

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH MUNEM, DONALD MILLER, and
DAVID KLEMM,

UNPUBLISHED
January 25, 2002

Plaintiffs-Appellants,

v

BEST BUY COMPANY,

No. 224366
Macomb Circuit Court
LC No. 99-001608-CP

Defendant-Appellee.

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right from two orders, one granting defendant's motion for summary disposition of plaintiff Munem's claim for unjust enrichment, and another granting defendant's motion for summary disposition of all plaintiffs' claims brought under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Summary disposition of these claims was granted pursuant to MCR 2.116(C)(8). We affirm the summary disposition of the unjust enrichment claim and reverse the summary disposition of the claims brought under the MCPA.

Plaintiffs initially contend that the trial court erred in ruling that a claim brought under the MCPA is held to the requirement of particularized pleading stated in MCR 2.112(B)(1), as is common-law fraud. We disagree.

In allegations of fraud or mistake, the circumstances constituting the fraud or mistake must be stated with particularity. MCR 2.112(B)(1). This rule applies to all cases of fraud or mistake in Michigan courts. MCR 1.103. Plaintiffs have failed to point out any statutory pleading requirement within the MCPA which lessens this burden. Moreover, the nature of plaintiffs' case, although styled under the statute, is that some of defendant's rebate advertisements defraud consumers. Thus, we see no reason why plaintiffs should be exempt from the pleading requirement of MCR 2.112(B)(1) when bringing a statutory claim alleging fraud.

Plaintiffs' further contend that the trial court demanded a more rigorous standard than MCR 2.112(B)(1) required. We disagree. The particularized pleading required by MCR 2.112(B)(1) "is consistent with the general concept of 'fact pleading' in Michigan [and] should not be taken as more demanding." 1 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2112.3, p 290. As noted by plaintiffs, this Court has held that to avoid summary disposition under MCR 2.116(C)(8), a plaintiff must plead the circumstances of the fraud "with

sufficient particularity to apprise the opposite party of the nature of the case he must prepare to defend.” *Kassab v Michigan Basic Prop Ins Assoc*, 185 Mich App 206, 213; 460 NW2d 300 (1990), mod on other grounds 441 Mich 433; 491 NW2d 545 (1992), quoting 1 Martin, Dean & Webster, Michigan Court Rules Practice (3rd ed), p 242. The trial court in this case required plaintiff “to re-plead Count I with particularity, including all causes of action, factual bases, claims and relief that Plaintiff [was] seeking under the [MCPA].” We conclude that the trial court’s requirement did not differ from the standard required under the court rule and *Kassab*.

Nonetheless, we find that plaintiffs have pleaded claims sufficiently to withstand summary disposition under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When reviewing a grant of summary disposition under MCR 2.116(C)(8), a court considers all well-pled factual allegations in support of the claim as true and construes them in the light most favorable to the nonmoving party. *Id.* at 119-120. “The motion should be granted if no factual development could possibly justify recovery.” *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

An individual who suffers harm from any of the acts enumerated in MCL 445.903 can bring suit under the MCPA. MCL 445.911. Plaintiffs’ complaint specifically alleges that defendant violated MCL 445.903(1)(i), (r), (s), (bb) and (cc). Thus, we must review plaintiffs’ claims to see if each plaintiff established the elements for at least one violation of the MCPA.

Plaintiff Munem alleged in his amended complaint that as a result of having read one of defendant’s February 1998 sales circulars advertising computer software subject to a sales rebate, he went to defendant’s store. There, he noticed an in-store promotion for that software indicating that it was subject to a “Buy Two Get One Free” rebate offer. Munem claimed that he purchased the software, expecting to redeem the rebate, but later discovered that the rebate had expired six weeks before his purchase. Munem further alleged that the rebate sticker on the package did not clearly and conspicuously disclose that the rebate had already expired. Assuming Munem’s claims to be true, this factual scenario could show that defendant represented to customers that they would receive a free software program, without clearly and conspicuously disclosing that the offer had already expired, in violation of MCL 445.903(1)(r).¹

Plaintiff Miller claimed that in April 1999 he read one of defendant’s circulars advertising a software product that offered a \$10 rebate, as well as a free coffee grinder, subject to a shipping fee. Miller bought the software, believing that the rebate was valid and intending to claim the rebate. After purchasing the product, Miller noted that, in small print, the rebate indicated an expiration date two weeks before his purchase. Miller further alleged that the information regarding the expiration date was misleading and did not disclose the expiration date with the same prominence as it stated the rebate offer.

¹ “Representing that a consumer will receive goods or services ‘free’, ‘without charge’, or words of similar import without clearly and conspicuously disclosing with equal prominence in immediate conjunction with the use of those words the conditions . . . to the use or retention of the goods or services advertised” is unlawful. MCL 445.903(1)(r).

In a similar manner, plaintiff Klemm alleged that he saw an advertisement from defendant's store, in November or December 1998, promoting computer disks for \$0.99, after a \$29.00 rebate. Klemm purchased the disks with the intent of claiming the rebate. After applying for the rebate, Klemm was advised that it would not be honored. Klemm further alleged that defendant did not conspicuously disclose any information indicating that the rebate was invalid.

Both Miller and Klemm allege a situation where defendant's advertisements made misleading statements about the existence of a valid rebate or price reduction. Thus, Miller's and Klemm's claims, taken as true, establish a valid claim under MCL 445.903(1)(i).²

Therefore, we find that summary disposition under MCR 2.116(C)(8) was improper as each plaintiff sufficiently pleaded at least one of the acts listed as an unfair trade practice under the MCPA. Additionally, the allegations properly apprised defendant of the factual scenario which made up plaintiffs' claims of unfair, unconscionable or deceptive methods, acts or practices on the part of defendant. *Kassab, supra* at 213. Because we hold that the trial court improperly granted summary disposition of plaintiffs' MCPA claims, we need not address the trial court's denial of plaintiffs Miller's and Klemm's requested leave to amend their complaint.

Plaintiff Munem further purports that the trial court erroneously granted summary disposition, under MCR 2.116(C)(8), on his unjust enrichment claim. We disagree.

"The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Absent an express contract covering the subject matter, the law will imply a contract to prevent unjust enrichment. *Id.* Munem suggests that defendant received increased sales traffic and profits due to its misleading advertisements and promotional rebates. However, after a careful review of Munem's complaint, this Court finds that it failed to allege any loss that he personally suffered due to defendant's alleged increased sales traffic and profits. Because Munem has failed to assert facts in support of both elements of an unjust enrichment claim, we affirm the trial court's grant of summary disposition.

We therefore reverse the trial court's grant of summary disposition with regard to all of plaintiffs' MCPA claims. We remand the case to the trial court and reinstate those claims against defendant. However, we affirm the trial court's grant of summary disposition on plaintiff Munem's unjust enrichment claim. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Jessica R. Cooper

² "Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions" is unlawful. MCL 445.903(1)(i).