STATE OF MICHIGAN

COURT OF APPEALS

LANE COLBY,

Plaintiff-Appellee/Cross-Appellant,

v

KENNETH R. ZIMMERMAN and MARIAN E. ZIMMERMAN,

Defendants,

and

MARION G. KAUFMAN TRUST, JACK KAUFMAN and MARION G. KAUFMAN,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
October 12, 2001

No. 220395
Sanilac Circuit Court
LC No. 97-025077-CH

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendants, Marion G. Kaufman Trust, Jack Kaufman and Marion G. Kaufman (the Kaufmans), appeal as of right from a jury verdict in favor of plaintiff, from the trial court's partial denial of defendants' motion for directed verdict, and its denial of defendants' motion for judgment notwithstanding the verdict (JNOV), new trial, or remittitur. Plaintiff, Lane Colby, cross-appeals the trial court's order partially granting the Kaufmans' motion for summary disposition. We affirm in part, reverse in part, and remand for entry of judgment notwithstanding the verdict in favor of the Kaufmans.[1]

I. Fraud Based on Bad-Faith Promise

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[1] We decide this case without oral argument pursuant to a stipulation of the parties.

The Kaufmans claim that the trial court erred by denying their motions with regard to Colby's claim of fraud based on bad-faith promise. The elements of fraud are well established in our state:

> The general rule is that to constitute actionable fraud it must appear: (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. [*Kassab, supra* at 442, quoting *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).]

Further, it is well-settled that "[f]uture promises are contractual and do not constitute fraud." *Hi-Way Motor, supra* at 336; see also, *Rutan v Straehly*, 289 Mich 341, 348; 286 NW 639 (1939). Fraud based on bad-faith promise is a narrow exception to the general rule that an action for fraudulent misrepresentation "must be predicated upon a statement relating to a past or an existing fact." *Hi-Way Motor, supra* at 336. Under this theory, an action for fraud exists for "the non-performance of a promise in certain cases where the promise is the device used to accomplish the fraud." *Rutan, supra* at 349. The exception requires evidence of a fraudulent promise "made in bad faith without intention of performance." *Hi-Way Motor, supra* at 337-338.

However, to fall within the bad-faith promise exception, the fraudulent intent "must relate to conduct of the actor 'at the very time of making the representations, or almost immediately thereafter.'" *Id*. at 338-339, quoting *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930); see also *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989). Accordingly, a plaintiff must show that, at the time the defendant made the promise, he had a bad-faith, fraudulent intent regarding the future activity in order to deceive the plaintiff and to induce his reliance. *Hi-Way Motor, supra* at 338-339. Given the difficulty of proving a defendant's state of mind, the facts and circumstances of a case may establish an inference of bad faith. *Rutan, supra* at 349. Nonetheless, as with any tort claim of fraud, the plaintiff must prove the elements of fraud based on bad-faith promise by clear and convincing evidence. *Jim-Bob, supra* at 90.[2]

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[2] We reject Colby's claim that our courts have established "no definitive standard for the burden of proof" in fraud cases and we find the cases Colby cites in support of that proposition easily distinguishable. Both *Campbell v Great Lakes Insurance Co*, 228 Mich 636; 200 NW 457 (1924) and *Mina v General Star Indemnity C*o, 218 Mich App 678; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997), involved insurers that used fraud and false swearing as *an affirmative defense* to preclude recovery under insurance policies. In *Modern Displays, Inc v Hennecke*, 350 Mich 67; 85 NW2d 80 (1957), the plaintiff asserted fraud as a basis for a reformation of contract claim. In that case, our Supreme Court cited both the clear and convincing and preponderance of evidence standards of proof for the assertion of fraud, without distinction or discussion. *Id*. at 73. Moreover, since then, the Supreme Court and this Court have clearly stated that a plaintiff must prove a tort claim of fraud by clear and convincing

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II. Directed Verdict

The trial court did not err in denying the Kaufmans' motion for directed verdict because an issue of fact existed regarding Colby's fraud based on bad-faith promise claim.

