

STATE OF MICHIGAN
COURT OF APPEALS

TERRY LEE JEBB,

Plaintiff-Appellant,

V

MASTER MORTGAGE & FINANCIAL
CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 12, 2002

No. 227012
No. 227762
Bay Circuit Court
LC No. 98-004094-CK
LC No. 98-004094-CK-B

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7),(8), and (10), and the judgment awarding costs and attorney fees as sanctions under MCR 2.405. We reverse.

This case arises out of an alleged oral employment agreement between plaintiff and defendant. Plaintiff was involved in the mortgage industry for a number of years. She had her broker's license and operated her own mortgage business with the assumed name "Master Mortgage" before associating with defendant. Defendant's founders sought her assistance in incorporating because they needed an individual on the board of directors with experience in the mortgage business. In consideration for her employment, plaintiff allowed the company to use the name "Master Mortgage" as part of defendant's name.

Plaintiff had no written employment contract. Rather, she allegedly negotiated the terms of her employment with Mark Dorian, married to Amy Brennan. Brennan was to be the president and sole shareholder of the new company. Dorian was not going to be on the board of directors because he was subject to a non-compete agreement from another mortgage company. Plaintiff claimed that Dorian promised her a number of different considerations for her employment, including salary, a ten-percent share of the Michigan profits, commissions, and part of the underwriting fee for the loans processed by the company. She also asserted that he agreed that the name "Master Mortgage" was hers and that if she ever left defendant's employ she could take the name with her. Moreover, plaintiff alleged that Brennan was present for many of the negotiation meetings and approved the representations. Defendant was incorporated, with plaintiff's knowledge and approval, under the name "Master Mortgage and Financial Lending Corporation." Brennan was president, plaintiff was vice-president, and JoAnn Brennan, Amy's

mother, was secretary. Plaintiff testified that Dorian ran the day-to-day operations of the business, including hiring and employment decisions.

After the business was operational for approximately six months, Dorian and plaintiff began an extra-marital affair. In late March 1998, Amy Brennan terminated plaintiff's employment. Plaintiff filed suit, claiming that defendant owed her a raise promised by Dorian before her termination, commissions on a number of loans, and ten percent of defendant's net profits from the Michigan branch of the company. She also sought the right to use the assumed name "Master Mortgage." The trial court granted summary disposition on a variety of grounds and imposed approximately twenty thousand dollars in mediation sanctions on plaintiff.

Plaintiff first argues that the trial court erred by granting summary disposition pursuant to MCR 2.116(C)(7), holding that plaintiff's claims were barred by the statute of frauds. MCL 566.132. We agree.

We review de novo the trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(7). *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). When reviewing a motion for summary disposition under MCR 2.116(C)(7), the court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery. *Id.* The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties. *Id.* If there are no facts in dispute, whether the claim is statutorily barred by immunity is a question of law. *Id.*

The statute of frauds, MCL 566.132, states that certain contracts and agreements are void unless the agreement is in writing and signed with an authorized signature. The statute renders void: "an agreement that, by its terms, is not to be performed within one year from the making of the agreement" and "an agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate." MCL 566.132(a) and (e). Neither section applies to plaintiff's claims.

Application of the statute of frauds to mortgage or real estate sales commissions is limited to situations where a broker deals directly with the real estate owner. *Real Estate Co, Inc v Curis*, 169 Mich App 378; 425 NW2d 559 (1988), citing *Thompson v Carey's Real Estate*, 335 Mich 474; 56 NW2d 255 (1953). The statute of frauds does not apply to oral agreements between a broker and the broker's employees. *Id.* at 384-385. Plaintiff claims a commission allegedly due from her employer, defendant; therefore, MCL 566.132(e) does not bar her claim for commissions.

To determine if claims are barred by the one year limitation of the statute of frauds, the court must determine whether the oral contract is capable, by any possibility, of performance within one year of the agreement. *Dumas v Auto Club Insurance Assn*, 437 Mich 521, 533; 473 NW2d 652 (1991); *Bullock v Automobile Club of Michigan*, 432 Mich 472, 523; 444 NW2d 114 (1989). Plaintiff's alleged agreement related to the return of her business name could have been performed within one year if she left defendant's employment during that time. Therefore, the claim was not barred by the statute of frauds. *Dumas, supra* at 533. In addition, plaintiff's claim for a percentage of net profits was not barred, despite the fact that annual profits could not be calculated within one year, because the services could have been rendered within the year.

Miller v Riata Cadillac Co, 517 SW2d 773, 776-777 (Tx, 1975); *Cron v Hargro Fabrics, Inc*, 91 NY2d 362, 367-370; 694 NE2d 56, 59-61 (1998).

Plaintiff next argues that the trial court erred by granting summary disposition pursuant to MCR 2.116(C)(8), holding that plaintiff failed to state a claim. We agree.

We review de novo the trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(8). *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted." *Id.* at 129-130, citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Only if no factual development could possibly justify recovery should the motion be granted. *Beaudrie, supra* at 130.

The primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position. *Stanke v State Farm Mutual Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). We find the first amended complaint adequate to state claims for unjust enrichment. Unjust enrichment is a recognized cause of action, although it should be approached with caution. *Dumas, supra* at 546. The essential elements of an unjust enrichment claim are: "receipt of a benefit by the defendant from the plaintiff, and which benefit it is inequitable that the defendant retain." *Id.*

Plaintiff's amended complaint alleged that she was promised certain compensation in consideration of her employment and that she did not receive that compensation after defendant terminated her employment. The amended complaint also asserted that although the use of the name "Master Mortgage" was a condition of her employment with defendant, she never relinquished or sold the name. She also asserts that the name "Master Mortgage" had value in terms of reputation and good will when she associated with defendant.

Factual development of these claims could possibly justify recovery. *Beaudrie, supra* at 130. Moreover, these claims were adequately stated to permit defendant to prepare a defense. *Stanke, supra* at 317. Therefore, we conclude the trial court erred by granting summary disposition pursuant to MCR 2.116(C)(8).

Plaintiff also argues that the trial court erred by granting summary disposition as a matter of law pursuant to MCR 2.116(C)(10), finding no genuine issue of fact. We agree.

We review de novo a trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(10). *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A summary disposition motion brought under MCR 2.116(C)(10) tests the factual support of a claim. *Id.* "After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Id.*, citing *Smith v Globe Life Ins Co*, 460 Mich 446, 453; 597 NW2d 28 (1999).

We find that plaintiff presented evidence demonstrating a genuine issue of fact related to the existence and contents of the alleged oral employment contract. Central to this conclusion is

our determination that a question of fact exists whether Dorian was authorized to bind defendant in employment negotiations. An agent's authority to bind a principal may be either actual or apparent. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 528; 529 NW2d 318 (1995). Apparent authority arises where the acts and appearances of the principal lead a third person reasonably to believe that an agency relationship exists. *Id.* at 528, citing *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). Actual authority may be implied from the circumstances surrounding the transaction, showing that the principal actually intended the agent to possess the authority to enter into the transaction on behalf of the principal. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

Plaintiff and Dorian testified that he conducted plaintiff's employment negotiations with his wife's express approval. Moreover, plaintiff testified that Amy Brennan told her that Dorian was the sole controller of the business and that Brennan was present when many of the offers were made. Viewing this evidence in the light most favorable to plaintiff, we find that a question of fact exists regarding Dorian's authority to bind defendant in employment matters. *Hazle, supra* at 461. Therefore, summary disposition was improper pursuant to MCR 2.116(C)(10).

Plaintiff also argues that the trial court erred by awarding defendant costs and attorney fees as sanctions under MCR 2.405. Because we reverse the trial court's grant of summary disposition, the issue of sanctions is moot. *Alar, supra* at 533.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer