STATE OF MICHIGAN

COURT OF APPEALS

MCMAHON HELICOPTER SERVICES, INC., Plaintiff/Counterdefendant-Appellant, v POST-NEWSWEEK STATIONS, MICHIGAN, INC., and MARCUS WILLIAMS,[1] Defendants/Counterplaintiffs-Appellees.	UNPUBLISHED November 30, 2001 No. 223035 Wayne Circuit Court LC No. 96-625839-CK

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from trial court orders granting defendant's motions for summary disposition and partial summary disposition in regard to plaintiff's breach of contract claim and defendant's breach of contract counterclaim, respectively. We affirm.

I. Factual Background

Plaintiff provides helicopter service and equipment to various news broadcasters in the Detroit area. Defendant owns and operates WDIV, a television station offering local news service. Brian McMahon, plaintiff's principal, represented plaintiff during the contract negotiations, whereas defendant Williams negotiated on defendant's behalf.

On December 1, 1995, a one-year agreement ("first contract") between the parties went into effect. The first contract required plaintiff to provide helicopter service to defendant.

[1] Plaintiff's claims against defendant Marcus Williams ("defendant Williams") were dismissed on August 5, 1996. Defendant Williams was never officially dismissed as a party, nor was the caption amended to remove his name. Similarly, defendant Williams is listed as a party to this appeal; however, the claim that is the subject of this appeal is only against defendant Post-Newsweek Stations, Michigan, Inc. ("defendant").

Before the first contract expired, the parties entered into a second agreement ("second contract"). The second contract, drafted by defendant, obligated plaintiff to provide helicopter service to defendant for three years, effective April 1, 1996. The contract provided in pertinent part:

> WDIV [defendant] will be responsible for and will defray the cost of equipping the primary aircraft with any special avionics and electronics apparatus required by WDIV for the purposes of use under the terms of this contract. McMahon and WDIV shall share the costs of installation and integration of the equipment. (The cost of installation is estimated to be Five Thousand Dollars ($5,000.00).) Installation shall include, but not be limited to, the installation and integration of (1) all microwave equipment; (2) 450 communications radios; (3) 1 crew station; (4) Elmo cameras; (5) commercial monitors; (6) gyro camera mount; and (7) gyro camera system. All such installations shall be performed in conformity with the specifications of McMahon and meet all applicable Federal Aviation Administration Airworthiness standards.

The parties agree that on March 31, 1996, plaintiff requested that defendant install an Ultra Media System ("the device"), a camera device similar to a Gyrocam®, on the helicopter. Plaintiff refused to install the device, and the instant dispute followed. Ultimately, plaintiff did not provide helicopter service to defendant, nor did defendant pay for the service.

Plaintiff filed a complaint alleging that defendant's conduct constituted a breach of both contracts by (i) failing to pay the consideration called for under the contracts; (ii) failing to provide an insurance policy covering defendant's electronic equipment; (iii) failing to provide ownership information for the equipment; and (iv) advising that it was unwilling to perform its contractual obligations.[2] Defendant filed an answer and a counterclaim alleging that plaintiff breached the second contract, noting that the second contract had substituted for the first contract.

Following discovery, defendant moved for partial summary disposition pursuant to MCR 2.116(C)(10). Specifically, defendant contended that there was no genuine issue of material fact regarding plaintiff's failure to perform its contractual obligations. Defendant sought both the dismissal of plaintiff's breach of contract claim and partial summary disposition regarding its counterclaim, reserving the issue of damages.

Plaintiff responded to defendant's motion, contending that the motion should be denied because defendant intentionally misrepresented the term "gyro camera system" to mean "Gyrocam®," a specific trademarked camera system.[3] In other words, under plaintiff's theory, defendant's request for plaintiff to install the device, a different camera system, was contrary to the parties' intent. Therefore, plaintiff contended that defendant was the breaching party.

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[2] Plaintiff further alleged counts of tortious interference with prospective business advantage, tortious interference, and defamation. However, these counts were voluntarily dismissed.

[3] The record suggests that Brian McMahon had a pecuniary interest in the company holding the Gyrocam® trademark.

In addition, plaintiff filed a first amended complaint, adding conversion and misrepresentation claims. The conversion claim alleged that plaintiff had an ownership interest in certain parts used to construct the device. The misrepresentation claim alleged that defendant, through its agent, falsely represented that the term "gyro camera system" meant the same thing as "Gyrocam®." Defendant opposed the amendment of the complaint, noting that plaintiff had not requested leave to amend and that discovery had already been completed. Alternatively, defendant requested additional discovery on the new counts.

Following a hearing, the trial court ruled that, to the extent plaintiff's complaint referenced the first contract, this argument had been abandoned. The trial court noted that the pertinent question was "which party was the first to breach?" The trial court opined:

> Plaintiff argues that when it signed the [second] contract it had no idea that Defendant would produce a gyro camera to install on the spot. Plaintiff asserts that in the negotiations leading up to the contract Defendant misrepresented this and other facts . . . .
>
> The most obvious problem with this argument here is that Plaintiff is arguing from sources outside the language of the contract itself. Plaintiff argues that the contract needs to be supplemented by an understanding that he reached with Defendant; namely, that the reference to "gyro camera," on its terms generic in nature, would in fact be to a GyroCam specifically. This is a hard argument to make in this State, where unambiguous contracts, at least, are interpreted according to their plain meaning. Plaintiff promised to install a gyro camera and this apparently is what Defendant asked him to do.

The trial court noted that, if anything, it appears that defendant "bargain[ed] hard," rather than engaging in any fraudulent conduct.

The trial court rejected plaintiff's contention that FAA regulations prevented it from installing the device, noting that plaintiff failed to produce any authority in support of its contention. The trial court further noted that plaintiff's case was weakened by Brian McMahon's testimony that the FAA did not require proof of ownership of the device before installation, and that it was simply his [McMahon's] concern. Thus, the trial court found that plaintiff failed to show a material factual question, and that defendant was entitled to summary disposition on plaintiff's breach of contract claim. In addition, the trial court opined that plaintiff was the breaching party, and that, in the absence of any factual support for a conclusion that defendant was the breaching party, defendant was entitled to partial summary disposition on its breach of contract counterclaim.

Plaintiff filed a motion requesting that the trial court reconsider its ruling. In rejecting plaintiff's request, the trial court provided additional reasons for its earlier order. The trial court reiterated that the phrase "gyro camera" was not ambiguous.[4] Indeed, the trial court noted the

[4] Plaintiff correctly notes on appeal that the trial court referred to the phrase as "gyrocam" in its second order. However, we do not believe that this erroneous reference was material to the court's ruling because the trial court's original order used the proper terminology.

inconsistency of Brian McMahon's testimony that there is no such thing as a gyro camera except for a Gyrocam®, but that he was somehow mislead by defendant's purported misrepresentation to the contrary. The trial court opined that, because there was but one reasonable interpretation of the phrase gyro camera, that is, as a generic term for cameras including the device and the Gyrocam®, plaintiff's refusal to install the device was a breach of the second contract.

In regard to plaintiff's claim that installing the device would have been illegal, the trial court opined:

> Plaintiff notes that 43 CFR § 7 requires that
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> > [e]xcept as provided in this section and sec. 43.17, no person, other than the Administrator, may approve an aircraft, airframe, aircraft engine, propeller, appliance, or component part for return to service after it has undergone maintenance, preventive maintenance, rebuilding, or alteration.
> >
> > Assuming this section to be relevant to the proposed installation of the camera here, we note an immediate problem: the section in question explicitly references exceptions . . . [w]e are thus reluctant to hold this reg[ulation] by itself as proof that Defendant asked Plaintiff to do something illegal here.

The trial court further opined that plaintiff failed to produce "firm evidence" that plaintiff had reason to believe that the device was stolen, thereby rejecting plaintiff's argument that concern over ownership of the device prevented installation. The trial court denied plaintiff's request to add the misrepresentation claim, noting that the same rationale supporting the dismissal of the breach of contract claim supported denying leave to amend to add the misrepresentation claim. On the other hand, the trial court granted plaintiff leave to amend its complaint to pursue the conversion claim.

The parties stipulated to an arbitration hearing to determine defendant's damages. During the arbitration hearing, additional evidence was introduced. Defendant was awarded $31,212.60.

On appeal, plaintiff raises three issues: (i) whether the trial court erred by granting defendant's motion for summary disposition on plaintiff's breach of contract claim; (ii) whether the trial court erred by granting defendant's motion for partial summary disposition on its own counterclaim for breach of contract; and (iii) whether the trial court abused its discretion by denying plaintiff's motion to amend its complaint to add a misrepresentation claim.

II. Breach of Contract

As noted above, both parties claim that the other party breached the contract. We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), the affidavits, pleadings, admissions, and other documentary evidence filed in the action or submitted by the

parties are considered in a light most favorable to the party opposing the motion. *Id*. at 454, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Summary disposition may be granted if the affidavits and other documentary evidence show that there "is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Smith, supra* at 454-455, quoting *Quinto, supra* at 362-363.

As a preliminary matter, it should be noted that "one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994), quoting *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). Here, it is clear from the trial court's rulings that plaintiff was the first party to breach the contract. Indeed, the trial court opined that plaintiff failed to install a gyro camera system contrary to its contractual obligation. Unless the trial court erred in reaching this conclusion, plaintiff's breach of contract claim must fail as a matter of law. *Id.*

Determining whether the trial court erred by concluding that plaintiff breached the contract requires us to interpret the underlying contractual language.[5] As a question of law, we review de novo the proper construction and interpretation of a contract. *Perry v Sied*, 461 Mich 680, 681, n 1; 611 NW2d 516 (2000). "A trial court may determine the meaning of the contract only when the terms are not ambiguous," and terms are ambiguous if they are "susceptible to two or more reasonable interpretations." *D'Avanzo v Wise & Marsac PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

Here, plaintiff challenges the trial court's construction of the phrase "gyro camera system" as essentially a generic term. In support of this assertion, plaintiff notes Brian McMahon's testimony that, after he inquired why the generic phrase was used in the second contract, defendant Williams stated that the terms were "one in the same." However, Brian McMahon also testified: "I will honestly say I assume that that's what he told me," conceding that he did not know for sure that defendant Williams made a representation that the terms were interchangeable. Defendant Williams denied making the aforementioned statement.

Brian McMahon further testified that, other than a Gyrocam®, there is no such thing as a gyro camera system. Nevertheless, he signed a contract containing that very phrase. In light of the plain language used in the second contract and Brian McMahon's inconclusive testimony, we do not believe that plaintiff's interpretation of the phrase "gyro camera system" as "Gyrocam®" is "reasonable." As such, we do not believe that the contract language was ambiguous or that the trial court's construction of the contract was erroneous. *D'Avanzo, supra* at 319.

The evidence introduced below established that defendant requested the installation of a gyro camera system, but that plaintiff refused. Because the second contract plainly required

[5] Here, both contracts required plaintiff to supply helicopter service in exchange for defendant's obligation to pay for the service. The second contract contains terms that were slightly different, but still covered the same subject matter. Thus, we agree with the trial court's conclusion that the second contract superseded the first contract. *Omnicom v Giannetti Investment,* 221 Mich App 341, 347; 561 NW2d 138 (1997). Therefore, to the extent that plaintiff argues that defendant breached the first contract this argument is without merit.

plaintiff to install a gyro camera system, the trial court did not err by ruling that plaintiff's refusal constituted a breach of contract. Thus, because plaintiff was the first party to breach the contract, the trial court correctly concluded that plaintiff's breach of contract claim failed as a matter of law. *Michaels, supra* at 650. In addition, for the same reasons, the trial court correctly concluded that defendant was entitled to partial summary disposition on its breach of contract counterclaim.

