STATE OF MICHIGAN

COURT OF APPEALS

STEVE TOMASKI, MARY TOMASKI, ALEX TOMAKSI, JEAN TOMASKI, FRANK FOX and EILEEN FOX,

Plaintiffs-Appellants,

v

SRW, INC.,

Defendant-Appellee.

UNPUBLISHED
October 3, 1997

No. 190978
Otsego Circuit Court
LC No. 95-006238-CZ

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Plaintiffs appeal by right the circuit court's order granting summary disposition to defendant on plaintiffs' breach of contract and fraud claims. We affirm.

Plaintiffs own mineral rights in Otsego County, and entered into oil and gas leases with defendant that provided that plaintiffs' royalties for gas sold would be "computed at the mouth of the well." At the time the leases were signed, defendant's representative allegedly told plaintiffs that they would not be charged for any costs. Beginning in November of 1989, defendant paid plaintiffs the full amount of their royalties with no deductions except a deduction for Michigan severance tax. In 1992, when defendant began to incur expenses for carbon dioxide removal from the gas, it deducted a portion of the cost from plaintiffs' royalties. Plaintiffs did not object at that time. However, when defendant began to regularly deduct other post-production refining and transportation costs from plaintiffs' royalties in September of 1994, plaintiffs objected and later filed a complaint alleging breach of contract, fraud and misrepresentation, and seeking an accounting of all production and expenses. Defendant moved for summary disposition pursuant to MCR 2.116(C)(5), (8) and (10), arguing that because the leases specifically provide for valuation at the well, plaintiffs were obliged to pay their proportionate share of post-production costs. Defendant also asserted that plaintiffs had failed to state a claim for fraud because the statement, if made, referred to future conduct. The trial court agreed and granted defendant's motion, apparently pursuant to MCR 2.116(C)(10) with regard to plaintiffs' breach of contract claim and MCR 2.116(C)(8) regarding plaintiffs' fraud claim.

Plaintiffs claim that the trial court erred when it found that the lease language was unambiguous. We disagree. The contested provision provides that plaintiffs' royalties on sales of gas were to be "computed at the mouth of the well."[1] The recent case of *Schroeder v Terra Energy, Ltd*, 223 Mich App 176; 565 NW2d 887 (1997), presented facts substantially similar to those here for purposes of analyzing plaintiffs' contract claim. In *Schroeder*, the lease provided for valuation of the plaintiffs' royalty "at the wellhead." *Id*., 223 Mich App at 179. The defendant did not deduct any post-production costs for some time after production had begun. *Id*., at 179-180. When the defendant began to deduct such costs, the plaintiffs sued for breach of contract, raising substantially the same arguments raised by plaintiffs in the instant case. *Id*., at 180. This Court rejected those arguments, finding that the term "at the well" is used "to identify the location at which the gas is valued for purposes of calculating a lessor's royalties . . . . [W]e believe that it necessarily follows that to determine the royalty valuation, post-production costs must be subtracted from the sales price of gas where it is subsequently marketed." *Id*., at 188-189; see also *Old Kent Bank & Trust Co v Amoco Production Co*, 679 F Supp 1435, 1444-1445 (WD Mich, 1988).

We find that the only substantive distinction between this case and *Schroeder* is that the plaintiffs in *Schroeder* did not claim that they had been defrauded. As discussed below, plaintiffs here have failed to state a claim for fraud, and in the absence of fraud, extrinsic evidence of prior or contemporaneous oral agreements is not admissible to vary the terms of a written contract that is clear and unambiguous. *Schroeder, supra*, 223 Mich App at 191; *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). For the reasons stated in *Schroeder, supra*, at 191-193, we find plaintiffs' arguments based on the parties' course of performance unpersuasive, especially in view of the fact that defendant did charge plaintiffs for their proportionate share of the post-production expenses with regard to carbon dioxide removal as soon as these costs began to be incurred.

Plaintiffs also contend that the trial judge erred in summarily dismissing their fraud claim. When fraud is claimed, the circumstances constituting fraud "must be stated with particularity." MCR 2.112(B)(1); *Kassab v Michigan Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992). The necessary elements of fraud are:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Kuebler v Equitable Life Assur Society*, 219 Mich App 1, 6; 555 NW2d 496 (1996).]

Here, plaintiffs failed to allege that the statement was false; that the person making the statement knew it was false when he made it or made it recklessly; or that when he made it he intended that plaintiffs should act upon it. Therefore, the trial court properly granted defendant's motion for summary disposition because plaintiffs failed to state a claim for fraud with the sufficient particularity.

Had plaintiffs' pleadings been sufficient, plaintiff's fraud claim was nonetheless properly dismissed because defendant's statement about the division of expenses was a promise of *future* conduct that cannot support an action for fraud. *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 554; 487 NW2d 499 (1992).

Moreover, "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). "[P]laintiffs cannot claim to have been defrauded when they had information available to them that they chose to ignore." *Id*., 475. In this case, the express language of the contract stated that the royalty would be "computed at the mouth of the well." Plaintiffs were sufficiently cognizant of their rights to negotiate for additional terms, which were typed into a blank space on the preprinted form. Plaintiffs could have insisted that defendant's representation, if made, be included in those additional terms. Therefore, the trial court correctly granted summary disposition on plaintiffs' fraud claim.

Plaintiffs argue that their complaint impliedly sets forth a claim for promissory estoppel and that defendant should be estopped from denying that its representative made the alleged statement. Regardless of whether plaintiff properly plead or raised their claim, they failed to establish promissory estoppel here.

To support a claim for promissory estoppel, the promise must be clear and definite. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993). Here, it is not clear that the statement, if made, referred specifically to post-production costs. Additionally, if the representation "is made in the course of preliminary negotiations when material terms of the agreement are lacking, [then] the degree of certainty necessary in a promise is absent." *Id*. at 86. Therefore, the promise was not sufficiently clear and definite to support such a claim.

Moreover, an essential element of a claim for promissory estoppel is that injustice will result if the promise is not enforced. *Bank of Standish*, 442 Mich at 97. As this Court stated in *Schroeder*, *supra*, 223 Mich App at 189:

> Further, to accede to plaintiff's interpretation [of the lease] . . . would be to require defendant to pay royalties to plaintiffs, based not only on the value of the gas at the wellhead, but also upon the costs which defendant has incurred to prepare the gas for, and transport the gas to, market. Thus, plaintiffs' royalties would be increased merely as a function of defendant's own efforts to enhance the value of the gas through post-production investments which it has exclusively underwritten. We simply do not believe that such an interpretation . . . is more compatible with either the plain language of the agreement or with the logical expectations of the parties to the agreement.

In other words, injustice would result if this Court held that plaintiffs were entitled to profit from defendant's subsequent financial expenditures in getting the gas in marketable condition in spite of the plain language of the lease that specifies that plaintiffs' share is to be "computed at the mouth of the

well." Therefore, had plaintiffs effectively set forth a claim for promissory estoppel, that claim would have failed.

Finally, plaintiffs have provided no evidence to support their claim that defendant was aware of their subjective interpretation of the lease. "Because plaintiffs have the burden of proof or at least the burden of production in this respect, summary disposition was properly granted." *Schroeder*, *supra*, 223 Mich App at 186, citing *Quinto v Cross & Peters*, 451 Mich 358, 362-363; 547 NW2d 358 (1996). Although plaintiffs contend that defendant's failure to charge post-production costs when production first commenced is evidence of its awareness of their understanding, this argument ignores the fact that defendant did charge plaintiffs for their proportionate share of the post-production expenses with regard to carbon dioxide removal as soon as these costs began to be incurred. Thus, defendant's pattern of performance does not provide support for plaintiffs' argument. Consequently, we find that the trial court did not err when it granted defendant's motion for summary disposition as to plaintiffs' implied promissory estoppel claim.

Affirmed.

/s/ Henry William Saad
/s/ Janet T. Neff
/s/ Maureen Pulte Reilly

[1] The relevant portion of the lease provides:

> As royalty, lessee convenants [sic] and agrees: (a) To deliver to the credit of lessor, in the pipeline to which lessee may connect its wells, the equal one-eighth part of all oil produced and saved by lessee from said land, or from time to time, at the option of lessee, to pay lessor the average posted market price of such one-eighth part of such oil at the wells as of the day it is run to the pipeline or storage tanks, lessor's interest, in either case, to bear one-eighth of the cost of treating oil to render it marketable pipeline oil; (b) To pay lessor on gas and casinghead gas produced from said land (1) *when sold by lessee, one-eighth of the amount realized by lessee, computed at the mouth of the well*, or (2) when used by lessee off said land or in the manufacture of gasoline or other products, the market value, at the mouth of the well, of one-eighth of such gas and casinghead gas. . . . (Emphasis added).