We review the grant or denial of a motion for directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In considering the trial court's ruling, this Court reviews "all the evidence presented up to the time of the motion to determine whether a question of fact existed." *Clark v K-Mart Corp*, 242 Mich App 137, 139; 617 NW2d 729 (2000). Further, we view "the evidence in the light most favorable to the nonmoving party, grant it every reasonable inference, and resolve any conflict in the evidence in the nonmoving party's favor." *Id.* "If reasonable jurors could have reached different conclusions, we will not substitute our judgment for that of the jury." *Id*. at 140.

Colby and Jack Kaufman's trial testimony differed on virtually every issue. However, because this Court must view the evidence in a light most favorable to Colby, we accept as true Colby's contention that Jack Kaufman made a material representation orally and in writing in December 1996, that "Lane Colby will be [sic] cash rent my farm for the 1997 year."[3] *Clark, supra* at 139; *Kassab, supra* at 442.

Colby was also required to prove that Jack Kaufman's representation was false. *Kassab, supra* at 442. The parties agree that Colby was not allowed to plant on the 165 acres of the Kaufman farm during the spring planting in 1997. Therefore, Jack Kaufman's future assurance that Colby could farm the land in 1997 turned out to be untrue.

Next, Colby needed to prove by clear and convincing evidence that, when Jack Kaufman promised Colby he could rent the farm in 1997, he knew that promise was false or made the future promise "recklessly, without any knowledge of its truth." *Kassab, supra* at 442. In addition, because this future promise, to be actionable, must fall under the bad-faith exception, Colby also had to prove that Jack Kaufman made the promise "in bad faith without intent to perform," *Jim-Bob, supra* at 90, or, in other words, that Kaufman possessed a fraudulent intent when he made the representation or almost immediately thereafter. *Hi-Way Motor, supra* at 338-339.

The trial court denied the Kaufmans' motion for directed verdict because Jack Kaufman testified that he had an agreement with the Zimmermans to sell the farm as of December 28, 1996, the day he assured Colby that he could rent the farm in 1997. The trial court submitted the

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evidence. *Flynn v Korneffel*, 451 Mich 186, 199, 201-202; 547 NW2d 249 (1996); *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459; 559 NW2d 379 (1996); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989); *Hi-Way Motor Co v Int'l Harveste*r, 398 Mich 330, 336; 247 NW2d 813 (1976).

[3] Colby also testified that Kaufman verbally assured him in early and late December 1996 that he could rent the same number of acres in 1997 that he farmed in 1996, 165 acres.

issue to the jury because it ruled that the testimony created an issue of fact for the jury regarding whether Jack Kaufman fraudulently intended to deceive Colby.

Kaufman offered conflicting testimony regarding when he actually sold his farm to the Zimmermans. It appears that the closing on the sale took place in March 1997, but, at one point, Kaufman testified that he considered the farm sold as early as December 1996. We agree with the trial court that this testimony created an issue of fact for the jury regarding whether Kaufman intended to perform on his December 28 representation that he would rent his land to Colby in 1997. Though Kaufman's testimony conflicted regarding when he believed he and the Zimmerman's had a firm agreement, because Kaufman's knowledge about the imminent sale and his innocent or fraudulent intent were issues of fact for the jury, the trial court did not err in denying the Kaufmans' motion for directed verdict on this issue. *Wickens, supra* at 388-389.

III. Judgment Notwithstanding the Verdict

Though the trial court properly submitted Colby's fraud based on bad-faith promise claim to the jury, the trial court should have granted the Kaufmans' motion for JNOV because reasonable jurors could not conclude that Colby proved by clear and convincing evidence that Jack Kaufman made a false promise, in bad-faith, with no intent to perform.[4]

Our Court reviews a trial court's decision regarding a motion for JNOV de novo. *Morinelli v Provident Life and Acc Ins Co*, 242 Mich App 255, 260; 671 NW2d 777 (2000). "In reviewing the trial court's decision on a motion for JNOV, we view the evidence in a light most favorable to the nonmoving party to determine whether reasonable jurors could reach different conclusions." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 115; 593 NW2d 595 (1999). "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Id.*, quoting *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

We hold that, viewing the evidence in the light most favorable to Colby, reasonable jurors could not conclude that Colby proved Jack Kaufman's bad-faith intent not to perform by clear and convincing evidence.

Colby's argument below and on appeal is that Jack Kaufman made an unconditional promise to Colby and that "Kaufman had a duty to act in good faith in making the unconditional promise; however, all the while he intended his promise to be conditioned upon 'no sale' to Zimmermans." Colby further argues that evidence showed that Jack Kaufman's "false promise was made as part of a scheme to defraud." The Kaufmans, on the other hand, maintain that the

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[4] We reject the Kaufmans' claim that Colby should not have prevailed on his claim of fraud based on bad faith promise because he failed to properly plead his claim under MCR 2.112(B)(1). We find that Colby asserted his claim with sufficient factual particularity and that, were we to find it deficient, the trial court could have properly allowed Colby to amend his pleadings at any time after finding that the proofs at trial justified an amendment thereto. MCR 2.116(I)(5); MCR 2.118(C)(1).

evidence failed to show that Jack Kaufman had a present intent to breach his promise to rent the land to Colby in 1997.

Testimony regarding Jack Kaufman's belief that the farm was sold before December 28, 1996, was far from clear or convincing. In fact, Kaufman made inconsistent statements about this very issue throughout his testimony. As noted above, Kaufman did state that he believed the farm was as good as sold in December 1996. However, Kaufman also testified that he did not have a deal with the Zimmermans until December 30, 1996, two days after he allegedly assured Colby he could farm in 1997. Kaufman also testified that he understood that the sale did not actually occur until they signed the purchase agreement and closing papers. Moreover, Kaufman testified at another point that he believed he actually had a deal with the Zimmermans when he received their $1,000 earnest money check dated January 4, 1997. Thus, while Jack Kaufman's testimony that he believed the farm was sold supported Colby's claim of bad-faith, any one of his other assertions would negate an inference of Kaufman's fraudulent intent in making a promise to Colby on December 28. Thus, the evidence on which the jury had to rely to find a bad-faith promise was tenuous at best, and far from clear and convincing as required by our case law.[5]

The record clearly established that the Zimmermans did not sign a purchase agreement until February 11, 1997, well after Kaufman represented to Colby that he could rent the land. Accordingly, the farm was not yet sold on December 28, 1996, and Kaufman would not have truly known he could not rent to Colby when he made the representation. Colby emphasizes that, as long as Kaufman *believed* the property was sold before December 28, 1996, his promise to Colby must have been made in bad faith. However, the evidence of the actual date of sale to the Zimmermans, along with Kaufman's conflicting testimony regarding his state of mind, renders evidence of Kaufman's intent uncertain.

Common sense also compels us to consider Colby's claim in light of his admitted knowledge at the time he alleges Jack Kaufman deceived him. Indeed, any alleged fraudulent deception on the part of Jack Kaufman is substantially diminished, if not totally eliminated, by the fact that Colby knew Kaufman planned to sell, and was in the process of selling, the farm. First, Colby helped Jack Kaufman sell his farm equipment in March 1996 in anticipation of his retirement. Also, Colby admitted that he saw the "For Sale" signs on the Kaufman property prior to any representation Kaufman made to him. Accordingly, Colby's claim that Kaufman promised him he could rent the land "unconditionally" defies logic. No evidence showed that Kaufman promised he would make any sale contingent upon the new buyers allowing Colby to continue renting. Kaufman's statement that Colby could continue to rent "*his*" farm does not suggest Kaufman acted in bad faith: Colby was well aware that, at any time, the property might be sold and no longer in Kaufmans' control. Thus, were we to conclude that Jack Kaufman told Colby he could farm 165 acres in 1997 knowing that the Zimmermans expressed an interest in buying the property, that future promise does not show a bad-faith intent to deceive Colby.