Nevertheless, plaintiff also contends that defendant breached the second contract because defendant Williams purportedly lied by stating that he did not know who supplied the device. However, the second contract does not require defendant to use a gyro camera system provided by any particular supplier, much less disclose the name of the supplier. Thus, even if plaintiff's allegations are true, this does not support a breach of contract claim.

Finally, plaintiff alleges that its breach was excusable because the contract required the installation to be in conformity with FAA standards. On appeal, plaintiff fails to reference any FAA standard that would have been violated by installing the device. Instead, plaintiff relies solely on Brian McMahon's testimony offered during the arbitration hearing on defendant's damages. This testimony, however, occurred *after* the relevant motions for summary disposition were granted. When considering the propriety of a trial court's decision on a motion for summary disposition, we may only consider the evidence properly before the trial at the time of the ruling. *Zurcher v Herveat*, 238 Mich App 267, 292; 605 NW2d 329 (1999). Regardless, the success of defendant's breach of contract claim does not turn on plaintiff's failure to obtain FAA approval, but on plaintiff's failure to even attempt to obtain FAA approval—that is, the refusal to install the device. Accordingly, we do not believe that a hypothetical FAA disapproval legally excuses plaintiff's failure to perform under the second contract.

III. Amendment of the Complaint

Plaintiff also argues that the trial court erred in denying its motion for leave to amend its complaint to add a claim for misrepresentation. In denying plaintiff's motion, the trial court opined: "[T]he same rationales that support granting Defendant summary [disposition] in the first place support denying Plaintiff leave to add these counts [misrepresentation]."

A trial court's decision regarding a motion to amend a pleading is reviewed on appeal for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Pursuant to MCR 2.118(A)(1) and (2):

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Reasons justifying denial of leave to amend include delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the defendant, or futility. *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile. *Id.* "An amendment is futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakiri v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998), quoting *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

As a general rule, an action for fraudulent misrepresentation requires proof of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damages as a result. *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994). Moreover, a party's reliance on the alleged misrepresentation must be reasonable in light of the circumstances to support a claim of misrepresentation. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-690; 599 NW2d 546 (1999).

Here, the proposed amended complaint states as follows: "[defendant] Williams indicated . . . [to Brian McMahon] that he understood that the terms 'Gyrocam' and 'gyrocamera' were the same thing." However, as noted above, we do not believe that plaintiff's construction of the contract was reasonable under the circumstances. In fact, Brian McMahon's testimony fell short of establishing that he was sure that defendant Williams made the purported misrepresentation.

Moreover, it does not follow that the purported misrepresentation was material to the contract. While the facts suggest that Brian McMahon may have had a pecuniary interest in supplying a Gyrocam®, rather than a generic gyro camera system, it does not necessarily follow that the use of a specific camera system was material to *plaintiff's* assumption of an obligation to providing helicopter service under the second contract. The proposed amended complaint does not allege that plaintiff would not have consented to the contractual language in the absence of the misrepresentation. In addition, plaintiff's amended complaint did not allege that it acted in reliance on the representation. Accordingly, because the proposed amended complaint neglected to address the reliance element, the proposed amendment was futile; therefore, the trial court's denial of plaintiff's request to add the claim was not an abuse of discretion.[6] *Dowerk*, *supra* at 75.

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[6] Plaintiff also sought to amend the complaint to estop defendant from relying on the term "gyro camera system" in the contract. However, plaintiff did not seek to amend its answer to add the affirmative defense of "fraud in the inducement." A party seeking to defend against a contract on the basis of fraudulent representations must plead fraud as an affirmative defense, or it is waived. *Glenhurst Const Co v Daniel*, 25 Mich App 115, 116; 181 NW2d 25 (1970). Thus, plaintiff's failure to amend its answer waives appellate review of the fraud in the inducement issue.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage