

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RONALD COHEN,

Plaintiff-Appellant,

v

NORTHVILLE DOWNS, and LOU CARLO,

Defendants-Appellees.

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UNPUBLISHED

August 5, 1997

No. 190909

Wayne Circuit Court

LC No. 94-421793-CK

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Plaintiff, Ronald Cohen, appeals as of right an order granting defendants Northville Downs' and Lou Carlo's motion for summary disposition. We affirm.

On March 6, 1992, plaintiff participated in the twin-trifecta wager at defendants' race track. A bettor in the twin-trifecta picks the exact order of finish for the top three horses in the eleventh and twelfth races. Plaintiff had numerous tickets that picked the top three horses in the eleventh race. At the time of or immediately after the start of the twelfth race, the triumvirate of stewards officiating the race declared that horse #2 was a "scratch" because it was not near the starting line and may have been off the track. When the twelfth race ended, plaintiff held a ticket that correctly picked the top three finishers. Defendants consulted the rules approved by the racing commissioner for the twin-trifecta and determined that, because of the late scratch, the pool would be distributed evenly among all winning tickets from the first half of the twin-trifecta and all holders of second half twin-trifecta exchange tickets.

Plaintiff claims that because defendants followed this distribution scheme, he received \$3,000 instead of \$30,000. He complained to the racing commission, which concluded that defendants correctly followed the applicable rules. Plaintiff filed suit against Northville Downs and its general manager, Lou Carlo, alleging breach of contract, negligence, and fraud. The trial court granted defendants' motion for summary disposition because defendants followed the distribution required by the rules in the event of a late scratch.

On appeal, plaintiff claims that the trial court erred in granting summary disposition because there were genuine issues of material fact for the jury to consider. We disagree. Although the trial court

does not identify under which subrule it granted defendants' motion, we will treat the motion as having been granted under MCR 2.116(C)(10) because the trial court's ruling appears to be in effect that plaintiff failed to produce evidence to support his allegations. This Court reviews an order granting such a motion de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis of plaintiff's allegations. *Id.* This Court must view the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the nonmoving party. *Id.* We must then decide "whether a genuine issue regarding any material fact exists to warrant a trial." *Id.*

Plaintiff contends that he established factual issues regarding his breach of contract claim. We disagree. This Court has previously held in the context of the state lottery that the terms on the back of a lottery ticket are agreed to when the ticket is purchased. *Ramirez v Lottery Bureau*, 186 Mich App 275, 282; 463 NW2d 245 (1990). The Legislature provided that the Commissioner of the Lottery Bureau may promulgate rules regarding the payment of prizes to holders of winning tickets. *Id.* We have also held that a subscription to lottery drawings is a "mode of participation" in the game rules promulgated by the commissioner. *Paulsen v State Lottery*, 167 Mich App 328, 335; 421 NW2d 678 (1988).

Similarly, in the case at bar, plaintiff agreed to the terms on the Northville Downs program, which provided that the races were run under the rules made and published by the Michigan Racing Commissioner and that all persons buying tickets agreed to be bound by those rules and the decisions of the stewards. MCL 431.66; MSA 18.966(36), in effect on the date in question and later repealed and replaced by MCL 431.307, MSA 18.966(307), provides that the Racing Commissioner shall promulgate rules regulating a uniform system of betting on races. Rules promulgated pursuant to this statutory authorization provide that stewards are authorized to make all findings of fact as to all matters occurring during and incident to the running of a race, and to determine all objections and inquiries concerning improper course covered by a horse. AC, R 431.1260(a). Stewards are authorized to determine all questions regarding a racing matter not specifically covered by the rules in conformity with justice and the best interest of racing. AC, R 431.1260(e).

Additional rules regarding twin-trifecta racing, which were approved by the Commissioner, provide that in the event of a late scratch as happened here, the second part of the twin-trifecta's divided pool shall be evenly distributed among the holders of first half winning tickets and holders of second half twin-trifecta exchange tickets. The cumulative pool is carried over for use in the next twin-trifecta.

Defendants therefore fulfilled their contractual obligations to plaintiff to conduct the race under the rules made and published by the commissioner and to follow the decision of the stewards. Plaintiff agreed to the terms on the program which bound him to the decisions of the stewards and to the race being held under the rules of the commissioner. Under *Paulsen, supra*, plaintiff's contract with defendants is a "mode of participation" in the rules promulgated by the Racing Commissioner, and defendants complied with the applicable rules.

Plaintiff argues that he should be paid his winnings because participants in other wagers in the twelfth race were paid their full winnings. We disagree. The rules regarding the distribution scheme followed by defendant in the event of a late scratch only applied to twin-trifecta wagers. Other wagers at Northville Downs were not bound by the twin-trifecta rules approved by the commissioner. Defendants therefore acted properly in imposing the twin-trifecta distribution scheme to the twin-trifecta, but not with respect to the other races. We therefore hold that plaintiff has failed to establish a genuine issue of material fact to support his breach of contract claim.

Plaintiff next contends that he has established a prima facie case of negligence requiring reversal. We disagree. The elements of negligence are: “(1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant’s breach of duty was a proximate cause of the plaintiff’s damages; and (4) that the plaintiff suffered damages.” *Jenks v Brown*, 219 Mich App 415, 417; 557 NW2d 114 (1996). The existence of a duty is a question of law for the court. *Id.*, pp 417-418.

Plaintiff has failed to cite any authority for his assertion that defendants owed plaintiff a legal duty apart from the contractual duties evidenced in the Northville Downs program. It is clear from the case law that a lottery winner’s entitlement to a prize is governed by contract law. *Coleman v Lottery Bureau*, 77 Mich App 349, 351; 258 NW2d 84 (1977). We hold that plaintiff’s entitlement to his winnings is also governed by contract law, and we find no authority to suggest an independent duty in tort apart from any duties owed by defendants pursuant to the terms of the contract. Therefore, since plaintiff has failed to establish the first element of his prima facie case, his negligence claim must fail.

Plaintiff’s final contention is that he has established factual issues regarding his claim for fraud. We disagree. In order to prove fraud, plaintiff must show:

(1) that defendant made a material representation; (2) that the representation was false; (3) when defendant made the representation, defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity; (4) that defendant made it with the intent that plaintiff would act upon it; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff suffered injury. [*Baker, supra*, p 208.]

An action for fraud must be based on a statement relating to a past or existing fact. *Id.*, pp 208-209. “Future promises are contractual and cannot constitute actionable fraud.” *Id.*, p 209.

Here, plaintiff has failed to establish that defendants made a false representation concerning a past or existing fact. Plaintiff appears to be asserting that defendants falsely represented that they would comply with the contract. An action for fraud cannot be based on that representation because it relates to a future promise rather than a past or existing fact. Plaintiff has also failed to produce any evidence that the representation was false because defendants complied with the terms of the contract by following the decision of the stewards and by running the race in conformity with the rules promulgated and approved by the Racing Commissioner. Further, plaintiff admitted at deposition that he did not have any proof that defendants knew that the representation was false or that they acted in reckless

disregard as to whether the representation was false. Plaintiff has therefore failed to establish a prima facie case of fraud.

Affirmed.

/s/ William B. Murphy  
/s/ Michael J. Kelly  
/s/ Roman S. Gibbs