

STATE OF MICHIGAN
COURT OF APPEALS

W.S. TOWNSEND, doing business as CLASSIC
FLOORS & INTERIORS, doing business as THE
KITCHEN SHOP, also known as MICHIGAN
KITCHEN DISTRIBUTORS,

Plaintiff/Counter Defendant-
Appellee,

v

GERALD L. NYE and SHARON V. NYE,

Defendants/Counter Plaintiffs/Cross
Defendants-Appellants,

and

BRADFORD GROUP,

Defendant,

and

EXECUTIVE HOUSING CORPORATION and
NEIL FISK CONSTRUCTION, INC.,

Defendants/Cross Defendants-
Appellees,

and

APPLEGATE HEATING & AIR
CONDITIONING,

Defendant/Counter Plaintiff-
Appellee,

and

UNPUBLISHED
July 1, 2003

No. 235396
Lenawee Circuit Court
LC No. 98-007863-CH

MICHIGAN HOMEOWNERS CONSTRUCTION
LEIN RECOVERY FUND,

Defendant/Cross Plaintiff.

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Gerald and Sharon Nye appeal by right the summary dismissal of their claims against Executive Housing Corporation (EHC).¹ We affirm.

The Nyes contracted with EHC for the construction of their home and the contract included monetary allowances for kitchen cabinetry and flooring for the home. After the materials had been supplied, EHC, through William Snyder, submitted false sworn statements indicating that the cabinetry and flooring were paid in full although no payment had been made. After liens were filed against the Nyes, they filed a third-party complaint against Snyder alleging negligent performance of contract, breach of fiduciary duty, misrepresentation and fraud, and slander of title. The Nyes also requested that EHC's corporate veil be pierced. Subsequently, the trial court summarily dismissed the Nyes' claims against EHC and Snyder under MCR 2.116(C)(10) and, here, the Nyes appeal the dismissal of their case against EHC.

The grant or denial of a motion for summary disposition is reviewed de novo. *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, considering the documentary and other evidence in a light most favorable to the nonmoving party to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

First, the Nyes argue that their negligent performance of contract claim should not have been dismissed because Snyder's negligent performance of his employment contract with EHC caused their injuries. We disagree. To establish a prima facie case of negligent performance of contract, the Nyes must prove that Snyder owed them a duty that he breached, causing damages. See *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A duty of care owed to the public may arise from a contract in that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done." *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967).

Here, the Nyes argue that as a direct consequence of Snyder's breaches of duty, EHC did not finish constructing their home and they were unable to secure refinancing at a lower interest rate. However, even if we assumed that Snyder owed a duty to the Nyes, his breach was not the

¹ The Nyes asserted the same claims against EHC's president, William Snyder, and raised the same issue on appeal in *Michigan Kitchen Distributors v Nye*, docket number 235423, which was resolved by an opinion issued on the same day as this opinion.

direct cause of their damages. EHC's failure to finish construction on their home was caused by a series of events, including the corporation's insolvency. Further, the Nyes' inability to obtain refinancing was speculative. More importantly, because Snyder did not file the liens against the Nyes' property, he did not directly affect their ability to obtain refinancing. Therefore, the trial court did not err in dismissing the Nyes' claim for negligent performance of contract against Snyder.

Next, the Nyes contend that Snyder breached his fiduciary duty. We disagree. The Nyes rely on *James Lumber Co, Inc v J & S Constr, Inc*, 107 Mich App 793, 795-796; 309 NW2d 925 (1981), for the proposition that a corporate officer may be held liable for a violation of the Michigan Building Contract Fund Act (MBCFA), MCL 570.151 *et seq.* The MBCFA was originally enacted in 1931 as a measure to provide additional protection to subcontractors and materialmen. *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 49; 631 NW2d 59 (2001), quoting *People v Miller*, 78 Mich App 336, 342; 259 NW2d 877 (1977). "It is clear that the design of the act is to prevent contractors from juggling funds between unrelated projects." *Id.*

In *James Lumber Co, Inc, supra*, the panel noted that "[i]f the money received by the contractor in fact was used to pay laborers, subcontractors, or materialmen on the specific job in question, the purpose of the act is carried out and no remedies under the act, civil or criminal, are available to the other, unpaid laborers, subcontractors, or materialmen." *Id.* at 795-796, citing *Nat'l Bank of Detroit v Eames & Brown*, 396 Mich 611, 622; 242 NW2d 412 (1976). The Nyes do not contend that Snyder used their funds to pay suppliers or contractors from other construction projects. Like the plaintiff in *James Lumber Co, Inc, supra* at 796-797, the Nyes have failed to meet their burden. Thus, the trial court did not err in dismissing their claim for breach of fiduciary duty against Snyder.

Next, the Nyes contend that Snyder misrepresented facts and defrauded them. However, the Nyes have presented no evidence of injury or damages caused by Snyder's misrepresentation that he was a licensed builder. Also, although Snyder falsely obtained a full unconditional waiver of lien, there is no evidence that Snyder caused damage to the Nyes. All liens against the property have been dismissed. Therefore, we conclude that the trial court did not err in dismissing the Nyes' claim for misrepresentation and fraud against Snyder.

The Nyes also argue that their claim for slander of title against Snyder is valid. We disagree. To establish slander of title at common law, a plaintiff must show that the defendant maliciously published false statements that disparaged the plaintiff's right in property, causing special damages. *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). The Nyes admit that all liens against their property were filed by parties other than Snyder. Therefore, the trial court did not err in dismissing the Nyes' claim for slander of title against Snyder.

Finally, the Nyes contend that EHC's corporate veil should be pierced to expose Snyder to liability. We disagree. Although the line between EHC and Snyder was somewhat blurry and many corporate formalities were disregarded, disregard of the corporate formalities alone is not sufficient to justify piercing. In addition, fraud, illegality, or injustice must be shown. *Soloman v Western Hills Dev Co (After Remand)*, 110 Mich App 257, 262-263; 312 NW2d 428 (1981). Although it is clear that the corporate form may be disregarded to prevent injustice and to reach

an equitable result, the injustice sought to be prevented must in some manner relate to a misuse of the corporate form “to defeat public convenience, justify a wrong, protect fraud or defend crime.” *Id.*, quoting *Kline v Kline*, 104 Mich App 700, 702-703; 305 NW2d 297 (1981) (citations omitted). The Nyes have failed to establish that Snyder used EHC merely as an instrumentality to commit a fraud on the Nyes. In addition, all liens against their property were dismissed. We conclude the trial court did not err by refusing to pierce the corporate veil.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra