STATE OF MICHIGAN

COURT OF APPEALS

GERALD G. BERGMAN, INC.,

Plaintiff/Counter Defendant/Third Party Plaintiff-Appellee,

v

GHAZI MIZORI,

Defendant/Counter Plaintiff-Appellant,

and

MCMATH MASONRY, INC.,

Third Party Defendant.

UNPUBLISHED
March 23, 2010

No. 284038
Saginaw Circuit Court
LC No. 02-046796-CK

Before: ZAHRA, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Following the jury trial in this breach of contract case involving the faulty construction of Ghazi Mizori's ("Owner") basement, the trial court entered a judgment in favor of Owner for $9,500. Owner appeals as of right. We affirm.

I. BASIC FACTS AND PROCEEDINGS

On April 14, 2000, Owner and Gerald G. Bergman, Inc. (Builder) entered into a contract for the construction of a custom built home, to be built Spring Lane in Saginaw, Michigan. The home was to be built according to the architectural plans created by builder, Gerald G. Bergman, a designer/building contractor and owner of Builder. According to the contract, Builder was to construct a home with 3,715 square feet of living space for $425,529. It was to include a three-car garage and a basement wall that was 14 ½ blocks high. If constructed properly, Owner's basement would have had 10-foot high ceilings. Following the completion of construction, Owner learned that the basement did not contain 14 ½ block high walls. Instead, the basement was constructed with 13 block high walls in breach of the parties' contract. As such, Owner did not pay Builder the remaining $30,182.91 owed on the contract. Consequently, Builder filed a suit against Owner alleging breach of contract, unjust enrichment, and conversion. Owner filed an answer and also a counter-complaint seeking rescission or, in the alternative, money damages

for breach of contract and relief under the Michigan Consumer Protection Act, MCL 445.901 *et seq*. Builder's suit was settled under the terms of a consent judgment. However, the trial court stayed collection of the judgment until resolution of Owner's counter-complaint. The trial in regard to Owner's counter-complaint is the subject of this appeal.

II. AMENDMENT OF COUNTER-COMPLAINT

Owner first argues that the trial court abused its discretion when it denied his motion for leave to amend his counter-complaint to include a claim for structural defects resulting from Builder's faulty construction of his home.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision whether to grant or deny leave to amend for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004). A trial court abuses its discretion when its decision is outside the range of principled outcomes. *Barnett v Hildago*, 478 Mich 151, 158; 732 NW2d 472 (2007).

B. ANALYSIS

A plaintiff may amend a complaint once as a matter of right within 14 days of being served a responsive pleading. MCR 2.118(A)(1); *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). Otherwise, a plaintiff may amend a complaint only by leave of the court or by written consent of the appellant. MCR 2.118(A)(2); *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 352; 711 NW2d 801 (2005). A court should freely grant leave to amend when justice so requires. MCR 2.118(A)(2); *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Thus, a motion to amend should ordinarily be denied only for particularized reasons. *Miller*, 477 Mich at 105. A trial court may properly deny a motion to amend if any of the following exists: undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility. *Id.* The trial court must specify its reasons for denying leave to amend. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). The failure to do so requires reversal of the trial court's decision unless the amendment would be futile. *Id.*

Owner's structural defect claim was based upon a report created by a structural engineer that Owner hired to determine the origin of some cracks in the drywall throughout the home. The trial court denied Owner's motion to amend, stating that Owner had known about the cracks in the drywall at the time he filed his counter-complaint more than four years earlier. The court held that Owner's failure to investigate the origin of the cracks until more than four years later and less than two months before the scheduled trial constituted undue delay. The court noted that it had already granted Owner's motion to amend his witness list, which necessitated an adjournment of the trial. Granting Owner's motion, the court noted, would inevitably cause another adjournment. The court reasoned that since the discovery date had long since passed and trial was set to begin in less than two months, it would be unfairly prejudicial to Builder to grant Owner's motion. We find no fault with the trial court's reasoning.

Owner also argues that the trial court abused its discretion when it denied his motion for reconsideration of the decision to deny his motion to amend. Following the opinion and order

denying Owner's motion, trial was adjourned for reasons unrelated to the parties' case. Almost three months after trial was adjourned and less than two months before the new trial date, Owner filed the motion for reconsideration. We decline to address whether the trial court abused its discretion. Owner only gives cursory treatment to this issue.

> It is not enough for [a party] . . . simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The [party] himself must first adequately prime the pump; only then does the appellate well begin to flow. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Thus, we deem Owner's argument abandoned on appeal.

III. SUMMARY DISPOSITION

Owner also argues that the trial court erred when it granted Builder's motion for summary disposition pursuant to MCR 2.116(C)(8) & (10), dismissing Owner's rescission claim.

A. STANDARD OF REVIEW

"This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party is entitled to a judgment as a matter of law when, viewing the evidence in the light most favorable to the nonmoving party, *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and drawing all reasonable inferences in favor of the nonmovent, *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005), the Court finds that no genuine issue of material fact exists. *Maiden*, 461 Mich at 120.

B. ANALYSIS

Owner specifically argues that a genuine issue of material fact existed as to the materiality of Builder's breach because of Owner's intended use for his home.

Rescission is an equitable remedy that restores the parties to their precontract positions. *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995). "Rescission of a contract is permissible only for a substantial or material breach." *Hisaw v Hayes*, 133 Mich App 639, 642; 350 NW2d 302 (1984), citing *O'Conner v Bamm*, 335 Mich 438; 56 NW2d 250 (1953). In *Omnicom of Michigan v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997), this Court described the factors a court should look at to determine whether a breach is material. We stated:

> In determining whether a breach is material, the court should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive. Other considerations include the extent to which the injured party may be adequately compensated for damages for lack of complete performance, the extent to which the breaching party has partly performed, the comparative hardship on the

> breaching party in terminating the contract, the wilfulness of the breaching party's conduct, and the greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract. [Internal citations omitted.]

In the present case, there is no dispute that Builder failed to construct Owner's basement with 14 ½ block high walls as contracted. Thus, the only issue before the trial court was whether Builder's breach was material. After reviewing the evidence before the trial court at the time of Builder's motion, we disagree with Owner's argument that a genuine issue of material fact existed. Owner's arguments that he did not really receive a benefit because the basement only contained 13 block high walls rather than 14 ½ block high walls does not alter the fact that Builder provided Owner with a habitable living space capable of meeting the purpose for which it was built. At most, Owner's arguments indicate that Builder failed to appreciate the importance of the 14 ½ block high basement wall to Owner. Regardless, Owner received a custom built home with a habitable living space in the basement that could be finished to accommodate Owner's needs. Furthermore, Owner does not dispute that the defect could be cured with money damages.

IV. INSTRUCTIONAL ERROR

Lastly, Owner argues that the trial court's instructions to the jury in regard to the proper measure of damages in breach of construction contract cases were erroneous. We disagree.

A. STANDARD OF REVIEW

Claims of instructional error are generally reviewed de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). Here, Owner's claim of instructional error was preserved through objection. A trial court's determination whether an instruction is supported by the evidence is entitled to deference. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). A determination based upon a legal issue is a question of law subject to de novo review. *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). However, reversal is not required unless the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A); *Ward v Consolidated Rail Corp*, 472 Mich 77, 84, 87; 693 NW2d 366 (2005). Nor is reversal warranted if an instructional error did not affect the outcome of the trial. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). There is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

B. ANALYSIS

In regard to damages, the trial court instructed the jury as follows:

> [W]here the contract is substantially complied with, and the building is such a one as is adapted for the purpose for which it was constructed, and only slight additions or alterations are required to finish the work according to the contract, the defects being remediable at a reasonable expense, and without interfering with the rest of the structure, the measure of damages is such a sum as is necessary to make the building conform to the plans and specifications.

> But, where the defects are such that they cannot be remedied without the entire demolition of the building, and the building is worth less than it would have been if constructed according to the contract, the measure of damages is the difference between the value of the building actually tendered, and the reasonable value of that which was to be built.

The instruction was identical to the instruction in *Kokkonen v Wausau Homes, Inc*, 94 Mich App 603, 615; 289 NW2d 382 (1980), quoting *Gutov v Clark*, 190 Mich 381, 387; 157 NW 49 (1916).

Owner argues that the above instruction was "both misleading and confusing" because it "inject[e]d the concept of demolition in the measure of damages when there was no evidence that demolition was required to cure the admitted breach." It is error to instruct the jury on a matter not supported by the evidence. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003), citing *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). However, not all instructional error requires reversal. *Slayton v Michigan Host, Inc*, 144 Mich App 535, 544; 376 NW2d 664 (1985). Reversal is only required where the failure to do so would be inconsistent with substantial justice. *Cox v Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), quoting *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985). An instruction is inconsistent with substantial justice where the result might have been different without the instructional error. See *Slayton*, 144 Mich App at 544.

Contrary to Owner's assertion, however, we conclude there was evidence presented from which a reasonable jury could conclude that "defects [were] such that they cannot be remedied without the entire demolition of the building."

To establish his claim, Owner presented testimony from Brett Moeller whom was asked to give an estimate for raising the home. Moeller testified:

> *Q*. Let me ask you, is it possible to add a block and a half to the basement at the house on Spring Lake Road?
>
> *A*. Yes, it's possible.
>
> *Q*. Is it possible to do that with the entire demolition of the building?
>
> *A*. Yes, it is.

Moeller also agreed that "at a minimum the cost to lift the house and add the bricks and connect everything back up at a minimum would be [$97,500.]" The above testimony represents the entirety of evidence that Owner presented to establish his claim that the house could be raised without destroying the home.

On cross-examination, Moeller testified that:

> *Q*. Now, let's go to the raising of the house issue if we might. Have you ever in your experience lifted a house of this size?
>
> *A*. Not of that size, no.

Q. It's a pretty big house, no.

A. It's a big house.

* * *

Q. And do you, as part of the work that you perform, do you guarantee that you can do this without cracking any drywall or without causing structural problem to this house?

A. Absolutely not, no. You can't guarantee that, not when you are lifting a house of that size. You're probably going to wind up with cracks and things of that sort, yes.

Q. And you could end up with something where parts of it could drop a little bit and it could cause some kind of structural problem, couldn't it.

A. It could.

Q. Again, you can't guarantee that because you don't know exactly how it's going to go when you do that?

A. Hard time guaranteeing that.

Moeller further testified he did not make any recommendation to Owner whether he should or should not raise the house. Builder elicited evidence from Moeller that:

Q. And you can't—you can't indicate to us here this morning that by doing the work that you've proposed that this house couldn't be severely damaged, can you?

A. No, you can't. You can't give that.

On redirect examination, Owner's counsel asked whether raising the house "can be accomplished without destruction of the building," and Moeller replied, "[n]o, you don't have to tear it down to lift."

Here, Moeller's testimony that the house could be lifted without destroying the house is hardly convincing. Moeller's strongest testimony was that it was "possible" to lift the house without destroying it. According to Random House Webster's Dictionary (2d ed 1998), the word "possible" means "that may or can be, exist, happen, be done, be used etc." Black's Law Dictionary defines "possible" as "[c]apable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not; contrasted with impossible." Black's Law Dictionary (6th ed.). Moeller's testimony that it is "possible" to raise the house without destroying it barely presents a question of fact.

Further, considering Moeller's cross-examination testimony, there is at least a question of fact in regard to whether the house could be raised without destroying it. Moeller admitted he

had never lifted a home this large. He admitted that the house would probably "wind up with cracks and things of that sort," and he could not guarantee that the home would not suffer a "structural problem" or be "severely damaged" by raising the home. In addition, Moeller's redirect examination testimony did not squelch these doubts. His statement that "[n]o, you don't have to tear it down to lift," appears literal and does not address the likelihood that the house could be destroyed or substantially damaged by raising it.

Moreover, Bergman testified that he agreed with Moeller that the house could be raised; however, he noted many problems that could arise when lifting the home. He specifically cited several unknown costs in raising the house, including electrical service, gas service, plumbing, heating, chimney, and brickwork. He also noted that raising the house could destroy the structural integrity of the house. Here, Builder presented evidence that "defects are such that they cannot be remedied without the entire demolition of the building."

Owner also takes issue with the language of the jury instruction, claiming the jury may not have understood or may have been misled by it. Owner suggests that a proper instruction would simply have been to instruct the jury to simply determine a "cost of repair" to place him in the same position he would have been in but for the breach of contract. However, Owner fails to appreciate that the above jury instruction was specifically crafted by our Supreme Court to address defects in construction cases. Indeed, in the case in which the instruction was derived, *Gutov*, 190 Mich at 383, the plaintiff primarily claimed:

> The pier foundations under the building are 9 x 9 in size and made of cement instead of 12 x 12 of brick, and the pier foundations are not deep enough causing the building proper to settle 1 ½ inches to 1 ¾ inches, and causing the front porch to slope back toward the building 2 inches to 3 inches, instead of sloping away from the building. The cement used is not properly mixed and crumbles.

Clearly, the claims in *Gutov* are similar to the claims made in the instant case, and thus, Owner cannot maintain that the instruction was not appropriate. A trial court's determination whether an instruction is supported by the evidence is entitled to deference. *Keywell*, 254 Mich App at 339. Although we recognize that the instruction is somewhat dated, the instruction is nonetheless specifically approved by our Supreme Court and has been previously applied by this Court. This Court must apply the precedents of our Supreme Court. See Const 1963 art 6, § 1; *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds in *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 30, 732 NW2d 56 (2007).

We affirm.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly