

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY R. BIRMINGHAM, STEPHANIE
BOUDREAUX, MARIE CRAPANZO, BILLIE JO
GORHAM, MICHELLE LAVACK, LINDA NASH,
LINDA L. STOETZEL, and DEBORAH
WILLIAMS,

UNPUBLISHED
March 24, 1998

Plaintiffs-Appellants,

v

PARAGON OF MICHIGAN, INC., d/b/a
MOUNTAIN JACKS PARAGON STEAKHOUSE
RESTAURANTS, INC.,

No. 197285
Wayne Circuit Court
LC No. 96-608424-NZ

Defendant-Appellee.

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the trial court granting defendant's motion for summary disposition brought under MCR 2.116(C)(4) and (8). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs were waiters and waitresses at defendant's various Mountain Jacks restaurants. Plaintiffs filed the instant lawsuit claiming that they were subjected to a tip-sharing policy imposed by defendant as a term and condition of employment. Plaintiffs alleged that they were required to contribute a percentage of their daily gross sales to be shared by bartenders and other specified employees. Plaintiffs' original complaint alleged that the tip-sharing policy violated the wages and fringe benefits act, MCL 408.471 *et seq.*; MSA 17.277(1) *et seq.* In their first amended complaint, plaintiffs added claims for violation of public policy, conversion, unjust enrichment, and breach of contract.

Defendant moved for summary disposition under MCR 2.116(C)(4) and (8), arguing that the trial court lacked jurisdiction because plaintiffs failed to exhaust their administrative remedies as

* Circuit judge, sitting on the Court of Appeals by assignment.

provided in the wages and fringe benefits act. The trial court agreed and granted defendant's motion for summary disposition, stating that there was no common-law prohibition against defendant's alleged tip-sharing policy, and that plaintiffs' common-law claims were "merely artful recasting of violation of the statutory prohibition." We review de novo an order granting or denying summary disposition. *Steele v Dep't of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996).

When reviewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. *Id.* A motion for summary disposition may be granted under MCR 2.116(C)(8) if the claim is so unenforceable as a matter of law that no factual development would justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). In reviewing a motion for summary disposition brought under MCR 2.116(C)(8), we examine the pleadings alone, and accept as true all factual allegations contained in the pleadings. *Id.*

Plaintiffs argue on appeal that they were not required to file a complaint with the Department of Labor before proceeding with a lawsuit. In *Murphy v Sears, Roebuck & Co*, 190 Mich App 384; 476 NW2d 679 (1991), this Court held that the plaintiff was not required to proceed under the wages and fringe benefits act before instituting a civil action because he was seeking enforcement of a common-law contract:

Seeking, as he did, enforcement of a contract, a common-law right, the remedy afforded to plaintiff was cumulative, not exclusive. While we do find that once an employee chooses to pursue the administrative remedy, that remedy must be utilized exclusively, we do not find that the instant plaintiff was required to file a complaint with the Department of Labor. [*Id.* at 388.]

Here, the trial court appears to have interpreted the act as having some sort of *preemptive* effect, thus precluding all claims related to the payment of wages. However, as stated in *Murphy*, that is not how the act applies. Rather, the act merely provides the exclusive statutory remedy for enforcement of those rights that are *created* by the statute. Consequently, one set of factual allegations may support not only a claim under the wages and fringe benefits act, but other related claims as well.

Applying the principles of *Murphy* to the instant case, we conclude that the trial court properly dismissed plaintiffs' claim for violation of public policy. Plaintiffs' first amended complaint alleged that defendant violated the public policy expressed in MCL 750.351; MSA 28.583, which provision is identical to § 8 of the wages and fringe benefits act, MCL 408.478(1); MSA 17.277(8)(1). Therefore, consistent with *Murphy*, the wages and fringe benefits act provides the exclusive remedy for that alleged violation. However, the trial court erred in dismissing plaintiff's common-law breach of contract, unjust enrichment, and conversion claims. Moreover, because the trial court never addressed the substance of those alternative claims, we decline to do so for the first time on appeal. *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994). Instead, we believe that the proper course is to remand the case for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Robert P. Young, Jr.

/s/ James M. Batzer