

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD DARBY,

Plaintiff,

v

LAKETOWN TOWNSHIP,

Defendant/Cross-Plaintiff/
Appellant,

and

KALAMAZOO LAKE SEWER AND WATER
AUTHORITY, VILLAGE OF DOUGLAS, CITY
OF SAUGATUCK, and ALLEGAN COUNTY
BOARD OF PUBLIC WORKS,

Defendants/Cross-Defendants/
Appellees.

UNPUBLISHED

January 11, 2000

No. 211942

Allegan Circuit Court

LC No. 96 19075 CK

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

In this contract case, the parties dispute the extent of contractual rights to water and sewer capacity granted to cross-plaintiff Laketown Township as a third party beneficiary to a contract between cross-defendants and the State of Michigan. Cross-plaintiff appeals as of right from the trial court's order granting cross-defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) as to count II, MCR 2.116(C)(10) as to count III, and MCR 2.116(C)(8) and (10) as to count IV of cross-plaintiff's claim. Additionally, cross-plaintiff appeals as of right from the trial court's judgment of no cause of action as to count I of cross-plaintiff's claim. We affirm.

I Facts

In 1976 the cities of Saugatuck and Douglas agreed to cooperate together to construct a sewage collection and treatment system to serve their communities. In December 1976, Saugatuck and Douglas, pursuant to MCL 124.284; MSA 5.2769(54), each signed resolutions adopting articles of incorporation to form the water authority.

On August 5, 1977, Saugatuck and Douglas, through the water authority, entered into a contract with Allegan County Board of Public Works (hereinafter "BPW") whereby BPW agreed to build the waste water collection and treatment system (hereinafter "the system") and then lease the system back to the water authority for forty years. At the end of the forty years, BPW agreed that ownership would transfer to the water authority.

At the time the water authority was planning to construct the system, the State of Michigan was building the Saugatuck Dunes Correctional Facility (hereinafter "the prison") in Laketown Township. During construction of the prison, the state sought permission to tie-in to the water authority's waste water treatment plant. However, in order for the state to hook up to the system, it was necessary for the state and the water authority to receive Laketown's permission to run some of the infrastructure along county roads within Laketown. Laketown was unwilling to grant the water authority permission unless Laketown was also granted access to the waste water treatment facility. On June 20, 1978, Laketown's board of trustees, representatives of the State of Michigan, and members of the water authority met to work out an agreement that would be acceptable to all parties. After the meeting, the state and cross-defendants believed that Laketown would approve the installation of the infrastructure within the township if Laketown could utilize up to 10,000 gallons per day capacity which would be surrendered from the 60,000 gallons per day committed to the state.

The negotiations between the state, the BPW, the water authority, and Laketown resulted in what is commonly referred to as the "Dunes Contract." Before the execution of the Dunes Contract by the water authority, BPW, and the state (Laketown was not a signatory to the contract), Laketown passed a resolution of its board of trustees on July 7, 1978, granting BPW permission to construct the necessary infrastructure along Laketown roads, which states, in part:

The Laketown Township Board hereby grants its approval to the Allegan County Board of Public Works and the Kalamazoo Lake Sewer and water authority to proceed with the construction of a sewage transmission facility over and under the above described streets, avenues and highways as are located within the boundaries of Laketown Township, Allegan County, Michigan . . . provided, however, that the residents of Laketown Township shall be permitted, notwithstanding possible earlier expiration of any contract between the Authority and the State of Michigan, to utilize for at least forty years, a minimum of 10,000 gallons per day of capacity in the Authority's treatment plant and treatment facility, and such additional per day gallonage as will not interfere with the needs of the Michigan Dunes Correctional Facility and as are within the capacities of said transmission main and treatment plant as determined and approved by said Authority and Board of Public Works, through a connection point in the vicinity of Island Lake Road and 64th Street, to be installed at the time of the original transmission main construction.

On July 11, 1978, the water authority, BPW, and the state executed the Dunes Contract. A copy of Laketown's resolution was attached to the Dunes Contract as "Attachment D" when the contract was executed, and the resolution was specifically referenced within the Dunes Contract. Under the Dunes Contract, the state agreed to pay the entire cost of installation of the water main, administration costs, specific operational costs, and reduced customer use charges. In exchange, the state was assured a maximum of 60,000 gallons per day capacity in the system that was previously reserved for use by Saugatuck. The Dunes Contract, by its terms, was to terminate as of the date and time the state ceased to own and operate the prison or forty years from the date the Dunes Contract was executed, whichever event occurred first.

As a result of the negotiations with Laketown, the state's allotted 60,000 gallons per day was subject to Laketown's right to obtain 10,000 gallons per day of capacity upon 30 days' written notice to the water authority and the state. Although Laketown was not a signatory to the Dunes Contract, Laketown requested that the Dunes Contract reflect the capacity to which Laketown would be entitled. Two paragraphs were added to the proposed agreement between the water authority and the state to reflect the agreement which had been reached with Laketown. Paragraphs 15 and 16 of the Dunes Contract state as follows:

15. LAKETOWN TOWNSHIP: Laketown Township residents may connect to the transmission facility through a connection point at the vicinity of Island Lake Road and 64th Street, which point shall be provided for in the original construction. Input through this point shall be metered and shall be limited to not more than 10,000 gallons per day. Rights under this paragraph must be effectuated by 30 days' written notice from the Laketown Township Board to the AUTHORITY and to the STATE. Upon expiration of 30 days after such notice, any reference in this contract to 60,000 gallons per day for the STATE shall be deemed to read "50,000 gallons per day", provided however, that the 10,000 gallons per day limitation may be increased to additional per day gallonage, as is within the capacity of the transmission main and treatment plant and as approved and determined by the AUTHORITY and the Board of Public Works, so long as any said additional per day gallonage will not impair or interfere with the guaranteed per day capacity granted to the STATE as hereinabove set forth. Any request for capacity by Laketown Township above the 10,000 gallons per day limitation shall be made in writing and must first be approved by the AUTHORITY and the Board of Public Works after consultation with the STATE. The AUTHORITY shall not be obligated to allocate, by virtue of such a request from Laketown Township, any additional capacity in its treatment plant above the 60,000 gallons per day allocation now provided for in this contract.

16. THIRD PARTY BENEFICIARIES: Laketown Township and its residents shall be considered to be third party beneficiaries of paragraph 15. Rights under that paragraph and this paragraph shall be preserved through the original 40 year term of the agreement, notwithstanding earlier termination as the result of the state's ceasing to own and operate the Michigan Dunes Correctional Facility.

In 1995, the state closed the prison and conveyed the property to Laketown. As evidenced by a March 11, 1996 letter from Laketown to the water authority, it became apparent that Laketown believed that under paragraphs 15 and 16 of the Dunes Contract, it was entitled to the entire 60,000 gallons per day, as a matter of right and without approval of the water authority, because the state had closed the prison and sold the property. The water authority, Saugatuck and Douglas disagreed.

II Procedural History

Plaintiff Richard Darby, a real estate developer who owned property in Laketown, commenced this suit because his initial request to connect his property to the water authority's system had been denied by the water authority. Ultimately, plaintiff's claim was dismissed by summary disposition and plaintiff has not appealed the dismissal.

Laketown filed a five-count cross-claim against its codefendants Saugatuck, Douglas, the water authority, and BPW. Count I alleged that under paragraphs 15 and 16 of the Dunes Contract, Laketown is entitled to additional capacity out of the state's contracted capacity of 50,000 gallons per day upon written request, subject only to consultation with the state to confirm that the state will not need such capacity, and because the state no longer owns and operates the prison, Laketown is entitled to the full 60,000 gallons per day without approval from the water authority. Count II alleged that under the Dunes Contract, Laketown is entitled to "step into the shoes of the State" and pay the same rate for the 50,000 gallons per day capacity that the state paid, and that Laketown is not required to pay the usual connection fees and other charges which are paid by nonresident customers of the system. Count III alleged that in the alternative to an express contract under the Dunes Contract, "cross-defendants impliedly agreed that . . . [Laketown] could use the portion of the 60,000 gallons per day contracted capacity no longer needed by the state, at the same rates (without connection charges) under the express terms of the 1978 [Dunes] Contract." Count IV alleged that if cross-defendants are allowed to deny Laketown the right to use the contracted capacity at the same rate (and without connection fees) as provided for the state in the Dunes Contract, cross-defendants would be unjustly enriched and that it would be inequitable for cross-defendants to retain the benefits of the Dunes Contract, which was made possible by Laketown's approval of installation of the transmission main in Laketown. Count V alleged that the rates which cross-defendants were insisting were applicable to the use by Laketown violated conditions included in state and federal grants used to construct the system.

The trial court dismissed counts II, III, IV of Laketown's cross-claim against the water authority, Saugatuck, and Douglas following a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), and it granted Laketown leave to amend its cross-claim as to count V because Laketown had not attached to the pleadings the document upon which the claim was based as required by MCR 2.113(F). In addition to curing the procedural deficiency, Laketown added the subheading "BPW only" to counts II, III, and IV in its amended cross-claim. Following the trial court's grant of summary disposition as to counts II, III, and IV against the water authority, Saugatuck, and Douglas, BPW filed a motion for summary disposition. Instead of a second hearing and ruling, a stipulation and order was signed which disposed of Laketown's cross-claim against BPW in accordance with the court's order following the summary disposition motion by the water authority, Saugatuck, and Douglas.

as if a motion for summary disposition had been brought by BPW at the time the motion was brought by the other cross-defendants.

On March 2, 1998, the trial court conducted a one-day bench trial regarding count I of Laketown's cross-claim. Before trial, the trial court dismissed count V following a motion for summary disposition by cross-defendants. After a day's worth of testimony and reviewing documentary evidence, the trial court found that Laketown has an unconditional right to access the 10,000 gallons per day capacity, but the right to use any additional capacity is strictly governed by paragraphs 15 and 16 of the Dunes Contract which requires Laketown to get approval from the water authority rather than an unconditional automatic right to the unused capacity allotted to the state. Accordingly, the trial court denied Laketown's request for a declaratory judgment of unconditional rights to the 50,000 gallons per day capacity.

III Analysis

A. Trial court's dismissal of counts II, III, and IV of Laketown's cross-claim.

Before reaching the merits of cross-plaintiff's appeal, we note that cross-defendants argue that cross-plaintiff abandoned its claim under counts II, III, and IV because cross-plaintiff's second amended cross-claim added the words "BPW only" to the subheading of counts II, III, and IV and then cross-plaintiff did not pursue these claims against BPW at trial. We disagree. Although an amended pleading generally supersedes any previous pleading, MCR 2.118(A)(4), in this case cross-plaintiff was simply acknowledging that the trial court had dismissed counts II, III, and IV by summary disposition, but that cross-defendant BPW had not been a party to the motion. Additionally, counts II, III, and IV were dismissed against BPW in a stipulation and order before trial; therefore, Lakewood did not abandon these claims by not introducing evidence at trial as to counts II, III, and IV against BPW. Accordingly, Lakewood has not abandoned the issue of the trial court's dismissal of counts II, III, and IV as to all cross-defendants.

This Court reviews the trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Therefore, this Court must review the record in the same manner as the trial court to determine whether the movant was entitled to a judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

First, cross-plaintiff argues that the trial court erred when it dismissed cross-plaintiff's breach of contract claim regarding the applicable rates to be charged by the water authority pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). However, a mere statement of a pleader's conclusions, unsupported by allegations

of fact, will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

In the instant case, cross-plaintiff has alleged that it is entitled to “step into the shoes of the State” and pay the same rate for the 50,000 gallons per day capacity that the state paid, and that cross-plaintiff is not required to pay the usual connection fees and other charges which are usually paid by nonresident customers of the system. “For a plaintiff to sue on a contract to which he is not a party, it must be determined that the plaintiff was an intended third-party beneficiary of the contract which suit is brought on.” *Krass v Joliet, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999). “The contract itself reveals the party’s intentions.” *Frick v Patrick*, 165 Mich App 689, 694; 419 NW2d 55 (1988). The Dunes Contract expressly states in paragraph 16 that the water authority and the state intended cross-plaintiff to be a third-party beneficiary under paragraph 15 only. However, paragraph 15 does not address rates and connection fees. The rates agreed upon for the state to pay are set forth in paragraph 6, and in its cross-claim, Laketown pleaded no facts that indicate that the water authority intended the rates for the state to apply to cross-plaintiff. Accordingly, the trial court properly granted summary disposition as to count II of cross-plaintiff’s claim.

Second, cross-plaintiff argues that the trial court erred when it dismissed Laketown’s claim for breach of implied contract pursuant to MCR 2.116(C)(10) because it did not acknowledge the evidence that the water authority and the state intended to confer a benefit on Laketown as a third-party beneficiary, and Laketown’s approval of the construction of the infrastructure was a prerequisite to the Dunes Contract. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion granted under MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties. MCR 2.116(G)(5).

Elements required to establish an implied contract include: (1) parties being competent to contract, (2) proper subject matter, (3) consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In the instant case, cross-plaintiff produced no evidence that would indicate that the water authority intended to confer on cross-plaintiff the benefits cross-plaintiff alleges it is entitled to. To the contrary, the Dunes Contract expressly states that cross-defendants intended to limit cross-plaintiff to the benefits set forth in paragraph 15. It is fundamental that a contract will be implied only if there is no express contract covering the same subject matter. *Johnson v Michigan Mutual Ins Co*, 183 Mich App 277, 280; 454 NW2d 128 (1989).

Cross-plaintiff argues that “the Dunes Contract is silent insofar as it does not establish any other rate applicable to the state’s 60,000 gallons per day capacity in the event that a portion of that capacity is used by Laketown [;therefore,] it must follow that the state and/or the Authority intended to allow Laketown to access a portion of the state’s capacity at the rates established for the state by the Dunes Contract.” However, as previously discussed, paragraph 16 of the Dunes Contract evidences that the parties did contemplate the extent of cross-plaintiff’s rights as a third-party beneficiary, and the parties

expressly and unambiguously limited cross-plaintiff's rights to the capacity allotment set forth in paragraph 15.

Next, cross-plaintiff argues that the trial court erred when it dismissed its claim of unjust enrichment pursuant to MCR 2.116(C)(8) and (10) because there is evidence that the water authority had been unjustly enriched at cross-plaintiff's expense. Specifically, if the water authority is allowed to refuse Laketown the benefit set forth in the Dunes Contract and Laketown's resolution, i.e., a minimum of 10,000 gallons per day at the rates established for the state, the water authority will be unjustly enriched at the expense of Laketown.

The doctrine of unjust enrichment operates to imply a contract where a defendant has received a benefit from a plaintiff and an inequity would otherwise result at the plaintiff's expense because of the retention of the benefit by the defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993) (citing *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991)). "However, a contract will be implied only if there is no express contract covering the same subject matter." *Id.* (citing *Campbell v City of Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972)). As discussed above, the Dunes Contract named cross-plaintiff as a third-party beneficiary and paragraph 16 expressly limited cross-plaintiff's rights to those set out in paragraph 15. Accordingly, this Court will not imply a contract under the doctrine of unjust enrichment and create additional rights to cross-plaintiff's benefit that go beyond the express terms of the Dunes Contract. The trial court properly granted defendant's motion for summary disposition of this claim.

B. Trial court's judgment of no cause of action as to count I of Laketown's cross-claim.

Count I of cross-plaintiff's claim alleged that under the Dunes Contract and the Laketown Resolution of July 7, 1978, Laketown is entitled to additional capacity out of the state's contracted capacity upon written request subject only to consultation with the state to confirm that the state will not need such capacity, and because the state no longer owns and operates the prison, cross-plaintiff is entitled to the full 60,000 gallons per day capacity without approval from the water authority.

Cross-plaintiff argues that the trial court erred when it discounted the facial inconsistency between the Laketown resolution and the language of paragraph 15 and rendered a judgment of no cause of action against cross-plaintiff. "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994). If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties. *Chrysler Corp v Brenca Contractors, Inc*, 146 Mich App 766, 775; 381 NW2d 814 (1985). A contract is ambiguous if "its words may reasonably be understood in different ways." *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). In this case, the trial court determined that the conflicting terms between Laketown's resolution and paragraph 15 of the Dunes Contract made it necessary to examine extrinsic evidence to discern the intent of the parties involved.

A bench trial was conducted on March 2, 1998 to determine the intent of the parties to the Dunes Contract in light of the apparently conflicting language in the Dunes Contract and the Laketown

resolution. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). The trial court heard a day's worth of testimony and reviewed eighteen trial exhibits which were jointly submitted by the parties. The trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C).

Cross-plaintiff argues that the trial court erred when it discounted the facial inconsistency between the resolution and the language of paragraph 15. However, the trial court addressed what appeared to be conflicting language in the Laketown resolution, and after reviewing extrinsic evidence, held that the resolution and paragraph 15 of the Dunes Contract can be read together. The trial court found that the resolution and paragraph 15 of the Dunes Contract grant cross-plaintiff access up to 60,000 gallons per day capacity, of which 10,000 gallons per day is guaranteed and the additional 50,000 is subject to approval by the water authority.

The trial court's findings are supported by the record. Testimony by Allegan District Judge Stephen Sheridan, who represented the water authority in 1978, and by the manager of the water authority, who signed the Dunes Contract on behalf of the water authority, established that it was never the understanding of the water authority that, under the Dunes Contract, cross-plaintiff would automatically be entitled to one-hundred percent of the state's capacity if the prison closed. Written communication between parties indicates that the understanding was that Laketown would be entitled to capacity up to 10,000 gallons per day. Finally, the attorney who represented Laketown during negotiations for the Dunes Contract testified that he believes that at one point Laketown's board may have agreed to accept a 10,000 gallons per day maximum, but that the board changed its mind after consulting with its attorney. However, there is no evidence that the change in position was communicated to cross-defendants, nor is there any evidence which indicates that Laketown objected to the language in paragraphs 15 and 16 of the Dunes Contract. Accordingly, the trial court's findings of fact and its interpretation of the Dunes Contract were not clearly erroneous.

IV Conclusion

The circuit court's grant of summary disposition as to counts II, III, and IV of cross-plaintiff's claim was proper because cross-defendants were entitled to judgment as a matter of law under MCR 2.116(C)(8) & (10). Cross-plaintiff set forth no facts from which the trial court could conclude that cross-defendants intended cross-plaintiff's rights as a third-party beneficiary to the Dunes Contract to extend beyond the rights set forth in paragraph 15 of the contract. Furthermore, a contract cannot be implied if an express contract exists regarding the subject matter. Here, the Dunes Contract expressly states cross-plaintiff's rights to capacity in the water treatment and sewer system.

Facially, the Dunes Contract and the attached resolution appear to conflict and the intent of the parties is ambiguous. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. Findings of fact by the trial court may not be set aside unless clearly erroneous. The trial court's interpretation of the Dunes Contract and its opinion as to the intent of the parties at the time the Dunes Contract was executed are supported by the record. Therefore, the trial court's findings are not clearly erroneous.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael J. Kelly

/s/ Gary R. McDonald