# STATE OF MICHIGAN

# COURT OF APPEALS

JAMES O. GORE and BOBBIE N. GORE,

Plaintiffs-Appellants/Cross Appellees,

v

FLAGSTAR BANK, FSB,

Defendant-Appellee/Cross Appellant.

UNPUBLISHED
November 9, 2004

No. 248919
Oakland Circuit Court
LC No. 2001-034913-CK

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for judgment notwithstanding the verdict. Defendants cross appeal from the same order. We reverse and remand for reinstatement of the judgment on the jury's verdict.

This action arises from the foreclosure of plaintiffs' residence and plaintiffs' unsuccessful efforts to redeem the property. After a foreclosure sale, plaintiffs sought to obtain financing in order to redeem the property. Plaintiff James Gore met with Paul O'Connell, a loan officer at defendant's bank. According to Gore, he informed O'Connell of the foreclosure status and the nature of the property (a working farm of approximately fifty-three acres), and O'Connell informed him that this would not be a problem with regard to securing a loan. Over the next several weeks, Gore and O'Connell exchanged several documents and an appraisal for the property was ordered. On March 24, 1999, a sixty-day extension of the March 31, 1999, deadline for redeeming the property was obtained. Plaintiffs' former lender, NBD Bank, which had purchased the property at the foreclosure sale, agreed to the extension after plaintiffs paid it $5,000, which was to be applied against the balance due, and after O'Connell faxed an approval letter to its attorneys indicating that plaintiffs' new loan had been conditionally approved. Over the next several weeks, Gore sold certain assets in preparation for the anticipated closing on the loan. In late May 1999, however, shortly before the extended redemption period was due to expire, plaintiffs learned that defendant had decided not to approve the loan. Plaintiffs attempted to arrange for alternative financing, but were unable to do so in the short period of time before the redemption deadline and, consequently, they lost their property. At trial, defendant explained

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

that the property did not qualify for a loan under its guidelines because it was in foreclosure, and because it was a working farm of more than ten acres.

Plaintiffs subsequently commenced this action against defendant. The action proceeded to a jury trial under theories of breach of contract, fraud, and promissory estoppel. The jury rendered a verdict in favor of plaintiffs on the promissory estoppel claim, but found that plaintiffs failed to prove either breach of contract or fraud. The trial court subsequently entered a judgment in favor of plaintiffs for $206,856, plus $14,958.19 in interest. Thereafter, defendant moved for a new trial or judgment notwithstanding the verdict (JNOV). The trial court granted defendant's motion for JNOV, concluding that the jury had found that an enforceable contract existed between plaintiffs and defendant, which precluded recovery under a theory of promissory estoppel as a matter of law.

On appeal, plaintiffs argue that the trial court erroneously granted defendant's motion for JNOV. We agree. A motion for judgment notwithstanding the verdict should only be granted where the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). If reasonable jurors honestly could have reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

In granting JNOV, the trial court observed that the jury, in response to Question No. 1 on the special verdict form, found that plaintiffs' claims against defendant were "based upon a promise or commitment which is in writing and signed with an authorized signature by the [d]efendant." The trial court apparently equated this special finding with a determination that the jury found the existence of an enforceable contract. The court therefore concluded that plaintiffs' only available remedy was for breach of contract and, because the jury found that plaintiffs failed to prove a breach of contract, defendant was entitled to judgment in its favor.

The trial court followed the rule that a contract may be implied, for instance on a theory of unjust enrichment or promissory estoppel, only if there is no express contract. *Martin v East Lansing School Dist*, 193 Mich App 166, 177-180; 483 NW2d 656 (1992). As the trial court observed, the comments to M Civ JI 130.01 provide:

> Promissory estoppel is not available as a cause of action for a person who suffers an injury relying on an enforceable contract promise because the usual remedies for breach of contract apply. Promissory estoppel substitutes for consideration in a case where there are no mutual promises. *Huhtala* [*v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977)]. Where the reliance claimed by the promisee is bargained-for and is performance required under a contract between the parties, the promisee must rely on contract remedies and cannot sue on a promissory estoppel theory. See *General Aviation v Cessna Aircraft Co*, 703 F Supp 637 (WD Mich, 1988), aff'd in part, rev'd in part on other grounds, 13 F3d 178 (CA 6, 1993) [sic, 915 F2d 1038 (CA 6, 1990)]; *Paradata Computer Networks v Telebit Corp*, 830 F Supp 1001 (ED Mich, 1993). . . .

Here, however, the record does not demonstrate that the jury found the existence of an enforceable contract. In concluding that the jury found an enforceable contract, the trial court relied on the jury's answer to Question No. 1 on the special verdict form:

> QUESTION NO. 1: Are the Plaintiffs' claims against the Defendant based upon a promise or commitment which is in writing and signed with an authorized signature by the Defendant?
>
> ANSWER: yes (Yes or No)
>
> If your answer is "no," do not answer any further questions.

We do not view the jury's verdict in favor of plaintiffs on their claim for promissory estoppel as being inconsistent as a matter of law with the jury's prior determination that there was a promise or commitment in writing with an authorized signature by defendant.

"If a verdict *appears* inconsistent, a court must 'make every effort to reconcile the seemingly inconsistent verdicts.'" *Kelly v Builders Square, Inc*, 465 Mich 29, 41; 632 NW2d 912 (2001). "A new trial may not be granted if an interpretation of the evidence logically explains the jury's findings." *Id*. When determining whether a jury's inconsistent verdict can be explained, "[a] court must look beyond the legal principles underlying the plaintiff's causes of action and carefully examine how those principles were argued and applied in the context of the case." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 399; 628 NW2d 86 (2001). In *Bouverette*, the trial court's instructions to the jury provided a plausible explanation for the jury's verdict.

Here, one of the defenses raised by defendant was that plaintiffs' action was barred by the statute of frauds, MCL 566.132(2). The trial court determined that this was a threshold issue to be decided by the jury. Considered in this context, the purpose of Question No. 1 on the special verdict form was to determine whether defendant made a promise in writing sufficient to satisfy the statute of frauds. The jury was not asked to determine whether a valid, enforceable contract was established. Not every promise gives rise to rights enforceable in contract. Thus, the jury's "yes" response to Question No. 1 does not compel the conclusion that the jury found an enforceable contract between the parties. Rather, the jury's "yes" response to Question No. 1 and their verdict in favor of plaintiffs on the promissory estoppel claim, considered in light of the parties' theories, can be harmonized to mean that the jury found the existence of a written promise to support recovery under a promissory estoppel theory.

We also disagree with the trial court's conclusion that permitting the jury to consider the doctrine of promissory estoppel as a ground for recovery in addition to the breach of contract claim was error. Parties are permitted to argue alternative or inconsistent theories based on the same set of facts. MCR 2.111(A)(2); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Thus, even though plaintiffs argued at trial that a contract existed between them and defendant, they were not foreclosed from alternatively arguing a claim based on promissory estoppel. See, also, *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 574; 595 NW2d 176 (1999) ("plaintiff was not required to elect to proceed under one theory or the other, but could seek recovery on the basis either of an express verbal

contract, or an implied contract if the [trier of fact] found that the express verbal contract did not exist.")

We disagree with defendant's contention that the trial court's decision may be upheld because plaintiffs could not establish promissory estoppel for the reason that any promise made by it was conditional only. Although the evidence indicated that plaintiffs' loan application was conditionally approved, the promise underlying plaintiffs' promissory estoppel theory was not conditional. Plaintiffs presented evidence that they were unconditionally assured that their property was eligible for financing, notwithstanding that it was in foreclosure, was a working farm, and consisted of more than fifty-three acres. Plaintiffs relied on this promise to their detriment by proceeding with the loan application process, obtaining an extension of the redemption period, and foregoing alternative sources of financing. Compare *First Security Savings Bank v Aitken*, 226 Mich App 291, 310-319; 573 NW2d 307 (1997), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2 (1999), and *Bivans Corp v Community Nat'l Bank of Pontiac*, 15 Mich App 178, 180; 166 NW2d 270 (1968).

Relying on *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538; 619 NW2d 66 (2000), the trial court also determined that defendant was entitled to JNOV because the statute of frauds barred plaintiffs' claim under a promissory estoppel theory. We disagree.

In *Crown Technology*, *supra* at 549-553, this Court held that MCL 566.132(2) applies to claims under a promissory estoppel theory of recovery. In that case, a party relied on an oral promise to waive a prepayment penalty term on a loan. This Court held that because the promise was not in writing, the plaintiff's claim was barred by the statute of frauds. *Id*. at 547. This Court's decision in *Crown Technology* only indicates that recovery is not permitted under a theory of promissory estoppel where the underlying promise pertains to a matter governed by the statute of frauds and is not in writing.

Here, unlike in *Crown Technology*, there was evidence that defendant's promise was evidenced by a writing. We reject defendant's argument that the March 24, 1999, approval letter was insufficient to satisfy the statute of frauds because it never authorized the letter, and because the letter was not signed by it. Whether a person intends to authenticate a writing is a question of fact. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 87; 443 NW2d 451 (1989). The evidence showed that defendant's loan officer, Paul O'Connell, faxed a loan approval, indicating that plaintiffs' loan had been conditionally approved, and that O'Connell hand wrote his name on the fax cover sheet. Although O'Connell denied having the authority to sign and send the letter to plaintiffs, a jury could have found that O'Connell was acting within his authority as plaintiffs' loan officer when he sent this communication concerning the status of plaintiffs' loan. Furthermore, although O'Connell did not sign the document, the jury could have found that his printed, hand-written name was sufficient to satisfy the signature requirement of the statute of frauds. See *Clark v Coats & Suits Unlimited*, 135 Mich App 87, 97; 352 NW2d 349 (1984).

Defendant also argues that the trial court's decision to grant JNOV may be upheld because plaintiffs failed to satisfy all of the conditions for their loan and, therefore, it was not in breach of contract. We find no merit to this argument. It is relevant only to plaintiffs' breach of contract claim, which the jury decided in defendant's favor. This argument provides no basis for disturbing the jury's verdict on the promissory estoppel theory of recovery.

Defendant also argues that the jury's verdict is excessive. Appellate review of jury verdicts must be limited to objective factors grounded in the existing record. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 764; 685 NW2d 391 (2004). Of the three objective factors mentioned in *Gilbert*, *supra*, the only one that appears applicable in this case is whether the jury's verdict is within the limits of what reasonable minds would deem just compensation for the injury suffered. This inquiry focuses on whether the verdict is supported by the record. *Id*. at 766.

At trial, plaintiffs argued that the evidence supported an award of $258,000, considering the amount of lost equity in their property and the amount they still owed to NBD Bank. To determine the value of their equity, plaintiffs relied on the sale price of the property when it was sold by the bank. Defendant argues that plaintiffs should have instead relied on the appraised value only to calculate the lost equity. We disagree. There was evidence that the bank sold plaintiffs' property for substantially more than it was appraised. To the extent that the true value of the property exceeded the appraised value, the true value would represent that actual lost equity value of the property and the sale price was reflective of that value. Furthermore, even though the bank had not yet attempted to collect a $106,000 balance that plaintiffs still owed, because plaintiffs were still liable for that amount, it was not improper for plaintiffs to request that amount as a measure of their damages. Defendant has failed to show that the jury's verdict is not supported by the record.

Defendant also argues that, if the trial court's JNOV order is reversed, it is entitled to a new trial because the trial court erred in refusing to allow its banking and mortgage expert to testify at trial. We disagree. This Court reviews a trial court's decision on the admissibility of testimony from an expert witness for an abuse of discretion. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). Under MRE 702, a trial court may permit a qualified expert witness to testify if "recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." *Gilbert, supra* at 779-780.

Here, defendant does not explain how an expert's testimony about practices in the banking and mortgage industry in general would have assisted the jury in deciding the issues involved in this case. Indeed, defendant later acknowledged that its underwriter for this mortgage testified as well as an expert regarding the conditions for plaintiffs' loan. Defendant has not shown that the trial court abused its discretion in determining that the proposed expert's testimony was not required.

In sum, the trial court's opinion and order of May 14, 2003, granting judgment notwithstanding the verdict for defendant is vacated, and the original judgment of February 11, 2003, based on the jury's verdict is reinstated.

Reversed and remanded in accordance with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood