STATE OF MICHIGAN

COURT OF APPEALS

INTERNATIONAL CONTAINER SERVICES, INC.,

Plaintiff/Counter-Defendant-Appellant,

V

WALBRO CORPORATION, WALBRO AUTOMOTIVE CORPORATION and U.S. COEXCELL,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs/Third-Party Counter-Defendants-Appellees,

and

JOHN H. HOBSTETTER,

Third-Party Defendant,

and

THE LOVAT GROUP, INCORPORATED,

Third-Party Defendant/Third-Party Counter-Plaintiff-Appellant.

UNPUBLISHED
November 6, 2001

No. 220202; 223935
Wayne Circuit Court
LC No. 97-719871-CK

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

In Docket No. 220202, International Container Services, Inc. ("ICS") and The Lovat Group, Incorporated ("Lovat") appeal as of right from an order granting summary disposition in favor of defendants Walbro Corporation, Walbro Automotive Corporation and U.S. Coexcell ("USC") (collectively referenced as "Walbro"). In that case, ICS and Lovat also raise an issue pertaining to the trial court's order granting Walbro's motion for partial summary disposition.

Finally, in Docket No. 223935, ICS and Lovat appeal by leave granted from an order awarding attorney fees and costs in favor of Walbro. We affirm in Docket No. 220202 and reverse in Docket No. 223935.

I. Promissory Estoppel

In Docket No. 220202, ICS and Lovat first argue that the trial court erroneously granted Walbro's motion for summary disposition with respect to ICS' promissory estoppel claim because sufficient evidence was presented to create a question of fact regarding each element of promissory estoppel. We review a trial court's grant or denial of a motion for summary disposition de novo. *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 546; 619 NW2d 66 (2000). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact, entitling the moving party to judgment as a matter of law. *Id*.

To establish a claim of promissory estoppel, a party must prove the following: (1) there was a promise, (2) the promisor reasonably should have expected the promise to cause the promisee to act in a definite and substantial manner, (3) the promisee did in fact rely on the promise by acting in accordance with its terms, and (4) the promise must be enforced to avoid injustice. *Crown*, *supra* at 548-549; *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999).

> To support a claim of estoppel, a promise must be definite and clear. A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment has been made. [*Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995).]

Reliance on a promise is reasonable only if that reliance is induced by an actual promise. *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993). In determining whether a promise existed, a court must objectively examine the words and actions surrounding the situation as well as the nature of the relationship between the parties and the circumstances surrounding their actions. *Novak*, *supra* at 687. In addition, a promise must be distinguished from a mere statement of opinion, a prediction of future events, or a party's wish or desire for something to happen. *First Security Savings Bank v Aitken*, 226 Mich App 291, 312; 573 NW2d 307 (1997), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). The doctrine of promissory estoppel should be applied only where the facts are unquestionable and the wrong to be prevented is undoubted. *Novak*, *supra* at 687.

ICS and Lovat contend that Walbro promised to "support the establishment of ICS" while refraining from entering the drum-leasing market itself. Such a vague statement does not constitute a definite and clear promise upon which to establish a claim for promissory estoppel. *Schmidt*, *supra* at 379. As the trial court's opinion shows, "support" may be construed in a variety of different ways. In any event, in support of their argument, ICS and Lovat maintain that

Walbro agreed to provide "support" to ICS by allowing it a longer period of time for payment than it allowed other buyers and by selling drums to ICS at a lower cost than to other buyers. The evidence, however, does not establish that Walbro agreed to either of the above provisions.

Although the purported container supply agreement addressed the payment terms and price of the drums, the evidence showed that the parties had not reached a final understanding on the proposed terms of that agreement. At the time of Gary Vollmar's termination, the agreement remained unexecuted, and further negotiations were necessary. Even John Hobstetter admitted that the parties had never agreed upon the exact price that USC would charge ICS for drum bodies. Because the parties never agreed on the terms of the container supply agreement, ICS and Lovat's contention that Walbro agreed to allow ICS a longer period of time for payment and agreed to sell drums to ICS at a lower price than to other buyers is not supported by the record.

ICS and Lovat also maintain that Walbro agreed to "support the establishment" of ICS by ensuring that Walbro would not enter into the leasing business itself. While Vollmar indicated to Hobstetter that Walbro would not be entering into the leasing market, such a representation could not have reasonably been interpreted as a blanket promise to "support the establishment" of ICS. Moreover, ICS and Lovat do not explain how an assurance not to enter the leasing business constitutes a promise to "support the establishment" of ICS. Because Walbro's representation that it would not enter the leasing business did not constitute a promise to "support the establishment" of ICS, ICS and Lovat's argument fails.

ICS and Lovat further argue that Walbro promised to sell drums to ICS in order for it to lease the drums to its customers. The evidence shows, however, that no such promise was made. Prior to Vollmar's termination, he was negotiating the container supply agreement with Bradley Czajka, Daniel Fraser, and Hobstetter in an effort to reach a final agreement. Walbro was also stockpiling drums in a Florida warehouse for the purpose of selling the drums to ICS once an agreement was reached. Vollmar admitted that Walbro would benefit from the establishment of ICS because USC would profit from its drum sales to ICS. However, notwithstanding the actions taken in anticipation of the agreement, both parties understood that an agreement was necessary before Walbro would furnish ICS with drums. Although the surrounding circumstances indicated that both parties desired to reach an agreement and anticipated reaching an agreement, such wishes and desires did not constitute a promise on behalf of Walbro to sell drums to ICS. *Novak, supra* at 687; *Aitken, supra* at 313. For the foregoing reasons, we conclude that the trial court properly granted Walbro's motion for summary disposition on ICS' promissory estoppel claim.

II. Tortious Interference

ICS and Lovat next contend that the trial court improperly granted summary disposition in favor of Walbro on ICS' claim and Lovat's counterclaim for tortious interference with business relations. We disagree. To establish tortious interference with a business relationship, a plaintiff must prove: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996);

Lakeshore Community Hospital, Inc v Perry, 212 Mich App 396, 401; 538 NW2d 24 (1995). To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate with specificity the affirmative acts by the defendant that corroborate the defendant's improper motive. *BPS, supra* at 699. Where the defendant's actions were motivated by legitimate business reasons, its actions do not constitute improper motive or interference. *Id*.

ICS and Lovat cannot show that ICS had a valid business relationship with either Freshco or Florida Quality Products. *BPS, supra* at 698-699; *Lakeshore, supra* at 401. Hobstetter admitted that ICS had only prospective customers and no actual customers, and further admitted that neither Freshco nor Florida Quality Products had executed a lease agreement with ICS. Because ICS had no valid business relationship with either company, the question becomes whether ICS had a valid business expectancy with either Freshco or Florida Quality Products.

Hobstetter and Czajka testified that they expected that both companies would sign lease agreements with ICS. However, the record fails to support those expectations. Pat Schirard of Freshco testified that he had been dealing with Stephen Kipp from USC regarding leasing plastic drums. Further, Schirard testified that he believed that Kipp represented USC. When Schirard heard of ICS, he was confused as to the division between USC and ICS. All of his negotiations regarding the drums had occurred with Kipp and all representations were made by Kipp. Schirard then received a lease agreement for his signature from ICS, and Hobstetter expressed a sense of urgency to execute the agreement. Schirard was confused because the lease agreement was from ICS and not from USC, and the deal had not been negotiated specifically enough to be executed at that point. Kipp ended up negotiating the agreement with Schirard for several more weeks before Freshco executed a lease agreement with USC. Therefore, while Hobstetter and Czajka expected that Freshco would execute a lease agreement with ICS, the evidence shows that such an expectancy was not well-founded, considering the relatively early stage of negotiations and the fact that Schirard was confused by Hobstetter's role in the deal.

Likewise, the record fails to support Hobstetter's and Czajka's expectations that Florida Quality Products would execute a lease agreement with ICS. Jack West, of Florida Quality Products, testified that his first communication with ICS was his receipt of the ICS lease agreement signed by Hobstetter. Hobstetter then telephoned West to inquire about the status of the lease agreement. West telephoned Kipp immediately afterward because he was confused about Hobstetter's position in the matter. Kipp had never represented that he was from a company other than USC, and West assumed that USC would be the entity leasing the drums. Ultimately, Florida Quality Products executed a lease agreement with USC. Considering West's confusion as to ICS' position in the matter, Hobstetter's and Czajka's expectations of an imminent lease agreement with Florida Quality Products were not supported by the record.

In any event, ICS and Lovat cannot show that Walbro's lawful actions were done with malice and without justification because Walbro's actions were motivated by legitimate business reasons. *BPS, supra* at 699. Freshco had previously purchased drums from USC, and both Freshco and Florida Quality Products ultimately executed lease agreements with USC. Therefore, the trial court properly granted summary disposition in favor of Walbro on ICS' tortious interference claim against Walbro and Lovat's counterclaim against Walbro.

III. Conversion

ICS and Lovat next argue that the trial court erroneously granted summary disposition in favor of Walbro on ICS' claims for conversion and misappropriation. We disagree. Conversion has been defined as "'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). "The gist of conversion is the interference with control of the property." *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997). Initially, actions for conversion were limited to tangible chattels, but over time, the doctrine of conversion was extended to include intangible rights. *Id.* at 585-586, citing Prosser & Keeton, Torts (5th ed), § 15, p 102.

ICS and Lovat argue that Walbro converted ICS' contractual rights under its lease agreements with Freshco and Florida Quality Products. The evidence indicates, however, that ICS had no contractual rights with either company. Neither Freshco nor Florida Quality Products executed lease agreements with ICS. In fact, Hobstetter admitted that ICS had no actual customers, but only prospective customers. Because no lease contract existed between ICS and Freshco or Florida Quality Products, Walbro could not possibly have converted any contractual rights derived from such lease agreements.

ICS and Lovat also argue that Walbro converted the contract form and language developed by ICS and utilized in its lease agreement. To establish its claim for conversion, ICS must prove that it had an exclusive right of ownership in the ideas allegedly converted. *Sarver*, *supra* at 586-588. The record fails to show that ICS had an exclusive right of ownership in the lease agreement form or the language contained in the form. Vollmar and Hobstetter worked together to develop a lease agreement which was acceptable to both parties. In a 1997 memorandum, Hobstetter asked Vollmar to review the lease form and advise Hobstetter if he had any changes to make to the agreement. Additionally, Hobstetter offered to allow a Walbro attorney to review the lease agreement instead of obtaining outside counsel, and Kipp provided Hobstetter with sample lease agreements from USC to assist Hobstetter in the development of the lease form. ICS did not attempt to assert an exclusive right of ownership in the form until after Hobstetter provided copies of the purported Freshco and Florida Quality Products leases to Daniel Hittler. Only after voluntarily sending the proposed lease agreements to Hittler did ICS contend that the information contained therein was confidential, proprietary information of ICS. Considering the above evidence, we conclude that ICS cannot establish that it had an exclusive right of ownership in the lease agreement form or the language contained in the form. We conclude that the trial court properly granted summary disposition in favor of Walbro on ICS' conversion and misappropriation claim.

IV. Breach of Contract

ICS and Lovat next contend that the trial court erroneously granted Walbro's motion for partial summary disposition, finding that ICS' breach of contract claim was barred by the statute of frauds. We disagree. This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Crown, supra* at 546. When reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court accepts all well-pleaded factual allegations as

true and construes them most favorably to the nonmoving party. *Fante v Stepek*, 219 Mich App 319, 321-322; 556 NW2d 168 (1996). This Court considers affidavits, admissions, depositions, and other documentary evidence along with the pleadings. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition under MCR 2.116(C)(7) is properly granted where no factual development could provide a basis for recovery. *Id.* Furthermore, whether the statute of frauds bars a contract claim is a question of law which this Court reviews de novo on appeal. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

Agreements that, by their own terms, are not to be performed within one year are void unless in writing and signed by the party against whom enforcement is sought. MCL 566.132(1)(a). Further, the statute of frauds provides that contracts for the sale of goods for the price of $500 or more are not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made and signed by the party to be charged. MCL 440.2201; *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 177; 604 NW2d 772 (1999).

ICS and Lovat argue that a question of fact existed regarding the existence of a contract and contend that the circumstances surrounding the negotiations of the container supply agreement evidenced Walbro's intent to be bound by the agreement, notwithstanding the fact that it was not signed by a Walbro representative. Regardless of the surrounding circumstances, however, enforcement of an agreement that is within the statute of frauds is barred unless it is in writing and signed by the party against whom enforcement is sought. MCL 440.2201. Contrary to ICS and Lovat's argument, the surrounding circumstances did not exempt the container supply agreement from the operation of the statute of frauds. Therefore, we affirm the trial court's grant of Walbro's motion for partial summary disposition on ICS' breach of contract claim.

V. Attorney Fees and Costs

In Docket No. 223935, ICS and Lovat argue that the trial court lacked jurisdiction to award attorney fees and costs in favor of Walbro because ICS and Lovat had already filed their claim of appeal with this Court. Jurisdiction is a question of law that this Court reviews de novo. *Bass v Combs*, 238 Mich App 16, 23; 604 NW2d 727 (1999). Once a claim of appeal is filed with this Court, the trial court may not amend or set aside the judgment or order appealed from except pursuant to an order of this Court, by stipulation of the parties, or as otherwise provided by law. MCR 7.208(A); *Co-Jo, Inc v Strand*, 226 Mich App 108, 118; 572 NW2d 251 (1997); *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 314; 486 NW2d 351 (1992). This provision has been interpreted by this Court to deny a trial court jurisdiction to grant a party costs and attorney fees after a claim of appeal is filed, unless the trial court's final order or judgment expressed an intent to award such costs and fees. *Co-Jo, supra* at 118-119; *Admiral, supra* at 314-315.

In the instant case, the trial court entered its final order granting Walbro's motion for summary disposition on April 29, 1999, and the order made no mention of an award for costs and attorney fees. On May 27, 1999, Walbro filed its motion for costs and attorney fees, and on June 9, 1999, ICS and Lovat filed their claim of appeal. The trial court thereafter granted Walbro's motion, on July 2, 1999. However, the trial court was divested of its jurisdiction on June 9, 1999, when ICS and Lovat filed their claim of appeal with this Court. *Co-Jo, supra* at 118-119;

Admiral, supra at 314-315. Although Walbro's motion for costs and fees was filed while the trial court still had jurisdiction over the case, the trial court lacked jurisdiction to grant costs and fees in favor of Walbro on July 2, 1999.

Walbro argues that, pursuant to MCR 7.208(I), the trial court retained jurisdiction to rule on Walbro's motion for costs and attorney fees. MCR 7.208(I) provides:

> The trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise.

However, MCR 7.208(I) did not take effect until February 1, 2000.[1] Because ICS and Lovat filed their claim of appeal before MCR 7.208(I) took effect, Walbro's argument fails.

ICS and Lovat also argue that the trial court erred by awarding Walbro the full amount of attorney fees requested notwithstanding ICS' challenge the reasonableness of the fees. Because the trial court lacked jurisdiction to award such costs and attorney fees, however, we need not address this issue.

We affirm the trial court's orders granting summary disposition in favor of Walbro. We reverse the trial court's order awarding attorney costs and fees in favor of Walbro. Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen

McDonald, J. did not participate.

[1] See Staff Comment to 1999 Amendment of MCR 7.208.