

STATE OF MICHIGAN
COURT OF APPEALS

GLH TRUCKING, INC. and GARY HUEBLER,
Plaintiffs-Appellees,

UNPUBLISHED
January 13, 2005

v

R&R HEAVY HAULERS INC., and RODNEY B.
BURRELL,

No. 250601
Wayne Circuit Court
LC No. 02-207577-CK

Defendants-Appellants.

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

I. Overview

This case arose from a contract dispute between plaintiffs GLH Trucking, Inc. and its president, Gary Huebler, and defendants R&R Heavy Haulers, Inc. and its president, Rodney B. Burrell.¹ R&R had contracted with GLH, among other contractors, to haul muck from a lake restoration project. According to GLH, R&R misled it regarding the amount of muck it would be allowed to remove. The trial court denied the parties' motions for summary disposition, and also denied R&R's motion for reconsideration. The parties appeal by leave granted. We reverse in part, affirm in part, and remand to the trial court.

II. Basic Facts And Procedural History

In July 1997, R&R entered into a contract with John Carlo, Inc. to haul about 470,000 tons of muck for Wayne County's Newburgh Lake restoration project. At that time, John Carlo, president of John Carlo, Inc., believed he would need about 705,000 tons of muck hauled away to complete the project. However, because Wayne County controlled how much muck could be hauled away, it was difficult to estimate at any point in time how much muck remained to be

¹ References to GLH Trucking, Inc. in its capacity as a plaintiff should be understood to include Huebler, its president. Likewise, references to R&R Heavy Haulers, Inc. in its capacity as a defendant should be understood to include Burrell, its president.

hauled away. John Carlo, Inc., had hired other companies in addition to R&R to haul muck away for this project.

Huebler testified that Burrell told him there were 650,000 tons of muck left to be hauled in this project and that there were additional projects with which R&R could use Huebler's help. Huebler stated that he formed GLH Trucking, Inc. based on Burrell's representation. However, Burrell claimed that Huebler approached R&R seeking to buy trucks and subcontract with R&R to haul some of the muck. Burrell denied telling Huebler there would be 650,000 tons for GLH to haul.

To secure financing to purchase trucks from R&R, GLH needed a written statement that it had work. To that end, the parties entered into the "Newburgh Lake Contract" on March 3, 1998. The contract contained the following provisions:

It is anticipated that approximately +/- 650,000 tons are to be hauled off site.

R & R Heavy Haulers, Inc. expects Gary Heubler [sic] to provide four trucks for the duration of this project. Project trucking will be performed on a daily basis including Saturday unless weather prevents reasonable access or unsafe driving conditions prevail. It is expected that each truck will be capable of making an average of six loads per day at an average of 42 tons per load.

Payment will be made every two weeks.

Hauling will commence March 16, 1998. Completion of this project is expected approximately January 20, 1999.

This contract is good until project is complete.

A few days later, a purchase order was generated for 650,000 tons of muck at a price of \$3.50 a ton. The purchase order also stated: "These quantities are approximate. Quantities may be increased or decreased to meet job conditions. There shall be no additional cost to R & R for quantity changes."

On March 27, 1998, GLH obtained financing from Old Kent Bank and purchased four dump trucks from R&R. GLH purchased four additional trucks from R&R on June 11, 1998. GLH paid \$48,500 for the first six trucks and \$48,000 for the last two trucks. GLH also purchased a truck from a third party to complete the work for this job. By the time the project was completed in August 1998, GLH had hauled 65,690 tons, which was approximately ten percent of the 650,000 tons purportedly promised it. Thereafter, GLH was sued by Old Kent for defaulting on the loans.

GLH sued R&R for breach of contract, fraudulent misrepresentation, and innocent misrepresentation. To support its claims, GLH submitted a "change order" from Wayne County to John Carlo, Inc., stating that it was decreasing the amount of material to be removed from 705,000 to 585,000. Although the document had an effective date of January 29, 1998, John Carlo, Inc., did not sign the document until March 12, 1998. Michael McElroy, a representative

of John Carlo, Inc. stated this was because it was not until March 1998 that they were certain of the decrease. GLH claimed that R&R knew of this decrease before they contracted with GLH.

Burrell testified that he never told GLH that it could haul all 650,000 tons of muck from the project. He could not remember how he arrived at the amount of 650,000 tons, and he stated he may have done some investigation or it may have just been a random number. Huebler testified that he initially believed there were 650,000 tons for him to haul. However, he admitted that he knew it would have been impossible to haul 650,000 tons during the time period of the contract using the number of trucks listed in the contract. Huebler also admitted he knew that other companies would be hauling material. Huebler acknowledged that Burrell told him the amount to be hauled away could vary by as much as ten percent.

R&R moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). GLH sought partial summary disposition pursuant to MCR 2.116(C)(10). The trial court denied both motions, as well as a motion for reconsideration, and this appeal followed.

III. Summary Disposition

A. Standard Of Review

R&R first argues that the trial court erred in refusing to grant its motion for summary disposition on GLH's claims for fraud and innocent misrepresentation.² We review a trial court's ruling on a motion for summary disposition de novo.³

B. Legal Standards

In evaluating a summary disposition motion under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion.⁴ The trial court may only consider "the substantively admissible evidence actually proffered in opposition to the motion," and may not deny the motion on "the mere possibility that the claim might be supported by evidence produced at trial."⁵ If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.⁶

In evaluating whether summary disposition should have been granted under MCR 2.116(C)(7), this Court "considers all documentary evidence submitted by the parties, accepting

² The parties do not separate their discussion of GLH's fraud and innocent misrepresentation claims. However, because each claim requires proof of a different set of elements, we address each claim separately.

³ *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

⁴ MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

⁵ *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

⁶ MCR 2.116(C)(10), (G)(4); *Quinto*, *supra* at 362.

as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.”⁷

C. Fraud

To prove a claim of fraud a plaintiff must show 1) a material misrepresentation, 2) the misrepresentation was false, 3) the defendant knew or should have known the representation was false, 4) the defendant intended the plaintiff to rely on the misrepresentation, and 5) the plaintiff acted on the misrepresentation and suffered damages.⁸ A claim of fraud cannot be based on promises of future conduct.⁹ “An exception to this rule exists, however, if a promise is made in bad faith without the intention to perform it.”¹⁰ To come within the bad faith exception, “evidence of fraudulent intent . . . must relate to conduct of the actor ‘at the very time of making the representations, or almost immediately thereafter.’”¹¹

All the representations GLH claims R&R made had to do with future events, such as how much material GLH could haul, the duration of the project, and the availability of additional projects. Therefore, GLH had to show that when R&R made the representations, R&R was acting in bad faith with no intention to perform.¹² R&R argues that it demonstrated its intent to perform by allowing GLH to haul more than the amount specified in the contract until the project was finished. R&R also argues that GLH was unable to show R&R intended not to perform because R&R did not control the duration of the project or the amount of material to be hauled.

GLH argues that R&R acted in bad faith by representing that there would be 650,000 tons hauled, when the contract under which it had been operating since August 1997 was only for 470,000 tons. GLH also relied on Burrell’s deposition testimony suggesting that the 650,000-ton figure could have been a random number. Considering all the evidence submitted to the trial court, we find that there were material issues of fact regarding whether R&R made the representations to GLH in bad faith and with an intention not to fulfill those representations. Accordingly, we conclude that the fact that the alleged fraud was based on promises of future conduct does not bar GLH’s claim.

R&R argues that because the trial court concluded GLH was not guaranteed 650,000 tons to haul, summary disposition was proper on the fraud claim. Although the trial court stated that GLH could not have hauled 650,000 tons, it found that “Defendants did seem to promise

⁷ *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001); MCR 2.116(G)(5).

⁸ *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

⁹ *Hi-Way Motor Co v Int’l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

¹⁰ *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378; ___ NW2d ___ (2004).

¹¹ *Hi-Way*, *supra* at 338-339, quoting *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930).

¹² *Derderian*, *supra* at 378.

Plaintiffs something as to quantity.” Therefore, we conclude that the trial court’s statement did not preclude it from denying R&R’s motion for summary disposition on GLH’s fraud claims.

R&R also argues that GLH could not have reasonably relied on its alleged representations when they were contradicted by written documents. In *Novak*,¹³ this Court held that a plaintiff must show that it was reasonable for the plaintiff to rely on the defendant’s representations. The Court also held that when a written contract expressly contradicts verbal statements, reliance on the verbal statements is unreasonable.¹⁴ In this case, however, the contract did not expressly contradict the verbal representations. Although the contract did not state that GLH would haul 650,000 tons, it did list specifications that GLH may have relied on to assume it would haul substantially more tons than it actually did. Because the contract language did not expressly contradict R&R’s oral representations, we conclude that there are questions of fact whether GLH’s reliance on the statements was reasonable.

R&R also argues that GLH did not show damages. However, GLH presented evidence of damages in lost money for starting up the business, lost money for loans, lost income, back taxes, and having to defend a lawsuit from the bank that financed the trucks. Therefore, we conclude that the trial court did not err in declining to grant R&R’s motion for summary disposition on GLH’s fraud claim.

D. Innocent Misrepresentation

“A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation.”¹⁵ Innocent misrepresentation differs from a claim for fraud in that the person making the representations does not need to know that they were false.¹⁶ However, innocent misrepresentation claims cannot be based on a promise regarding the future; they must relate to an existing fact.¹⁷ Here the promises GLH claimed were innocent misrepresentations were about future events, and GLH cannot maintain an action for innocent misrepresentation regarding the promises. There is no “bad faith” exception for innocent misrepresentation.¹⁸ Therefore, we conclude that the trial court erred in denying R&R’s motion for summary disposition on this claim.

¹³ *Novak, supra* at 690-691.

¹⁴ *Id.* at 689.

¹⁵ *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998).

¹⁶ *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996).

¹⁷ *Derderian, supra* at 381.

¹⁸ See *id.*

E. Breach Of Contract

R&R argues that the trial court erred in refusing to grant its motion for summary disposition on GLH's claim for breach of contract. In an action for a breach of contract, a plaintiff must show an express agreement, performance of the agreement by the plaintiff, and a breach of the contract by the defendant that resulted in damages to the plaintiff.¹⁹

The contract provided that GLH was to haul approximately 241,920²⁰ tons of material over the ten-month period. GLH, in fact, only hauled 65,690 tons of material. There were questions of fact whether the work R&R actually provided to GLH was within GLH's expectations under the contract or whether R&R failed to substantially perform its side of the contract by providing the work.²¹ Therefore, we conclude that the trial court did not err in refusing to grant the motion for summary disposition.

We reverse the trial court's denial of summary disposition on GLH's innocent misrepresentation claim, but affirm the denial of summary disposition on GLH's fraud and breach of contract claims. We remand to the trial court for trial on the fraud and breach of contract claims and do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot

¹⁹ *Malcolm MacDowell & Associates, Inc v Ecorse-Lincoln Park Bank*, 325 Mich 591, 598; 38 NW2d 921 (1949).

²⁰ Four trucks taking six forty-two-ton loads a day equals 1,008 tons of material being hauled away a day. The contract called for GLH to work six days of week or approximately 24 days a month, meaning 24,192 tons of material was to be hauled away by GLH each month. The contract duration was for approximately ten months, so GLH was expected to haul 241,920 tons of material throughout the duration of the contract.

²¹ See *Antonoff v Basso*, 347 Mich 18, 28; 78 NW2d 604 (1956) (holding that not every deviation from a contract will be a breach of the contract, but there must be substantial performance).