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[5] See *Jim-Bob*, *supra* at 90; *Flynn*, *supra* at 199; *Foodland*, *supra* at 459; *Hi-Way Motor*, *supra* at 336.

Moreover, Colby's knowledge of the Kaufmans' intent to sell the farm made his asserted reliance on Kaufman's representation patently unreasonable.[6] "[A] person who unreasonably relies on false statements should not be entitled to damages" based on a fraudulent misrepresentation. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999). Not only was Kaufman's offer to rent his farm to Colby implicitly contingent upon his continued ownership, clearly it was Kaufman's prerogative to plan for a future rental of the property in case the sale to the Zimmermans fell through (as did another sale to David Borg in the fall of 1996). Colby's knowledge of the imminent sale simply defeats his claim.

Furthermore, Colby admitted at trial that he never planted crops on Kaufmans' farm until Jack Kaufman told him how many and which acres he could rent in May each year. Therefore, because Colby could not plant until late spring, because he never knew how many or which acres he could plant until late spring, and based on Colby's knowledge that the farm was for sale, to find that Jack Kaufman in any way made an unconditional and fraudulent promise to Colby is without logical, or sufficient evidentiary, support.

In sum, because the Kaufmans did not actually sell the farm until February or March 1997, and because Jack Kaufman's testimony conflicted regarding his belief about when he actually struck a deal with the Zimmermans, Colby did not establish by clear and convincing evidence that Kaufman made a promise which he did not intend to keep. Moreover, because Colby knew Kaufman planned to sell his farm and learned early in 1997 that the Zimmermans bought it, his claim that he relied on Kaufman's "unconditional" promise is both unreasonable and disingenuous. Thus, despite our reluctance to overturn a jury's verdict, we must conclude that the trial court should have granted the Kaufmans' motion for JNOV because no reasonable juror could find that Colby proved his claim by clear and convincing evidence. Accordingly, while we affirm the trial court's order denying the Kaufmans' motion for directed verdict, we reverse the trial court's order denying the Kaufmans' JNOV motion, and remand for entry of an order of JNOV in favor of the Kaufmans.[7]

IV. Summary Disposition

Colby argues on cross appeal that the trial court erred in partially granting the Kaufmans' motion for summary disposition on his leasehold claims. We disagree.

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[6] Moreover, Colby's pleadings suggest that he knew about the sale to the Zimmermans at a time earlier than his claims suggest. Colby admitted in his original and first amended complaints that, prior to the closing on March 1, 1997, he told the Zimmermans that, notwithstanding the sale, he wanted to continue to cash rent the farm (Lower Court File, Complaint, ¶ 30; Second Amended Complaint, ¶ 31). Given this assertion, any continued reliance by Colby throughout 1997 would have been unreasonable.

[7] Because we reverse the trial court's denial of the Kaufmans' JNOV motion, we need not address the Kaufmans' claim for remittitur.

This Court reviews a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).[8]

Colby alleged in his complaint that Jack Kaufman renewed a year-to-year lease for 1997 on December 28, 1996, and that he was wrongfully ejected from the property because he was entitled to one year notice to quit. Our Court has explained:

> A lease is a conveyance by the owner of an estate of a portion of the interest therein to another for a term less than his own for a valuable consideration. A lease gives the tenant the possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease. *In order for an agreement to be a valid lease, it must contain the names of the parties, an adequate description of the leased premises, the length of the lease term, and the amount of the rent*. [*De Bruyn Produce Co v Romero*, 202 Mich App 92, 98-99; 508 NW2d 150 (1993) (citations omitted); see also *United Coin Meter Co v Gibson*, 109 Mich App 652; 311 NW2d 442 (1981).]

The writing that Colby claims constitutes a written lease agreement states only that "Lane Colby will be [sic] cash rent my farm in 1997." This writing does not constitute a valid lease for several reasons. It does not contain the amount of rent; it does not adequately describe the premises to be leased; Colby never rented the entire farm and Kaufman always told him how many and which acres he could rent some time in May. Further, and most importantly, Colby admitted and Jack Kaufman testified that the document was filed with the Farm Services Agency for purposes of government subsidies. Colby cannot assert that the writing was made for one purpose, to collect his farm credits, then purport that it actually was made for another purpose, to establish that he and Kaufman intended to enter a binding, one-year lease agreement.

Moreover, in his deposition, Colby repeatedly testified that he and Jack Kaufman did not discuss or agree upon an amount of rent and that, at the end of the year, Kaufman would simply tell Colby the amount he wanted him to pay. Further, Colby specifically testified that the amount of rent was never tied to an objective standard or configuration. Jack Kaufman testified, similarly, that he set the rent in 1991 and never discussed it thereafter. Kaufman testified that, thereafter, Colby just entered the land and farmed without any consent or agreement. Kaufman also testified that, at the end of the year, Kaufman would give Colby a figure that Kaufman decided would cover his taxes and insurance and Colby would write a check for whatever amount Kaufman requested.

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[8] In reviewing a motion under this rule, this Court considers the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995).

Colby claims that leases that do not contain a rental amount are valid if the amount can be determined by the conduct of the parties or a methodology in the terms of the lease. However, as the trial court correctly ruled, the cases cited by Colby, including *Schneider v Bank of Lansing*, 337 Mich 646; 60 NW2d 187 (1953) and *Fuller v Michigan National Bank*, 342 Mich 92; 68 NW2d 771 (1955), are inapposite because they not only involve a prior written agreement, the written agreement set forth a specific method of determining rent after a long lease period. Further, in *Fuller*, the "methodology" specified in the written agreement provided that, if the tenant wished to continue the lease for several more years, the landlord could set the rental amount, but could not increase the rent above a certain amount.

Colby argues that the "methodology" employed by Jack Kaufman in leasing to him was that they tacitly agreed to a "reasonable" rental amount. However, the parties' silence on the issue of rent in no way establishes a "*method*" for determining the amount of rent, especially because the parties agreed that it was left entirely to Jack Kaufmans' discretion. Furthermore, Colby specifically testified that the rent was not tied to any agreement, methodology or formula. Accordingly, Colby's attempt to square this rental rate "arrangement" with the above cases fails; clearly, any agreement Colby and Kaufman may have had lacked this essential term and no lease existed.

Moreover, we agree with the trial court that the following assertions in Colby's response to the Kaufmans' motion are fatal to his claim that the agreement for 1997 was merely an extension of a prior lease:

> Lane Colby entered into fresh agreements with Kaufman, year after year. While some of the terms if their lease arrangement may have remained consistent each year ... other terms were renegotiated each year ...."

These statements weaken Colby's argument regarding *Bird, supra*, because, as the trial court properly concluded, "[t]he Supreme Court in the [*Bird*] case has indicated that they are only enforcing this lease because it is merely a change in the amount of rental of an existing lease, not the creation of a new or similar right or renewing a lease." Colby specifically states in his response brief that his "lease agreement" with Jack Kaufman was not merely a continuation of an existing lease, but a newly negotiated agreement every year.

Finally, Colby's attempt to characterize himself as a holdover tenant who was entitled to a one-year notice to quit is meritless. As the Kaufmans point out, because Colby admitted that his understanding with Kaufman was to rent the land for one year at a time, once Colby stayed after the year expired, the Kaufmans could have ejected him as a trespasser. *Teft v Hinchman*, 76 Mich 672, 681-682; 43 NW 680 (1889); *Rice v Atkinson, Deacon, Elliot Co*, 215 Mich 371, 374; 183 NW 762 (1921).

The trial court did not err in granting the Kaufmans' motion for summary disposition on Colby's leasehold claims. Because no issue of material fact existed to show that Colby had a valid lease agreement with the Kaufmans, the trial court properly dismissed his claims of breach of lease agreement and interference with his possessory interests.

Affirmed in part, reversed in part, and remanded for entry of judgment notwithstanding the verdict in favor of defendants. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski