

STATE OF MICHIGAN
COURT OF APPEALS

WATERS, COOK, OSLUND & WAUGH, PC,

Plaintiff-Appellant,

v

CITY OF BENTON HARBOR,

Defendant-Appellee.

UNPUBLISHED

August 11, 2000

No. 213687

Berrien Circuit Court

LC No. 96-003755-CK

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's order granting defendant's motion for summary disposition. We reverse and remand.

This case arises out of plaintiff's action to collect additional attorney fees allegedly owed to plaintiff by defendant for services rendered as its city attorney. Plaintiff was retained by defendant to act as its city attorney through a resolution by the city commission. The resolution, which incorporated plaintiff's proposal, provided that plaintiff would perform forty hours of legal services per week in return for a monthly payment of \$12,500. Plaintiff alleged that the parties then entered into an oral agreement whereby defendant agreed to compensate plaintiff for legal services performed in excess of forty hours per week at a rate of \$72.13. When defendant failed to pay plaintiff for additional legal services claimed by plaintiff, plaintiff filed suit. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and, following a hearing on the matter, the circuit court granted defendant's motion.

Plaintiff raises several issues on appeal, one of which we find dispositive. Plaintiff argues that the trial court committed error requiring reversal when it did not allow plaintiff an opportunity to amend its complaint to allege estoppel or unjust enrichment. We agree. We review the trial court's decision to allow amendment of a pleading under MCR 2.116(I)(5) for an abuse of discretion. *MacDonald v PKT, Inc*, 233 Mich App 395, 402; 593 NW2d 176 (1999), citing *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

A trial court should freely grant leave to amend pleadings if justice so requires. MCR 2.118(A)(2); *Weymers, supra* at 654. If a trial court grants summary disposition pursuant to MCR

2.116(C)(8), (9), or (10), the trial court must give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5); *Doyle v Hutzel Hospital*, ___ Mich App ___; ___ NW2d ___ (Docket No. 210750, issued 5/19/2000) slip op p 4. The amended pleading can introduce new facts, new theories, or even a different cause of action as long as the amendment arises from the same transactional setting that was set forth in the original pleading. *Id.*

Here, the court granted summary disposition, at least in part, because the fees claimed by plaintiff were not authorized by the contract and because defendant's commission had not passed a special resolution modifying the agreement to authorize additional legal fees. According to the court's decision denying plaintiff's motion for reconsideration, the court declined to address an "unjust enrichment" theory of recovery because the court did not believe such a theory had been pleaded in plaintiff's complaint. However, plaintiff's complaint did allege that plaintiff performed 1,027 hours of legal services on behalf of defendant in excess of the contractual forty hours per week amount, and that it informed defendant that it was working these additional hours. Moreover, amendment to include a claim based on an equitable theory of recovery would not be futile.

A municipal entity is estopped from denying liability for goods or services supplied to it, after accepting the benefits of the goods or services, particularly labor, by asserting an ultra vires defense, where the service provided is within the municipal entity's power to procure and the service is not illegal in nature, even where the municipality's power has been exercised in an irregular fashion to secure the provision of the service. *Parker v Twp of West Bloomfield*, 60 Mich App 583, 591-599; 231 NW2d 424 (1975). In the absence of a valid contract for legal services provided beyond the weekly forty hour amount, the municipality in this case could be liable under a theory of quantum meruit for the fair value of the legal services rendered. *Moore v City of Detroit*, 164 Mich 543, 549; 129 NW 715 (1911). Therefore, the trial court abused its discretion when it failed to allow plaintiff to amend its complaint to reflect a quantum meruit theory of recovery that relied on estoppel and unjust enrichment where the complaint before it alleged facts suggesting the existence of this valid theory of recovery.

In view of our decision on this issue, we need not address plaintiff's remaining issues on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jeffrey G. Collins