STATE OF MICHIGAN

COURT OF APPEALS

IRENE CARRINGTON-LEE, MARY FORTENBERRY, ANJENETTA PHIFFER, MATILDA SHANNON, and DIANA HUDSON,

Plaintiffs-Appellants,

and

JUDY NIBLETT,

Plaintiff,

v

DETROIT ENTERTAINMENT, L.L.C., MGM GRAND DETROIT, L.L.C., GREEKTOWN CASINO, L.L.C., and DETROIT TIGERS, INC.,

Defendants-Appellees.

UNPUBLISHED
September 17, 2002

No. 229760
Wayne Circuit Court
LC No. 99-930611-CZ

Before: Bandstra, P.J., and Smolenski, and Meter, JJ.

PER CURIAM.

Plaintiffs-Appellants ("plaintiffs"), who alleged that defendants harmed them by negligently performing contractual or voluntarily assumed duties and by aiding in a violation of the Civil Rights Act ("CRA"), MCL 37.2101 *et seq*., appeal as of right from an order granting defendants' motions for summary disposition under MCR 2.116(C)(8). We affirm.

Plaintiffs argue that the trial court erred in granting summary disposition to defendants because the complaint stated a valid claim for the negligent performance of a contractual or voluntarily assumed duty. This contractual or voluntarily assumed duty related to defendants' entering into a development agreement with the City of Detroit whereby defendants agreed that their contractors would hire a certain number of minority Detroit residents to work on construction projects in Detroit. Plaintiffs, who work in the construction industry, allege that defendants' actions served to deny them jobs.

We review de novo a trial court's decision to grant summary disposition. *Madejski v Kotmar Ltd*, 246 Mich App 441, 443; 633 NW2d 429 (2001). Motions brought under MCR 2.116(C)(8) test the legal sufficiency of a claim on the basis of the pleadings alone. *Id*. at 443-

444. "All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Id*. at 444. "Summary disposition under MCR 2.116(C)(8) is proper 'when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.'" *Corley v Detroit Bd of Ed*, 246 Mich App 15, 18; 632 NW2d 147 (2001), quoting *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

As noted in *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002), persons foreseeably injured by the negligent performance of a contract are owed a duty of care and may sue in tort under certain circumstances. However, as recently noted by this Court, a third party may not sue in tort for the negligent performance of a contract if the action is based solely on the nonperformance of a contractual duty.[1] *Derbabian v Mariner's Pointe Associates Ltd Partnership*, 249 Mich App 695, 708; 644 NW2d 779 (2002); see also *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 83-85; 559 NW2d 647 (1997). In other words, "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's*, *supra* at 84. Here, the essence of plaintiff's claim was the nonperformance of contractual obligations, and the claim thus was not viable under *Derbabian*. Plaintiffs failed to make any affirmative allegations of misfeasance or active negligence that could support an "independent action in tort against defendant regardless of" a contractual breach. *Derbabian*, *supra* at 708-709. Accordingly, the trial court correctly granted defendants summary disposition with regard to this issue.

Plaintiffs also argue that that the trial court erred in granting summary disposition to defendants because the complaint stated a valid claim for aiding in a violation of the CRA. We disagree.

In order for defendants to be liable for aiding in a violation of the CRA, plaintiffs must allege a violation of the CRA to which defendants have rendered aid. In order to allege properly a violation of the CRA, plaintiffs must set forth direct evidence of bias or allege a prima facie case of discrimination. See generally *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). Plaintiffs did not set forth any direct evidence of bias and thus must rely on the *McDonnell Douglas* framework for establishing a prima facie case of discrimination. *Hazle*, *supra* at 462-463; see also *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). In order to establish a prima facie case, plaintiffs must allege the following: (1) plaintiffs belong to a protected class, (2) plaintiffs suffered an adverse employment action, (3) plaintiffs were qualified for the positions in question, and (4) the positions were given to another person under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998).

Plaintiffs alleged that they belong to a protected class, that they suffered an adverse employment action, and that they were qualified for the positions in question. However, upon our de novo review, we conclude that plaintiffs made no allegations that the positions were given to other persons under circumstances giving rise to an inference of unlawful discrimination.

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[1] While at first blush, *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109; 393 NW2d 479 (1986), might suggest otherwise, we note that this plurality opinion rested on the theory of equitable subrogation and is thus distinguishable from the instant case. See *id.* at 126.

Indeed, plaintiffs made no factual allegations relating to these alleged discriminatory acts of the contractors or subcontractors; rather, plaintiffs merely stated that the contractors engaged in discrimination or violated their civil rights. As "the mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action," *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994), plaintiffs have failed to allege a prima facie case of discrimination. Accordingly, we conclude that plaintiffs have, likewise, failed to state a claim upon which relief may be granted with regard to their claim of aiding in a violation of the CRA.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter