STATE OF MICHIGAN

COURT OF APPEALS

KARKOUKLI'S, INC., and F & A, INC.,

Plaintiffs-Appellants/Cross-Appellees,

v

WALGREEN COMPANY, PHOENIX LAND DEVELOPMENT CORPORATION, FIDELITY TITLE COMPANY, STEVEN J. SCHAFER, MALET REALTY, AND ERIC MALETSKY, jointly and severally,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
March 9, 2004

No. 241611
Oakland Circuit Court
LC No. 01-032029-CK

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

In this contractual dispute, plaintiffs appeal as of right from the trial court's orders denying their motion for partial summary disposition and granting defendants' motions for summary disposition on all counts of plaintiffs' complaint. Defendants cross appeal from the trial court's order denying their motion for sanctions. We affirm.

I

In the first of three opinions and orders granting summary disposition to defendants and dismissing plaintiffs' claims in their entirety, the trial court set forth an accurate recitation of the facts surrounding this contractual dispute:

> Effective February 15, 2000, one of the plaintiffs, Karkoukli's, Inc., entered into a contract with one of the defendants, Phoenix Land Development Corporation, pursuant to which Karkoukli's would sell to Phoenix a parcel of land located at the southwest corner of Telegraph Road and Huron Street in Waterford Township. . . .
>
> Defendant Phoenix avers that it planned to acquire plaintiff's property and two smaller parcels to the west of that property. Defendant Phoenix alleges that it intended to build a Walgreen's Drug Store on the site, and, upon completion, sell

it to Walgreens, pursuant to a typical "build-to-suit" arrangement with the retailer. The subject property was previously occupied by a Big Boy Restaurant and a Minute Lube oil change facility. In the second half of 1999, plaintiff Karkoukli's had the Big Boy Restaurant and Minute Lube demolished.

There was an inspection period and several conditions precedent, which had to be satisfied before the deal "went hard." Of particular significance, Phoenix had to be satisfied that the buildings previously on the site had been cleared away properly and that the soil that replaced it would support future construction – the "fill dirt compaction condition" – and that the ground had no environmental contamination from the oil change facility or gas station previously on the site – the "physical condition." (Paragraphs 1(c)(i) and (ii) and 6 of the contract).

* * *

Defendants maintain that the contract required the buyer (Phoenix) to inform the seller specifically that the buyer was satisfied, or that it would waive the condition, and, absent such notice from Phoenix, the contract automatically terminated.

* * *

Following the execution of the contract, plaintiff furnished to defendant Phoenix a soil report to address the Fill Dirt/Compaction condition. Defendants maintain that the report revealed, contrary to plaintiff's representation, that the site had not been properly cleared and that the soil would not meet the 95% compaction requirement. . . . Likewise, the environmental report furnished to Phoenix reflected problems. . . .

Phoenix claims that it still wanted to buy the property if the problems could be resolved at a reasonable cost. Accordingly, in a letter dated March 8, 2000, Phoenix requested that plaintiff extend the periods set forth in the contract, so that Phoenix could obtain additional testing. . . . The letter stated that, in order to indicate agreement to the extension of dates, plaintiff must execute a photocopy of the letter and return the photocopy to Phoenix.

Plaintiff received the letter but did not sign it. Instead, Abdul Karkoukli redrafted the letter to change some of its provisions in dramatic ways. For example, neither the contract nor the letter obligated Phoenix to proceed with any particular amount of testing or exploration. The redraft of the letter obligated Phoenix to perform whatever testing was necessary, regardless of cost. Mr. Karkoukli's version of the letter also required Phoenix to "fix any problems with the Compaction/Fill Dirt condition" but offered to pay "any *reasonable* costs above and beyond $10,000 regarding this condition."

Phoenix avers that it was not willing to accept Mr. Karkoukli's redraft of the letter. It redrafted Mr. Karkoukli's version of the letter, incorporating some of

the provisions added by Mr. Karkoukli in an attempt to compromise. Mr. Karkoukli did not agree to the revision; he never signed it. Defendants maintain that the contract was not extended. Phoenix contends that, pursuant to its terms, the contract terminated in March 2000. No new agreement was ever signed.

Phoenix asked for more time so that it could determine the extent of the soil and environmental problems at the site. Defendants claim that plaintiff refused to grant additional time. Nonetheless, Phoenix continued to work toward development of the property. It prepared the materials necessary to obtain site plan approval from the township; it negotiated purchase agreements with the adjacent land owners and it continued to try to bring plaintiff back under the contract, even long after this lawsuit was filed.

* * *

Phoenix also pursued site plan approval from the township and submitted the necessary documents to township officials. However, when Phoenix wanted to appear before the zoning board of appeals to further the site plan review process, Mr. Karkoukli wrote to the township that he did not consent to Phoenix or any other entity conducting any sort of surveying or analysis of the property.

In order to develop a Walgreen's Drug Store on the site, property in addition to plaintiff's land had to be obtained. Mr. Karkoukli testified that he knew this from the beginning of his discussions with Phoenix. Phoenix continued negotiating with the other land owners, and their tenants, and even signed agreements with them, in what defendants term as the hope of ultimately bringing plaintiff back under the contract. Phoenix and Walgreen's continued preparing the site plan and associated drawings for the store.

. . . [I]n May 2000, plaintiff's then lawyer wrote to Phoenix accusing it of breaching the contract. Phoenix's counsel replied, explaining that the contract had terminated in March 2000 but offering to reinstate the contract on certain conditions. Plaintiff's counsel replied that he concluded from this letter that Phoenix was no longer interested in pursuing the project.

. . . [A]t the time plaintiff entered into the contract, it was in default on its mortgage loan to Bank One. On March 13, 2000, at the same time that it was refusing to give Phoenix more time to investigate the soils on the site, it entered into a "work-out agreement" with Bank One, promising to pay its debt when it sold the property, or by June 15, 2000 (whichever came first). Plaintiff continued to stave off foreclosure until early 2001, when the bank foreclosed by advertisement. Only after that, during the redemption period, did plaintiff list the property for sale with a broker. In May 2001, Mr. Karkoukli authorized the broker to advertise the property for $2,000,000. At the very same time, Mr. Karkoukli refused to even consider Phoenix's offer to reinstate the contract – which would have paid plaintiff roughly $2,300,000. Mr. Karkoukli testified that Phoenix had imposed too many conditions.

> Plaintiff no longer owns the property. The foreclosure was completed and the redemption period has expired.
>
> In May 2001, plaintiff filed a complaint for damages, listing four defendants, and setting forth eight counts. In October 2001, plaintiff filed their second amended complaint. The current complaint has thirteen counts. There are two plaintiffs (Karkoukli's and F & A, Inc) and six defendants: Phoenix (which entered into the contract with plaintiff); Steven Schafer (one of the principals of Phoenix); Eric Maletsky (an associate of Phoenix); Malet Realty (Maletsky's company, based in Chicago); Walgreen Company (the intended ultimate purchaser of the property); and Fidelity Title Co (the escrow agent). [Emphasis in original.]

The parties filed their respective motions for summary disposition with regard to the various counts in plaintiffs' complaint, and in three separate written opinions and orders, the trial court denied plaintiffs' motion for partial summary disposition, granted defendants' summary disposition motions, and dismissed plaintiffs' claims in their entirety. In sum, the trial court held that the contract expired on its own terms in March 2000 because defendant Phoenix was not satisfied with the fill dirt/compaction and physical conditions of the property and because plaintiffs refused to grant Phoenix an extension of time to further investigate these aspects of the contract. Plaintiffs' motion for reconsideration was denied by the trial court, and the court subsequently denied defendants' motion for attorney fees and costs. Plaintiffs now appeal the orders of the trial court denying their motion for partial summary disposition and granting summary disposition to defendants, and defendants cross appeal, arguing that the trial court clearly erred in denying their motion for sanctions.

II

Initially, we consider plaintiffs' argument that the trial court erred in granting summary disposition on their breach of contract claim. Plaintiffs maintain that a genuine issue of material fact exists regarding whether defendants actually breached the contract and whether the contract expired on its own terms. We disagree.

The grant or denial of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* The moving party is entitled to judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; MCR 2.116(C)(10), (G)(4).

In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing the

existence of a genuine issue of material fact. *Id*. If the opposing party fails to present such evidence, the motion is properly granted. *Id*. at 363.

"A contract must be construed in its entirety to determine the intent of the parties and give legal effect to it as a whole." *Alibri v Detroit/Wayne Co Stadium Authority*, 254 Mich App 545, 558; 658 NW2d 167 (2002), citing *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516 (2000). "Where the contract language is clear, its interpretation is a question of law." *Id*. "Also, a contract must be interpreted and enforced according to its plain and ordinary meaning." *Id*. See also *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). "Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties or consider extrinsic evidence to determine the parties' intent." *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). See also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

Plaintiffs' argument – that in order to terminate the contract based on Phoenix' dissatisfaction with the fill dirt/compaction conditions and physical conditions of the property, notice of termination was required and Phoenix failed to give the requisite notice – is not only inconsistent with the express and unambiguous language of the contract, but also contradicts the undisputed evidence of record. Paragraph 1(c) of the contract provides in pertinent part:

> (c) **Conditions**: the conditions precedent to Purchaser's obligation to purchase the Property, which Conditions are as follows:
>
> (i) **Fill Dirt/Compaction Condition:** Purchaser's satisfaction, in its sole and absolute discretion, with the fill dirt and compaction with respect to the razing of certain improvements formerly on the Property by Purchaser and the filling and compaction work conducted in connection therewith.
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> (ii) **Physical Condition**: Purchaser's satisfaction, in its sole and absolute discretion, with the soil bearing capacity, subsoil, wetlands, woodland and environmental condition of the Property and all other aspects of the Property and its intended use by Purchaser (other than the fill dirt and compaction related to satisfaction with the Fill Dirt Compaction Condition).

Paragraph 4 of the contract states:

> 4. **Conditions**. Purchaser's obligation to purchase the Property is expressly conditioned upon Purchaser's satisfaction, in its sole and absolute discretion, with the Conditions. . . .

Paragraph 6 of the contract states in pertinent part as follows:

> (a) Purchaser shall have the right, until the expiration of the period commencing on the Effective Date and expiring 15 days after delivery from Seller to Purchaser of reports, from contractors and/or engineers reasonably acceptable to Purchaser, detailing the condition of the fill dirt installed and compaction undertaken with respect to the razing of certain improvements formerly on the

> Property and the filling of the area of such improvements and the compaction of the same, to deliver to Seller notice that the Fill Dirt/Compaction Condition has been satisfied or waived, failing of which, subject to the provisions of this Agreement, this Agreement shall be deemed terminated. . . . In the event Purchaser determines that the Fill Dirt/Compaction Condition shall be unsatisfactory on or before the end of such period, then Purchaser shall have the right any time before the end of such period, upon notice to Seller, to terminate this Agreement whereupon the same shall be deemed terminated, the Deposit . . . shall be immediately refunded to Purchaser and neither party shall, thereafter, have any further liability or obligation hereunder.
>
> (b) Purchaser shall have the right, on or before the conclusion of 30 days after the Effective Date, to deliver to Seller notice that the Physical Condition has been satisfied or waived, failing of which, subject to the provisions of this Agreement, this Agreement shall be deemed terminated, the Deposit . . . shall immediately be returned to Purchaser and neither party shall, thereafter, have any further liability or obligation hereunder.
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> * * *
>
> (e) In the event that Purchaser determines that the Physical Condition shall be unsatisfactory on or before the end of the Inspection Period or that Purchaser shall be unable to obtain the approvals and permits necessary to satisfy the Site Plan Approval Condition prior to the end of the Inspection Period, then, Purchaser shall have the right, at any time before the end of the Inspection Period, upon notice to Seller, to terminate this Agreement whereupon the same shall be deemed terminated, the Deposit shall be immediately refunded to Purchaser and neither party shall, thereafter, have any further liability or obligation hereunder.[1]

The trial court in the instant case properly granted summary disposition in favor of defendant Phoenix on the breach of contract claims after concluding that the contract terminated on its own because Phoenix was not satisfied with two of the conditions precedent and because Karkoukli refused to grant Phoenix an extension of time to investigate further. The language of paragraph 6 of the contract is clear: if Phoenix did not indicate its satisfaction with the conditions, the contract automatically terminated. However, in the event that Phoenix determined that it was dissatisfied with the conditions prior to the end of the relevant inspection periods, then Phoenix *may* give notice of such dissatisfaction and the contract would terminate early. The contract extends to Phoenix "the right" to give early notice – but no obligation to do so. It is undisputed that Phoenix never notified plaintiffs that it was satisfied with the conditions. The trial court correctly surmised that:

> The contract clearly provided under Paragraphs 6(a) and (b) that purchaser (Phoenix) was required to notify plaintiff that it was satisfied, or that it would

[1] Paragraph 1(f) of the contract provided for a ninety-day inspection period.

> waive the condition. As noted, the contract required notice to be in writing. It cannot be disputed that Phoenix did not notify plaintiffs that it was satisfied or that it waived the condition. Plaintiffs' argument that the contract was in effect because defendants did not provide notice of dissatisfaction is without merit. The contract provided that in the event Phoenix determined, *prior to the expiration of inspection periods*, that the Fill Dirt/Compaction Condition was unsatisfactory, then Phoenix *had the right* to notify Plaintiff of its dissatisfaction and to terminate the Contract *early*. [Emphasis supplied by the court.] This provision merely gave Phoenix the right to terminate early; it did not require notice of termination unless Phoenix sought early termination. It cannot be disputed that the contract expired by its own terms in March 2000. Moreover, no new agreement was ever signed.

Because the undisputed evidence of record shows that Phoenix never notified plaintiffs that it was satisfied with the conditions, the trial court properly concluded that pursuant to the clear and unambiguous terms of the contract, it expired by its own terms in March 2000.

In any event, the record indicates that Phoenix notified plaintiffs that it was *not* satisfied with the fill dirt/compaction and physical conditions. Phoenix's dissatisfaction was clearly conveyed in a letter dated March 8, 2000, from Phoenix (signed by defendant Schafer) to plaintiffs:

> Reference is made to the captioned Agreement. In accordance with Purchaser's rights under the Agreement, this letter shall serve as notice to Seller that Purchaser is not, at this time, satisfied with the Physical Condition and that Purchaser is not satisfied, at this time, with the Fill Dirt/Compaction Condition.
>
> * * *
>
> Notwithstanding our dissatisfaction with the Physical Condition and the Fill Dirt/Compaction Condition, we are still interested in pursuing development of the Property.

In the letter, Phoenix also suggested an extension of time to deal with these issues and stated that if plaintiffs agreed to such a time extension, Mr. Karkoukli should countersign a copy of the letter and return it to Phoenix. The record indicates that plaintiffs refused to acquiesce to the requested extension and indeed redrafted the letter, seeking to place new conditions on defendant in order to comply with the conditions. Phoenix did not accept Karkoukli's redraft of the letter and in an effort to compromise, redrafted Karkoukli's version of the letter, incorporating some of his added provisions. However, Mr. Karkoukli did not agree to the revised letter and thus never signed it. Consequently, the contract was not extended and, pursuant to its express terms, paragraph 6(a), (b), and (e), terminated in March 2000.

Next, plaintiffs claim that defendant's conduct, subsequent to the termination of the contract in March 2000, demonstrates that Phoenix did not believe the contract was really terminated and acted as if the contract was still in effect. The record indicates that Phoenix continued to work toward development of the property, preparing materials necessary to obtain site plan approval from the township and negotiating purchase agreements with the adjacent landowners. However, there is no evidence indicating that in pursuing these options, defendant

still believed the original contract was in effect. As the trial court recognized, defendant's actions did not alter the fact that the contract expired by its own terms: "[d]efendant's subsequent behavior reflects an attempt to reach some kind of new agreement, not a continuation of the contract." "No contract can arise except on the express mutual assent of the parties." *Independence Twp v Reliance Building Co*, 175 Mich App 48, 53; 437 NW2d 22 (1989). "Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Id*. The parties' lack of agreement on the terms of a contract extension belie plaintiffs' argument in this regard.

III

Plaintiffs also contend that a genuine issue of material fact exists with regard to whether the requisite $50,000 deposit was ever delivered or properly placed in escrow by defendants as of the effective date of the contract, thus raising issues regarding enforceability of the contract.[2]

However, plaintiffs' arguments are speculative in nature. As noted by the trial court, the undisputed testimony of Fidelity's representative, Harry Ellman, indicates that he received Phoenix's check for $50,000 in a timely manner and retained the check in Fidelity's files until such time as the contingencies in the contract were satisfied. As previously noted, the contingencies were never satisfied, the contract expired on its own terms, and defendant thus had no entitlement to the deposit. Consequently, whether the deposit was properly placed in escrow by the title company, defendant Fidelity, pursuant to the deposit acknowledgment is immaterial to the viability of the contract between plaintiffs and Phoenix.

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[2] Paragraph 3 of the contract in question required that Phoenix deliver a $50,000 deposit to defendant Fidelity as of the effective date:

> 3. **Deposit**. As of the Effective Date, purchaser has delivered the deposit to the title company. The deposit shall be held by the title company in escrow in strict accordance with the terms of this agreement and the deposit shall be delivered to seller, applied to the purchase price or refunded to purchaser, all as provided below.

The "deposit acknowledgement" signed by defendant Fidelity on February 10, 2000, states in relevant part:

> The undersigned hereby acknowledges receipt of the Deposit and agrees to hold the same pursuant to the terms of the Agreement. . . . In the event of any dispute between Seller and Purchaser pertaining to the Deposit, the undersigned may commence an interpleader action and deposit any remaining balance of the Deposit with a court of competent jurisdiction and in such event, the undersigned shall be relieved of all further obligation and liability.

IV

Plaintiffs next contend that the trial court erred in dismissing its fraud and misrepresentation claims. Plaintiffs argue that a preliminary draft of the contract contained a provision whereby Phoenix's obligation to close was conditioned on its ability to purchase the adjacent properties; at plaintiffs' insistence, that provision was removed from the contract. Plaintiffs allege that Phoenix induced plaintiffs to sign the revised contract that omitted the adjacent property condition, even though Phoenix never intended to purchase plaintiffs' property unless it could get all the adjacent properties under contract. Second, plaintiffs alleged that defendants induced them to enter into the contract by misrepresenting that Phoenix had paid a deposit into escrow, when they in fact failed to do so.

However, we conclude that the trial court properly dismissed plaintiffs' claims of fraudulent inducement and misrepresentation because such claims are subsumed in the breach of contract action. See *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 82-85; 559 NW2d 647 (1997); *Freeman-Darling, Inc v Andries-Storen-Reynaert Multi Group, Inc*, 147 Mich App 282, 284-288; 382 NW2d 769 (1985). Plaintiffs' fraud claims are merely assertions that Phoenix had a duty to close on the contract and that Fidelity owed a duty to deposit the $50,000 with the bank, but failed to perform these contractual duties. "[A] tort action will not lie when based *solely* on nonperformance of a contractual duty." *Freeman-Darling, supra* at 284, quoting *Crews v General Motors Corp*, 400 Mich 208, 226; 253 NW2d 617 (1977) (emphasis in original).

Moreover, plaintiffs failed to establish that material misrepresentations were in fact made concerning the adjacent property condition and the deposit. See, generally, *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003); *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 51; 631 NW2d 59 (2001). "Fraud in the inducement occurs when a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

As we have already noted in conjunction with the breach of contract claim, *supra*, it is undisputed that Fidelity received the deposit check from Phoenix and held it pending resolution of the contract contingencies. Plaintiffs have failed to demonstrate the existence of a genuine issue of material fact regarding whether Phoenix made a fraudulent misrepresentation that it had delivered the deposit to Fidelity.

Further, contrary to plaintiffs' assertion, removal of the adjacent property condition from the contract did not constitute a representation that defendants would close even if they could not purchase the adjacent properties. As the trial court noted, the purpose of the adjacent property condition contained in the previous draft of the contract was to protect Phoenix from the risks involved in the event it could not assemble all of the properties for the Walgreen project. By removing this condition, Phoenix assumed the risk that if it could not assemble all the adjacent properties, and all other conditions had been satisfied, either it would be saddled with the property in question or it would have to pay plaintiffs liquidated damages as provided for in the contract. The evidence indicates that Phoenix agreed to delete the condition and to assume the risk of buying the property without the adjacent parcels or paying liquidated damages in the event it chose not to close. Defendant Schafer testified that the removal of this condition was a

calculated risk: Phoenix knew that the deal with plaintiffs would not be signed unless the adjacent property condition was omitted, but Phoenix had already spoken with the other property owners and thought it could get them under contract. Plaintiff Karkoukli testified that he knew from the outset of negotiations that Phoenix wanted to purchase the adjacent parcels. Moreover, the evidence demonstrates that Phoenix had every intention of closing on the contract and continued to ask for reinstatement of the contract even after it had expired on account of issues wholly unrelated to the acquisition of adjacent properties. We therefore conclude that the trial court did not err in summarily dismissing plaintiffs' claims for fraud and misrepresentation.

V

Next, plaintiffs contend the trial court erred in dismissing their tortious interference claim as it pertained to defendant Walgreen. In their complaint, plaintiffs pled that they had an existing contract or business relationship with Phoenix and that Walgreen interfered with the business relationship. Plaintiffs maintained that Walgreen issued a directive to Phoenix not to continue pursuing plaintiffs' property unless plaintiffs' property and the adjacent properties could be purchased within Walgreen's budget, resulting in termination of the relationship or expectancy between plaintiffs and Phoenix and damages to plaintiffs.

The elements of tortious interference with a contract are: "(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). With respect to the third element, "[o]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). See also *Winiemko v Valenti*, 203 Mich App 411, 418 n 3; 513 NW2d 181 (1994); *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984).

Plaintiffs based their tortious interference claim against Walgreen on a letter dated June 26, 2000, from Walgreen to defendant Schafer, which discussed the need for Phoenix to negotiate price reductions from plaintiffs. However, as the trial court properly held, the contract between Phoenix and plaintiffs had already expired by its own terms before Walgreen, in the above letter, expressed its concern with the price of the packaged parcels. Moreover, the letter, which merely expressed Walgreen's concern about the price of the packaged parcels, was not tantamount to an intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights of plaintiffs. *CMI Int'l, supra*. The trial court therefore did not err in granting summary disposition in favor of defendant Walgreen regarding this allegation.

Plaintiffs' similar claims of tortious interference on the part of defendants Malet Realty and Maletsky were likewise properly summarily dismissed by the trial court. These parties first became involved in negotiations for the project only after the contract had expired, thus providing grounds for dismissal of this claim. Moreover, the two letters written by Maletsky to Phoenix and cited by plaintiffs in support of their claim are devoid of actionable tortious language. *CMI Int'l, supra.* Plaintiffs' argument is therefore without merit.

VI

Plaintiffs next contend there was a genuine issue of material fact regarding whether defendant Fidelity breached its duties to plaintiffs and was negligent by failing to advise plaintiffs that the requisite $50,000 deposit was never delivered by Phoenix. We disagree.

In their second amended complaint, plaintiffs alleged that Fidelity agreed to undertake the duties of escrow agent pursuant to the executed deposit acknowledgment, which referenced the contract between plaintiffs and Phoenix. Plaintiffs alleged that in this capacity, Fidelity had the duties to (1) hold in escrow $50,000 in funds and abide by the terms of the contract, (2) collect, deposit, and safeguard the deposit and properly place in into escrow, and (3) forward the $50,000 to plaintiffs so that plaintiffs could make their monthly mortgage payments to the bank in the event the other defendants breached the contract. Plaintiffs alleged that Fidelity failed to perform these duties. Plaintiffs also alleged that because Fidelity failed to deliver the deposit to plaintiffs after Phoenix allegedly breached the contract, plaintiffs were unable to use the deposit to pay their mortgage to Bank One and subsequently lost the property to foreclosure.

It is well settled that a negligence claim will not lie if no duty is breached independent of a duty owed under a contract. *Rinaldo's, supra* at 83. Here, plaintiffs' negligence claim is essentially an assertion that Fidelity failed to abide by the deposit acknowledgement. Consequently, plaintiffs' claim must fail because "a tort action will not lie when based solely on nonperformance of a contractual duty." *Freeman, Darling, Inc, supra* at 284.

Moreover, pursuant to paragraph 15(a) of the contract, the only way plaintiffs would be entitled to the deposit was if Phoenix breached the contract. We have already determined that there was no breach of contract. Accordingly, plaintiffs were never entitled to the deposit, and Fidelity's return of the deposit to Phoenix could not possibly have caused damage to plaintiffs. See, generally, *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002).

Finally, even if Phoenix had breached the contract, plaintiffs would not have automatically received the deposit. The deposit acknowledgment signed by defendant Fidelity provided that in the event of a breach of contract, Fidelity was entitled to institute an interpleader action and deposit the escrow check with a court of competent jurisdiction. As a result, plaintiffs would not have received the check in time to pay their mortgage. Plaintiffs were in default on the mortgage no later than March 13, 2000, long before they would have been entitled to collect the deposit under any circumstance. Accordingly, plaintiffs' negligence claim pertaining to Fidelity was properly dismissed.

VII

Because we affirm the trial court's conclusion that there was a valid contract, we need not address plaintiffs' claim that the trial court erred in not enforcing its claim for promissory estoppel. "Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract." *Walker v KFC Corp*, 728 F2d 1215, 1220 (CA 9, 1984). "'[W]here . . . the performance which is said to satisfy the detrimental reliance requirement of the promissory estoppel theory is the same performance which represents consideration for the written contract, the doctrine of promissory estoppel is not applicable.'" *General Aviation, Inc v Cessna Aircraft Co*, 915 F 2d 1038, 1042

(CA 6, 1990) (quoting the district court's decision, 703 F Supp 637, 647 n 10 (WD Mich, 1988). See also *ParaData Computer Networks, Inc v Telebit Corp*, 830 F Supp 1001, 1007 (ED Mich, 1993). Here, the promises on which plaintiffs allegedly relied were incorporated into the fully integrated contract – i.e., Phoenix's alleged promise to buy the property and assume the mortgage payments is included in the contract between Phoenix and plaintiffs. As the trial court in the instant case aptly noted, "Plaintiffs knew what they bargained for; the contract was enforced. Plaintiffs cannot now use promissory estoppel for a second chance at a different result of the enforceable commercial contract."

VIII

Lastly, plaintiffs contend that the trial court erred in dismissing their civil conspiracy and concert of action counts. Plaintiffs alleged that defendants conspired to tie up the property without putting any money at risk. Plaintiffs now maintain that a genuine issue of material fact exists regarding whether defendants collectively never intended to purchase plaintiffs' property unless they could buy the adjacent properties, the very condition that plaintiffs initially rejected.

However, civil conspiracy and concert of action are inchoate claims that rely entirely on plaintiffs' ability to establish the underlying fraud and tortious interference claims. See *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986) ("[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort."); *Cousineau v Ford Motor Co*, 140 Mich App 19, 32, 37; 363 NW2d 721 (1985). Because plaintiffs have failed to establish viable claims for separate, actionable torts, plaintiffs' conspiracy and concert of action counts fail as a matter of law and the trial court properly dismissed these counts.

IX

In sum, the trial court did not err in denying plaintiffs' motion for partial summary disposition and granting defendants' motions for summary disposition. Because there was a proper basis for dismissing each count as a matter of law, we therefore affirm the trial court's orders effectively dismissing plaintiffs' complaint in its entirety.

X

In their cross appeal, defendants contend that the trial court clearly erred in denying their motion for sanctions. Defendants maintain that each of the counts asserted in plaintiffs' complaint were frivolous and also that plaintiffs filed numerous documents containing allegations that were demonstrably false.

A trial court's decision that a claim is not frivolous and thus not subject to sanctions is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 203; 650 NW2d 364 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Kitchen*, *supra* at 661-662; *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

Sanctions are mandatory if a trial court determines that a claim or defense was frivolous,

MCR 2.625, MCL 600.2591, or that a document was signed in violation of MCR 2.114. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). However, the mere fact that a party does not ultimately prevail does not mean that the party's position was frivolous and deserving of sanctions. *Kitchen*, *supra* at 662. "The frivolous claims provisions [of MCR 2.114] impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). The reasonableness of the inquiry is determined by an objective standard, focusing on the efforts taken to investigate a claim before filing suit. *Id*. The determination of reasonable inquiry depends on the facts and circumstances of the case. *Id.* The attorney's subjective good faith is irrelevant, and factual allegations later discovered to be untrue do not invalidate a prior reasonable inquiry. *Id*.

The trial court in the instant case denied defendants' motion for sanctions, concluding that plaintiffs' position was not devoid of legal or factual merit. In this regard, the court noted that it found only that the parties' contract had expired under its own terms, not that there was not a valid contract. The trial court further concluded that the parties had a legitimate dispute and plaintiffs' primary purpose in filing suit was not to harass defendants.

We find no clear error in the trial court's denial of defendants' request for sanctions. While many counts of plaintiffs' complaint were certainly redundant variations of the central breach of contract claim, we agree with the trial court that legitimate questions were raised by plaintiffs concerning the viability of the contract and whether it had been breached. Plaintiffs raised plausible legal arguments, albeit ultimately rejected by the court, regarding many aspects of the contract dispute and the relationships between the various parties. Under these circumstances, we conclude that the trial court did not clearly err in denying defendants' motion for costs and sanctions.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen