STATE OF MICHIGAN

COURT OF APPEALS

JOELLYN D. KUHN and KUHN, INC., d/b/a KUHN & ASSOCIATES,

Plaintiffs-Appellants,

v

NBD BANK,

Defendant-Appellant.

UNPUBLISHED
August 28, 1998

No. 201612
Wayne Circuit Court
LC No. 96-635971 CZ

Before: Sawyer, P.J., and Bandstra and J.B. Sullivan*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8). We affirm.

Plaintiffs filed suit against defendant alleging that plaintiffs performed accounting services that benefited defendant. Plaintiffs alleged that they were entitled to the value of the services under the theories of (1) an implied in fact contract, (2) quantum meruit, and (3) the common fund doctrine. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8). The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8), reasoning that there was no relationship between plaintiffs and defendant that could reasonably lead to defendant's liability.

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by looking at the pleadings alone, *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), and may be granted where the opposing party has failed to state a claim on which relief can be granted, MCR 2.116(C)(8). All factual allegations in support of the claim are accepted as true. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion should be granted only when the claim is so clearly unenforceable

---

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

as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

Plaintiffs argue that they stated a claim against defendant for an implied in fact contract for the value of the services provided to defendant. We disagree. Plaintiffs allege that, beginning in 1989, they performed accounting services for three business entities, American Building Systems, Inc., Birmingham Development, Inc., and Stern Investment Company, Inc., doing business as First Financial Credit (collectively referred to as the "American Building entities"). Plaintiffs allege that when the American Building entities obtained loans from defendant in 1993, their duties as accountants for the American Building entities were expanded to include performing tasks requested by defendant. The American Building entities defaulted on the loans and entered into a forbearance agreement with defendant in 1995. Under the terms of the agreement, the American Building entities retained plaintiffs as servicing agents for their contracts receivable and instructed plaintiffs to provide defendant with any information defendant deemed appropriate to satisfy itself under the agreement. Plaintiffs allege that they performed numerous tasks at defendant's request to maintain and preserve the American Building entities' assets that constituted collateral for defendant's loans. Plaintiffs also allege that defendant benefited from plaintiffs' services. Plaintiffs do not allege that they billed defendant for the services rendered or that defendant agreed to compensate plaintiffs.

An implied contract exists where one accepts beneficial services of another for which compensation is customarily made and naturally accepted. *Malik v William Beaumont Hosp*, 168 Mich App 159, 172; 423 NW2d 920 (1988). The test of an implied contract for compensation is whether such services were performed under circumstances fairly raising a presumption that the parties understood and intended that they should be paid for, or that reasonable men in a similar situation would understand and expect that compensation was to be paid. *In re Camfield Estate*, 351 Mich 422, 432; 88 NW2d 388 (1958), citing *Spence v Sturgis Steel Go-Cart Co*, 217 Mich 147, 153; 186 NW 393 (1921), quoting from *Notley v First State Bank of Vicksburg*, 154 Mich 676, 681; 118 NW 486 (1908).

"Where no compensation is discussed or agreed upon in advance for services requested by and rendered to another, the presumption that compensation was intended is rebutted by circumstances which negate such an intention." *In re Camfield Estate, supra* at 433. Any presumption that compensation was intended is rebutted by the allegations that the American Buildings entities hired plaintiffs to perform accounting services commencing in 1989, retained plaintiffs as their agent under the forbearance agreement in 1995, and authorized plaintiffs, as their agent, to supply defendant with any information that defendant deemed appropriate.

Plaintiffs' amended complaint does not allege circumstances in which defendant understood, or should have reasonably understood, that it should compensate plaintiffs for the accounting services rendered. Plaintiffs' allegations establish a contractual relationship between plaintiffs and the American Building entities rather than a contractual relationship between plaintiffs and defendant. A reasonable person in defendant's position would not have intended to pay for plaintiffs' services because the American Building entities' retention of plaintiffs and the work performed by plaintiffs was part of defendant's consideration in the forbearance agreement. Accordingly, because no factual development

could possibly justify a right of recovery, we hold that the trial court did not err in granting defendant's motion for summary disposition on the implied in fact contract count.

Plaintiffs next contend that they alleged a claim for recovery on a theory of quantum meruit. We disagree. While a contract implied in fact requires an inference that the parties expected payment for the services, a court considering quantum meruit relief conclusively implies an intent to pay for the services in order to prevent unjust enrichment. *Roznowski v Bozyk*, 73 Mich App 405, 409; 251 NW2d 606 (1977). The doctrine of unjust enrichment states that a person shall not be allowed to profit or enrich himself inequitably at another's expense. *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952), quoting from *American Univ v Forbes*, 88 NH 17; 183 A 860 (1936). The process of imposing a contract implied in law to prevent unjust enrichment should be approached with caution. *In re McCallum Estate,* 153 Mich App 328, 335; 395 NW2d 258 (1986). "The essential elements of such a claim are (1) receipt of a benefit by the defendant from the plaintiff and (2) which benefit it is inequitable that the defendant retain." *Id.* A quasi or constructive contract is imposed by fiction of law to enable justice to be accomplished, even if no contract was intended. *Cascaden v Magryta,* 247 Mich 267, 270; 225 NW 511 (1929).

Defendant was not unjustly enriched because plaintiffs' principal authorized defendant to request information from plaintiffs. Defendant was entitled to receive the benefit of plaintiffs' services under the terms of the forbearance agreement and acted within the scope of the agreement. We will not employ the legal fiction of a quasi contract because no injustice exists in the present case. See *id.* In addition, plaintiffs' claim attempts to substitute defendant for plaintiffs' promisor, the American Building entities. The courts will not employ a contract implied in law to substitute one promisor or debtor for another. *Id.* Accordingly, because no factual development could possibly justify a right of recovery, we hold that the trial court did not err in granting defendant's motion for summary disposition on the quantum meruit count.

Finally, plaintiffs argue that they are entitled to compensation from defendant because they created a common fund of receivables that secured the American Building entities' indebtedness owed to defendant. We disagree. The common fund doctrine typically arises when the court is taxing costs or awarding attorney fees at the conclusion of litigation. See, e.g., *GRP, Ltd v US Aviation Underwriters, Inc,* 70 Mich App 671, 681; 247 NW2d 583 (1976), aff'd 402 Mich 107; 261 NW2d 707 (1978); *State Farm Mutual Automobile Ins Co v Allen*, 50 Mich App 71, 77; 212 NW2d 821 (1973). Where a prevailing party in litigation has created or protected a common fund for the benefit of others as well as itself, reasonable attorney fees, payable from the fund, are allowed. *GRP, supra*; *State Farm Mutual Automobile Ins Co*, *supra*. The rule is based on a policy that seeks to compensate a party who has borne the burden and expense of a litigation that has benefited others. *GRP, supra*. A litigant who creates a common fund, allocable with some exactitude to a definite group of persons, may acquire an equitable claim against that group for costs incurred in creating that fund or benefit. *Smillie v Park Chemical Co*, 710 F2d 271, 275 (CA 6, 1983). In the present case, plaintiffs do not seek recovery from the alleged common fund as the prevailing party in litigation, and we decline to extend the doctrine to the facts of this case.

Plaintiffs cite a portion of the bankruptcy code for the proposition that they are entitled to recover a portion of the value of the American Building entities' collateral that they protected:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. [11 USC 506(c).]

Plaintiffs' reliance on 11 USC 506(c) is misplaced because this lawsuit does not involve a question of federal bankruptcy law and plaintiffs are not trustees. Accordingly, because no factual development could possibly justify a right of recovery, we hold that the trial court did not err in granting defendant's motion for summary disposition on the common fund count. *Wade, supra*.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan