STATE OF MICHIGAN

COURT OF APPEALS

PROPHET PRODUCTIONS, LTD., d/b/a BRASS RING PRODUCTIONS,

Plaintiff-Appellant,

v

OLYMPIA ENTERTAINMENT, INC., f/k/a OLYMPIA ARENAS, INC.,

Defendant-Appellee,

and

RADIO CITY PRODUCTIONS, INC., a/k/a RCP, XI, INC., a/k/a RADIO CITY PRODUCTIONS, L.L.C.,

Defendant.

UNPUBLISHED
April 23, 2002

No. 227921
Wayne Circuit Court
LC No. 00-002142-CK

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition. We affirm.

On July 11, 1989, plaintiff entered into a licensing agreement with defendant Olympia Entertainment, Inc. (hereinafter OAI). The licensing agreement gives plaintiff the "exclusive right to plan, program, schedule, promote, market, advertise, exploit, produce and otherwise present Entertainment Events at the Fox [Theatre] during the term hereof." The licensing agreement is scheduled to terminate on July 10, 2002. No right of renewal is included in the licensing agreement. In 1996, plaintiff entered an agreement with defendant Radio City Productions, Inc., to present the Radio City Christmas Spectacular (hereinafter "the Show") at the Fox Theatre. The term of the Radio City agreement was five years, and it granted plaintiff a right of renewal "for three consecutive five . . . year terms on terms and conditions substantially similar to those contained herein . . . ." The Radio City agreement was signed by plaintiff and Radio City, but not by OAI.

On December 30, 1999, plaintiff sent a written notice to Radio City electing to exercise its renewal option under the Radio City agreement. Radio City sent a letter to plaintiff stating that it was willing to meet to negotiate an agreement for a five-year renewal term under the Radio City agreement, "assuming that we are assured, prior to the commencement of such negotiations, that Brass Ring can and will fulfill its obligations under the Fox Theatre Agreement for a 5-year renewal term." OAI told plaintiff that the licensing agreement for the Fox Theatre ended on July 10, 2002, so plaintiff would not be able to furnish the Fox Theatre to Radio City for another five-year term under the Radio City agreement.

In its twelve count second amended complaint, plaintiff alleged: breach of express contract against OAI; ratification against OAI; declaration of plaintiff's right under the Radio City agreement; estoppel against OAI; breach of modified licensing agreement against OAI; breach of contract against Radio City; promissory estoppel against OAI; specific performance and injunctive relief against all defendants; tortious interference with contractual and business expectancy by OAI; unjust enrichment against all defendants; procuring cause against all defendants; and, breach of partnership against all defendants.[1]

OAI and Radio City both filed motions for summary disposition under MCR 2.116(C)(8). The trial court granted defendants' motions for summary disposition, reasoning, in part, that the licensing agreement specifically stated that OAI had no obligation to provide the Fox Theatre to plaintiff after July 10, 2002, and that OAI made it clear through correspondence that the licensing agreement would not be renewed and that plaintiff was not in a position to offer Radio City the opportunity to present the Show at the Fox Theatre after 2001.

Plaintiff first argues that the trial court applied the wrong legal standards when ruling on defendants' motion for summary disposition. We disagree. The trial court's reference to the "convincing evidence" standard mentioned in *Banwell v Risdon*, 258 Mich 274; 241 NW 796 (1932), was made in response to plaintiff's argument that the licensing agreement's clause providing that any changes had to be in writing was unenforceable. The trial court did not rely on the "convincing evidence" standard when ruling on the (C)(8) motion.

Plaintiff also asserts that the trial court erroneously treated defendants' motion as being brought under MCR 2.116(C)(10). Plaintiff's failure to develop this argument means that it has abandoned it on appeal. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, we find this argument to be without merit. The trial court found that plaintiff failed to state a claim because of the unambiguous language of the contract and because plaintiff failed to allege any facts that would entitle it to relief. It is clear that the court considered any factual allegations raised by plaintiff in the appropriate light. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The court also did not err in considering the language of the licensing agreement. MCR 2.113(F)(2); *Ferrell v Vic Tanny International, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984).

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[1] Although the trial court never granted plaintiff's motion to amend its complaint a second time, it proceeded on defendants' motions for summary disposition as if plaintiff's motion to amend had been granted.

Plaintiff also argues that the trial court erred in granting defendants' motions for summary disposition under MCR 2.116(C)(8) because there were factual issues raised in the trial court that necessitated discovery or were within the province of the factfinder. Again, we disagree. A motion for summary disposition under MCR 2.116(C)(8) does not test whether there is a genuine issue of material fact, but tests the legal sufficiency of the complaint. *Maiden, supra* at 119. All factual allegations and reasonable inferences arising therefrom are accepted as true. *Jackson v Detroit Police Chief*, 201 Mich App 173, 174; 506 NW2d 251 (1993). Therefore, it was irrelevant whether plaintiff presented factual issues that needed to be decided by the trier of fact. Discovery was also irrelevant to the trial court's decision under MCR 2.116(C)(8), because the trial court could only consider the pleadings in granting or denying the motions.

Next, plaintiff argues that the trial court erred in dismissing plaintiff's breach of contract claim where plaintiff pleaded that the contract was modified and the modified contract was breached. We disagree.

Plaintiff first argues that the parties modified the termination date of the licensing agreement in writing. In support of this argument, plaintiff points to several documents. First, plaintiff contends that the Radio City agreement was a written modification of the licensing agreement and that OAI signed the Radio City agreement through plaintiff, who was acting as OAI's agent. However, there is no language in the Radio City agreement stating that it is a modification of the licensing agreement. Further, the licensing agreement specifically states "that no agent, servant, or employee of OAI shall under any circumstances be deemed an agent, servant or employee of Brass Ring." In any event, there is no language in the Radio City agreement requiring OAI to provide the Fox Theatre to plaintiff beyond the first five-year term, nor does it contain any guarantee that plaintiff would be able to renew the agreement or be able to provide the Fox Theatre to Radio City after the first five-year term. In other words, even if plaintiff acted as OAI's agent in signing the Radio City agreement, OAI would not have any greater renewal obligations than plaintiff under the Radio City agreement.

The second document advanced by plaintiff as being a modification of the licensing agreement is OAI's July 22, 1999, letter to plaintiff, which states that the Radio City agreement was "not subject to the new booking protocol." Plaintiff argues that this language in the letter meant that OAI was waiving the "no-oral-modifications" provision of the licensing agreement by stating that the Radio City agreement did not require changes to be in writing. We do not accept this reading of the July 22, 1999, letter. Further, there is nothing in the letter stating that it was amending the licensing agreement, nor is there any language stating that the termination date of the licensing agreement was extended. Accordingly, we find this assertion to be without merit.

We also reject plaintiff's argument that the parties modified the licensing agreement in writing through OAI's August 13, 1998, letter to plaintiff. In the August 13, 1998, letter, OAI stated, "Given Brass Ring's right to renew the [Radio City] Agreement for three consecutive five year terms on conditions substantially similar to those contained in the [Radio City] Agreement, [OAI's] vested rights will continue past the projected completion of the first five year term of the Agreement in 2001."

Contrary to plaintiff's assertion, this language does not expressly acknowledge that the licensing agreement had been modified. Plaintiff's reasons that OAI's assertion of vested rights only makes sense if plaintiff is allowed to present the Show at the Fox Theatre after the July 10,

2002 termination of the licensing agreement. We disagree. The above quoted language merely acknowledges the timing realities of the two contracts. The licensing agreement is scheduled to terminate approximately six months after the termination of the Radio City agreement. If plaintiff chooses to renew the Radio City agreement, the interests of OAI are implicated because the Radio City agreement specifically states that the show must be performed at the Fox Theatre. If plaintiff is to satisfy this condition in a second, third, and fourth five-year run of the Show, then OAI will have to be involved. Further, the Radio City agreement specifically states that negotiations on renewal of the Radio City agreement must begin and end in the first two months of the third year of each successive five-year term. For example, Negotiations for the first renewal must begin "no later than January 30, 2000," and end "no later than February 28, 2000." If an agreement were to be reached on the first renewal, then plaintiff would have to have reached agreement with OAI over two years prior to the termination of the licensing agreement. Further, there is no other language in the August 13, 1998, letter stating that OAI was modifying the licensing agreement or guaranteeing plaintiff that it would lease the Fox Theatre to plaintiff beyond July 10, 2002.

The fourth writing cited by plaintiff is a December 6, 1991, memorandum that references an agreement between OAI and Fox to present a holiday show at the Fox Theatre. Because plaintiff did not plead that this agreement was a written modification of the licensing agreement in its second amended complaint, we conclude that the trial court did not err in finding that this memorandum did not support plaintiff's claim for breach of the modified contract. MCR 2.116(G)(5). In any event, we conclude that there is nothing in this memorandum, which was written five years before the Radio City agreement was executed, that expressly or impliedly modifies the licensing agreement.

We also reject plaintiff's argument that by authorizing plaintiff to enter the Radio City agreement, OAI orally modified the licensing agreement through its acceptance of the terms of the Radio City agreement. Plaintiff does not allege that OAI's acceptance of the Radio City agreement bound OAI to modify the licensing agreement in order for plaintiff to comply with the Radio City agreement, nor does it allege that OAI ever permitted plaintiff to enter an agreement that would bind OAI to provide the Fox Theatre to plaintiff beyond July 10, 2002. As discussed, the first term of the Radio City agreement terminates before the expiration of the licensing agreement, and therefore, does not modify the licensing agreement or extend it.[2]

Next, plaintiff argues that the trial court erred in granting defendants' motions for summary disposition because it alleged in its second amended complaint that the parties orally modified the licensing agreement and a plaintiff is not required to plead with particularity acts that demonstrate an oral modification. Plaintiff's failure to provide legal authority in support of this argument means that it has been abandoned on appeal. *Mitcham, supra* at 203. In any event, we find this argument to be without merit. Although we agree with plaintiff that it need not

[2] Because we find that OAI's oral authorization of the Radio City agreement would not amount to a modification of the licensing agreement, we need not address plaintiff's agency argument, plaintiff's argument that the "no-oral-modifications" clause of the licensing agreement is void and was waived by OAI, plaintiff's arguments that OAI is collaterally and equitably estopped from asserting that the "no-oral-modifications" clause of the licensing agreement bars plaintiff's claims, and OAI's statute of frauds argument.

plead a breach of contract claim with particularity, the allegations in the complaint must state the facts on which the plaintiff relies and the specific allegations necessary reasonably to inform the defendant of the plaintiff's claims. *Iron Co v Sundberg, Carlson & Associates, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997). The above allegation does not satisfy this requirement.[3]

Next, plaintiff argues that because OAI ratified the Radio City agreement, it is a separate and distinct contract that is enforceable against OAI and obligates OAI to provide the Fox Theatre to plaintiff beyond the expiration in the licensing agreement and for the next three five-year renewal terms. As the trial court correctly observed, even if OAI had ratified the Radio City agreement, OAI did not have an obligation under that agreement to furnish the Fox Theatre to plaintiff beyond the first five-year term of the Radio City Agreement. Rather, the Radio City agreement obligated plaintiff to provide the Fox Theatre as the venue for the Show.

Next, plaintiff argues that the trial court erred in dismissing plaintiff's promissory estoppel claim. Specifically, plaintiff argues that OAI made several promises to allow plaintiff to provide the Fox Theatre as the venue for the Show beyond July 10, 2002. Plaintiff argues that the licensing agreement does not cover these promises, so it was entitled to pursue a claim for promissory estoppel for the promises that are not part of the written contract. We disagree. The licensing agreement specifically states that the lease of the Fox Theatre expires on July 10, 2002. Therefore, even if OAI did make promises that it would provide the Fox Theatre to plaintiff beyond July 10, 2002, this subject matter is covered by the licensing agreement and plaintiff's claim of promissory estoppel in regard to these alleged promises should fail. *HJ Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999) ("[A] contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties."). Further, plaintiff fails to show both how plaintiff detrimentally relied on these alleged promises, and why the circumstances are such that enforcement of the promises is essential to avoid an injustice. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993).

Finally, we reject plaintiff's argument that the trial court erred in dismissing plaintiff's breach of partnership claim. Plaintiff alleged in its second amended complaint that the Radio City agreement formed a partnership between the parties. However, the licensing agreement specifically states:

> It is expressly understood that OAI shall not be construed or held to be a partner, agent or associate by joint venture or otherwise of Brass Ring in the conduct of its business, it being expressly understood that the relationship between the parties hereto is and shall remain at all times that of licensor and licensee.

Further, even if plaintiff did successfully allege that the Radio City agreement constituted a partnership between the parties and that OAI breached the partnership agreement, the trial court properly dismissed plaintiff's claim. Because the Radio City agreement does not obligate OAI to

[3] Plaintiff pleaded, "The parties entered into a clear and definite oral agreement to allow Brass Ring to provide the Fox Theatre for purposes of the [Show] for each year up to and including January, 2017, and agreed that a written modification of the Licensing Agreement was not required to effectuate this Agreement."

provide the Fox Theatre to plaintiff beyond the first five-year term, OAI did not violate the alleged partnership agreement.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin