writing. Further, according to Mid-American Title Company Closing Manager Charlene Hunt: "It is not unusual at all for someone's name to be added to a deed at closing. If the issue comes up, it has been my practice to make any such changes then and there - - it would not be my style to suggest the parties do it later when a change can be easily and quickly accomplished on the spot." (Charlene Hunt Affidavit, paragraph 4).

Finally, the Plaintiff's only response to the Defendant's motion for summary disposition on this point is to argue that there is a genuine issue of material fact regarding whether the Defendant misrepresented her intent to cure the problem with the deed. He says she did. She says she did not. The independent witnesses agree with her - no such discussion took place and no such promise was made. Plus, the Plaintiff is experienced in and knowledgeable about real estate transactions. He was present at the closing and he admitted that he knew his name was not on the deed before he financed the transaction. He also admitted that the parties never discussed the matter, except at the closing. Until the parties' relationship fell apart nearly 18 months after the closing, the Plaintiff admits that he did nothing to secure his name on the deed. The Plaintiff has submitted absolutely nothing to support an inference that the Defendant deceived the Plaintiff. No factfinder could reasonably conclude that the Plaintiff was deceived.

"If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Quinto v Cross*

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[1]The Plaintiff would have the Court believe that he was naive and the Defendant took advantage of him. There is no factual support for his position. He is the one who "owned numerous rental properties" and, in fact, was in the process of selling one of them when the parties decided to buy the home at issue. (See, Plaintiff's Brief in Support at p 2). The Plaintiff is obviously experienced and knowledgeable when it comes to buying and selling real estate.

& Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996), quoting *Celotex v Catrett*, 477 US 317, 331; 106 S Ct 2548; 91 L Ed 2d 265 (1986) (Brennan, J., dissenting). Thus, Defendant's motion for summary disposition on Count I - Fraudulent Misrepresentation is granted.

II

Innocent Misrepresentation

Count II alleges innocent misrepresentation as an alternative pleading. The Plaintiff alleges that his name was "inadvertently omitted" from the deed and that the Defendant represented to him that "this defect would be cured and that Plaintiff's name would be added to the Deed." The Plaintiff further contends that he agreed to provide the entire amount of the funds for the purchase as a result of "Defendant's unintendedly false representation that the parties would cohabitate together in the real property and that the property would be jointly titled in both parties' names."

A claim of innocent misrepresentation is shown if a party to a contract detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *M&D, Inc v W. B. McConkey*, supra at 27-28.

The Plaintiff has not submitted any affidavits, depositions, admissions or other documentary evidence of innocent misrepresentation with regard to the above statements about which the Plaintiff complains. In fact, the Plaintiff admitted at his deposition that the parties did cohabitate in the subject home for a period of time so that representation was true. In addition, the Plaintiff testified at his deposition that "[t]he only time . . . [the Defendant] ever said anything about [the Plaintiff] going on title or promising to put [the Plaintiff] on title was at the closing. . ." However, there is no factual support for this contention. As noted above, the Defendant submitted affidavits from others who were present at the closing who state that this discussion never took place. (See depositions attached to Defendant's motion and brief.) No reasonable factfinder could review this evidence and find that an innocent misrepresentation was made.

Again, the Plaintiff, as the nonmoving party, has been unable put forth sufficient evidence to make out his claim. Therefore, the Defendant is entitled to summary judgment as a matter of law. *Quinto, supra* at 362. The Defendant's motion for summary disposition on Count II - Innocent Misrepresentation is granted.

III

Unjust Enrichment

The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). In such instances, the law operates to imply a contract in order to prevent unjust enrichment. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, a contract will be implied only if there is no express contract covering the same subject matter. *Id*; *Campbell v City of Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972).

A person who has been unjustly enriched at the expense of another is required to make restitution to the other. Restatement, Restitution, § 1, p. 12. The process of imposing a "contract-in-law" or a quasi-contract to prevent unjust enrichment is an activity which should be approached with some caution. *B&M Die Co v Ford Motor Co*, 167 Mich App 176, 181; 421 NW2d 620 (1988).

The issue presented is whether the Plaintiff is entitled to recovery under a theory of unjust enrichment because it would be inequitable to allow the Defendant to own the home. In support of his claim for restitution, the Plaintiff relies on the undisputed facts that the parties intended that the property would be owned jointly, or solely by the Plaintiff, and the Plaintiff "provided all purchase monies required for the purchase of the property from his sole and separate assets."

The Plaintiff's allegations sound like property dispute allegations in divorce matters. These parties, however, were never married. Furthermore, Michigan does not recognize common-law marriages arising after January 1, 1957. MCL 551.2; MSA 25.2. Those engaged in meretricious relationships do not enjoy property rights afforded a legally married couple. *Carnes v Sheldon*, 109 Mich App 204, 211; 311 NW2d 747 (1981). Courts have, however, enforced an agreement made during the relationship upon proof of additional independent consideration. *Id*; *Tyranski v Piggins*, 44 Mich App 570, 573-574; 205 NW2d 595 (1973). The agreement must be either express or implied in fact. The courts will not allow recovery based on contracts implied in law or quantum meruit because to do so would essentially resurrect common-law marriage. *Carnes, supra* at 216-217, 311 NW2d 747; *Roznowski v Bozyk*, 73 Mich App 405, 408-409; 251 NW2d 606 (1977).

Here, the Plaintiff has not alleged an implied or express agreement between the parties. Instead, he contends that he conferred a benefit upon the Defendant and that it would be inequitable to allow her to keep that benefit. A person who without mistake, coercion, or request has unconditionally conferred a benefit upon another is not entitled to restitution on a theory of unjust enrichment, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons. *Estate of McCallum*, 153 Mich App 328; 395 NW2d 258 (1986).

The Plaintiff would have this Court ignore the fact that he had an intimate relationship with the Defendant, that he never married her (admittedly, the purchase of the house was "not tied to any promise on his part to marry her"), that she had his child, and that his child resides with her in the subject home. He would also ignore that he was at a closing where the Defendant received the home free and clear in her sole name because he chose to mortgage other properties and confer this benefit on her. Plaintiff chose not to marry the Defendant, to mortgage other property and to attend a closing and finance a purchase when he knew that he was not on the deed. Plaintiff was not compelled to make these decisions for the protection of the Defendant's interests or of third persons. *McCallum, supra.* But, now the Plaintiff cries, "equity." If the Defendant was anything other than the beneficiary of a gift from the Plaintiff, then the Plaintiff is the author of his own misfortune and equity will not come to his aid.

Equitable principles demand that the Court deny the Plaintiff's motion for summary disposition on Count III - Unjust Enrichment and grant the Defendant's cross- motion for summary disposition on Count III.

IV

Equitable Mortgage

The Plaintiff alleges in Count IV of his complaint that he is entitled to an equitable mortgage because he funded the purchase of the property believing it would be the parties' residence and titled in both their names, but the Defendant has "ejected" him and claims she is the sole owner of the property.

The Statute of Frauds, provides, in pertinent part, as follows:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. MCL 566.106; MSA 26.906.
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> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing * * *. MCL 566.108; MSA 26.908.

Notwithstanding the direct language of the statute, a court may declare a deed absolute on its face to be an equitable mortgage. *Grant v Van Reken*, 71 Mich App 121; 246 NW2d 348 (1976). The burden of proof rests with the party who asserts that an absolute conveyance is a mortgage. He must prove his case not merely by a preponderance of the evidence, but rather that party must make it "very clear" to the fact finder that the parties did not contemplate an absolute sale. *Grant, supra* at 125-126.

Discussing equitable mortgages, the Court of Appeals said in *Schultz v Schultz*, 117 Mich App 454; 324 NW2d 48 (1982):

> The demand for writing in the statute of frauds "was intended for persons dealing with each other at arm's length and on an equal footing." *Emerson v Atwater*, 7 Mich 12, 23 (1859). Thus, a review of Michigan case law reveals two instances in which it is proper to declare an equitable mortgage in order to circumvent the requirement for a writing. One such instance occurs when the deed is between parties where one party stands in a relationship of trust or guidance to the other party, such as attorney to client, guardian to ward, or parent to child, and the relationship has been abused. See *Emerson, supra*, 23-24; *Fred L. Alpert Industries, Inc v Oakland Metal Stamping Co*, 379 Mich 272; 150 NW2d 765 (1967). In that situation, a court may declare a deed to be subject to an equitable mortgage where the deed would have been held to be unencumbered had the parties not been so related. *Emerson, supra*, 24; *Alpert Industries, supra*, 278.
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> The other instance in which equitable mortgages may properly be declared occurs when a creditor abuses the "power of coercion" which he may have, by the force of circumstances, over the debtor. *Emerson, supra*, 24; *Alpert Industries, supra*, 278; accord, *Koenig v Van Reken*, 89 Mich App 102; 279 NW2d 590 (1979).

> Courts sitting in equity interfere between the creditor and debtor to prevent oppression. *Emerson, supra*, 24; *Alpert Industries, supra*, 278. Otherwise, the statute of frauds would become "a shield for the protection of oppression and fraud." See *Emerson, supra*, 25; *Alpert Industries, supra*, 279. As has been observed, an oppressed debtor "will not hesitate to execute a deed or bill of sale, absolute upon the face of it, but intended to operate as a mortgage, to four times the value of the loan, without insisting upon a written deed of defeasance." *Fuller v Parrish*, 3 Mich 211, 218 (1854). Thus, an adverse financial condition of thegrantor coupled with an inadequate purchase price for the property is sufficient to establish a deed absolute on its face to be an equitable mortgage. *Koenig, supra*, 106.

Neither ground for the proper invocation of the doctrine of equitable mortgage has been pled in the instant case. First, the parties did not stand in a confidential relationship of trust or guidance. The parties were involved in an adult relationship; they were not parent and child or guardian and ward. While their relationship was no doubt a close one, this does not imply a relationship of confidence. Thus, the doctrine should not be invoked to return the property to the Plaintiff on the ground of an abuse of confidence. Furthermore, the Plaintiff does not allege that the warranty deed was given to Defendant in her name only under the power of coercion. The Plaintiff acknowledges that this was not a situation of a creditor oppressing a debtor and paying an inadequate purchase price for property.

The Defendant's motion for summary disposition on Count IV - Equitable Mortgage, pursuant to MCR 2.116(C)(8), is granted. The Plaintiff has failed to state a cause of action upon which relief can be granted. Based upon the undisputed facts, no amendment can correct the defect in the Plaintiff's pleadings.

V

Mistake

The Plaintiff alleges that there was a mistake in the warranty deed in that the Plaintiff's name was "inadvertently omitted" from said deed. The Plaintiff bears the burden of proving a mistake of fact by clear and convincing evidence. *Holda v Glick*, 312 Mich 394, 403-404; 20 NW2d 248 (1945). A mistake of fact is "a misunderstanding, misapprehension, error, fault or ignorance of a

material fact, a belief that a certain fact exists when in truth and in fact it does not exist." *Montgomery Ward & Co v Williams*, 330 Mich 275, 279; 47 NW2d 607 (1951).

At his deposition, the Plaintiff asserted that the title company made the mistake, if any, of not including his name on the warranty deed and that he had no evidence to support that the Defendant made the mistake or assisted in making the mistake. (Plaintiff's deposition at pp 21-23). Additionally, the Plaintiff did not produce any evidence with his motion or in response to the Defendant's motion that would raise a fact issue regarding this claim.

Thus, there is no genuine issue of material fact and the Defendant's motion for summary disposition on Count V - Mistake is granted. MCR 2.116(C)(10).

CONCLUSION

The Plaintiff's cross-motion for summary disposition as to Count III - Unjust Enrichment is denied. The Defendant's cross-motion for summary disposition on Count III - Unjust Enrichment is granted. There is no genuine issue of material fact and, under the facts and circumstances of this case, it would be inequitable to require the Defendant to buy her house from the Plaintiff.

As to Count IV - Equitable Mortgage, the Plaintiff has failed to state a cause of action upon which relief can be granted and the claim is dismissed. MCR 2.116(C)(8). As to Counts I, II and V, there is no genuine issue of material fact and Defendant's cross motions for summary disposition is granted. MCR 2.116(C)(10).

This matter is dismissed.

IT IS SO ORDERED.

This decision and order resolves all disputed issues and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/16/01