STATE OF MICHIGAN

COURT OF APPEALS

TNT ARENAL LTDA, d/b/a TNT HEAVY EQUIPMENT AND CONSTRUCTION CO.,

Plaintiff-Appellant,

v

MICHIGAN TRACTOR AND MACHINERY, d/b/a MICHIGAN CAT and LARRY LAFLECHE,

Defendants-Appellees,

and

KEN CORDES,

Defendant.

UNPUBLISHED
August 20, 2002

No. 231145
Montmorency Circuit Court
LC No. 98-003640-CZ

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff, TNT Arenal LTDA, d/b/a TNT Heavy Equipment and Construction Company (TNT), appeals from the trial court's grant of summary disposition in favor of defendants, Michigan Tractor and Machinery, d/b/a Michigan CAT and Larry LaFleche.[1] We affirm.

I. Facts and Procedural History

This appeal concerns a purchaser's claim against an inspector who was paid $235 by the purchaser to inspect a used bulldozer sold by Cordes Excavating, no longer a party in this matter. Bruce Krouse[2] and Gregory Brossard, representatives of the prospective purchaser, traveled to Montmorency County, Michigan to negotiate the purchase of a used Caterpillar bulldozer from Ken Cordes, president of Cordes Excavating, Inc. Krouse arranged for Larry LaFleche, a

[1] Plaintiff appeals as of right.

[2] Krouse was originally named as a plaintiff in this action, but plaintiff stipulated to his dismissal on December 15, 1998.

certified mechanic and an employee of Michigan CAT, to perform "a visual walk around inspection" of two bulldozers. On the day of the inspection, but before Krouse and Brossard arrived at Cordes Excavating, LaFleche called Krouse and told Krouse that the bulldozer at issue "had some serious problems which could cost anywhere from $15,000 to $20,000 to repair." According to plaintiff, Cordes, the seller, later assured Krouse, the purchaser, that the bulldozer did not need extensive repairs and that any problems LaFleche found could be corrected before delivery. In its complaint, plaintiff alleges that, when Krouse arrived at the site, LaFleche noted the various problems with the bulldozer but concluded that, overall, the bulldozer was in good condition.

Krouse paid LaFleche $235 for the inspection. On April 20, 1998, Krouse agreed to buy the tractor for $120,000 and Cordes agreed to make the repairs noted by LaFleche before delivery. The bulldozer was delivered to Florida and was then shipped to Costa Rica. According to plaintiff, on May 7, 1998, the bulldozer was again inspected in Costa Rica and the inspector found dirty oil in the bulldozer's oil reservoir and damage or wear to various other parts. Plaintiff asserts that the cost to repair the bulldozer is $30,000 and that, because of the problems, the company that planned to use the bulldozer rescinded its million dollar contract with plaintiff.[3]

Plaintiff filed its complaint on September 14, 1998, and alleged fraudulent misrepresentation and violation of the Michigan Consumer Protection Act against Cordes and LaFleche and that Cordes Excavating and Michigan CAT are vicariously liable for the actions of Ken Cordes and LaFleche on a theory of respondeat superior.[4]

Thereafter, plaintiff filed a motion to amend its complaint to add breach of contract and negligence claims against LaFleche. LaFleche and Michigan CAT then filed a motion for summary disposition under MCR 2.116(C)(10). Defendants argued that plaintiff could not present evidence of fraudulent misrepresentation because LaFleche told plaintiff that the bulldozer needed extensive repairs. Further, defendants argued that plaintiff could not show that Michigan CAT or LaFleche intended to defraud plaintiff. In response, plaintiff conceded that its fraudulent misrepresentation claim is "somewhat tenuous" and urged the trial court to grant its motion to amend because the facts showed a viable breach of contract claim. Plaintiff further argued that summary disposition was premature because discovery was not complete.

On October 18, 2000, the trial court denied plaintiff's motion to amend its complaint and granted defendants' motion for summary disposition. The trial court entered an order dismissing plaintiff's action in its entirety on November 6, 2000.

I. Analysis

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[3] In its complaint, plaintiff estimates the cost of necessary repairs to be "at least $30,000." However, in his affidavit, Krouse testified that plaintiff "spent in excess of $60,000 in repairs to the bulldozer to make it operational." We will not comment on the plausibility that a "million dollar" contract was lost because plaintiff needed to repair a used bulldozer.

[4] The trial court granted summary disposition to Cordes and Cordes Excavating on October 15, 1999. The motion disposed of all plaintiff's claims against those defendants and plaintiff does not appeal that order.

A. Motion to Amend

Plaintiff argues that the trial court erred by denying its motion to amend its complaint to add the breach of contract claim.

This Court "review[s] a trial court's decision regarding a motion to amend pleadings for an abuse of discretion." *Backus v Kauffman*, 238 Mich App 402, 405; 605 NW2d 690 (1999).[5]

As plaintiff correctly observes, under MCR 2.118(A)(2), as a general rule, leave to amend should be "freely given when justice so requires." However, a trial court may properly deny a motion if the amendment would be futile. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697-698; 588 NW2d 715 (1998). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Id*. at 697.

Here, the trial court ruled that an amendment to add a breach of contract claim would be futile because, in its first complaint, plaintiff admitted that LaFleche inspected the bulldozer and informed Krouse about serious problems that would require expensive repairs. Because Krouse was on notice of those problems, the trial court concluded that plaintiff could not prove a claim of breach of contract.

The trial court did not abuse its discretion in denying plaintiff's motion to amend. First, plaintiff has presented no evidence regarding specific terms of the agreement that LaFleche allegedly breached. Rather, the record merely reflects that the parties orally agreed that LaFleche would perform a visual, walk-around inspection and the record indicates that LaFleche performed that inspection.

Moreover, plaintiff's attempt to add a breach of contract claim is merely a restatement of allegations plaintiff already made. Plaintiff asserts that LaFleche failed to *properly* inspect the bulldozer because LaFleche admitted that he did not check the oil and because the inspector in Costa Rica found numerous additional problems with the bulldozer. Plaintiff asserted in its original complaint that LaFleche told Krouse that the bulldozer had several, serious problems but

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[5] As our Supreme Court recently reiterated in *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 193; 644 NW2d 710 (2002):

> An abuse of discretion involves far more than a difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is " 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and noting that, although the *Spalding* standard has been often discussed and frequently paraphrased, it has remained essentially intact. [*Id*., quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999).]

later said that, overall, it was in good condition. This was the basis for plaintiff's *misrepresentation* claim and plaintiff is simply attempting to state the same allegations under a different theory.

B. Fraudulent Misrepresentation

Plaintiff contends that, because the record contains conflicting facts regarding LaFleche's assessment of the bulldozer, that one of LaFleche's statements must have constituted a fraudulent misrepresentation.

In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court set forth the following standard of review:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358, 547 NW2d 314 (1996).

"The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

The crux of plaintiff's claim against LaFleche is that, while he initially noted serious problems with the bulldozer, he inexplicably changed his opinion after Krouse arrived at the inspection site. Thus, according to plaintiff, LaFleche intentionally misrepresented the extent of the bulldozer's problems in order to induce plaintiff to buy it from Cordes.

In support of their motion for summary disposition, defendants submitted portions of Krouse's deposition testimony. Krouse testified that, before he arrived for the inspection, LaFleche told him over the telephone that the bulldozer had *significant problems* involving the hydraulics, seals and other items in the undercarriage and that the repairs could cost $15,000 to $20,000. Krouse further testified that, when he arrived at the inspection site, LaFleche pointed out the seal and hydraulics problems, cylinder problems, worn stabilizing bars, and stated that the blade needed replacing. Further, Krouse testified that:

> What [LaFleche] had originally told us, of course, was the fifteen to twenty thousand dollars, and these were the things that he pointed out when he got to the site.

In response to defendants' motion, plaintiff submitted an apparently conflicting affidavit by Krouse which was drafted *after* Krouse's deposition.[6] The affidavit states that, when Krouse arrived at the inspection site, the results

> [W]ere dramatically different than what had been previously represented . . . over the phone by Mr. LaFleche. I was told that that particular D8L had only minor problems which could be fixed in a matter of days.

Again, plaintiff claims that this conflict shows that LaFleche must have intentionally misrepresented his findings to induce Krouse's reliance and to close the sale with Cordes.

Krouse's affidavit essentially restates the assertions in plaintiff's complaint and conflicts with his deposition testimony. "It is well settled that a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 154; 565 NW2d 868 (1997). The purpose of the rules governing motions for summary disposition are "not well served by allowing parties to create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition." *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). Accordingly, " '[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.' " *Id*., quoting *Perma Research and Development Co v Singer Co*, 410 F2d 572, 578 (CA 2, 1969). Moreover, it is also well-established that an affidavit containing "a general allegation without explanation" is insufficient to rebut a motion for summary disposition. *Gamet*, *supra* at 726-727.

Krouse testified at his deposition that LaFleche informed him about significant problems with the bulldozer and that he pointed out those problems when Krouse arrived at the inspection site. In contrast, Krouse's affidavit flatly states that LaFleche gave a "dramatically different" assessment when he arrived at the inspection. Not only does this assertion contradict his deposition testimony, it is a mere "general allegation" without further support or explanation. This was insufficient to create a genuine issue of material fact regarding plaintiff's claim that LaFleche "fraudulently" misrepresented the condition of the bulldozer, particularly in light of uncontradicted evidence that LaFleche told Krouse about the extensive repair problems. Accordingly, the trial court correctly granted summary disposition to defendants.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

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[6] This Court takes judicial notice that, generally, such affidavits made during litigation are drafted by lawyers for the parties.