

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LIGGETT RESTAURANT GROUP, INC.,

Plaintiff-Appellant,

v

CITY OF PONTIAC and PONTIAC STADIUM  
BUILDING AUTHORITY,

Defendants-Appellees.

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UNPUBLISHED

November 29, 2005

No. 256571

Oakland Circuit Court

LC No. 2001-036350-CZ

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying its motion to amend its complaint to add a claim for “breach of contract/breach of the implied covenant of good faith and fair dealing.” We affirm.

The basic facts and procedural history of this case are set out in *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127; 676 NW2d 633 (2003), wherein this Court affirmed the trial court’s grant of summary disposition to defendants on plaintiff’s claims for rescission of a contract that gave plaintiff’s predecessor, Elias Brother’s Restaurants, Inc. (“Big Boy”), the exclusive right to sell concessions at all events at the Pontiac Silverdome. *Id.* at 135-138. Plaintiff sought to rescind the contract based on frustration of purpose and unjust enrichment. *Id.* Although this Court affirmed the dismissal of those claims, it remanded the case because the trial court had denied plaintiff the opportunity to amend its complaint. *Id.* at 138-139. On remand, plaintiff moved to amend its complaint to add a claim for “breach of contract/breach of the implied covenant of good faith and fair dealing.” The trial court denied the motion, finding that the proposed cause of action was not recognized in Michigan and, in any event, plaintiff had not properly pleaded such a claim.

We review a trial court’s decision whether to allow amendment of a complaint for an abuse of discretion. *Liggett, supra* at 138. Where summary disposition is granted based on MCR 2.116(C)(8), “the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that the amendment would not be justified.” MCR 2.116(I)(5). An amendment is futile if it simply restates allegations that were already made or adds allegations that still fail to state a claim. *Yudashkin v*

*Linzmeyer (On Remand)*, 247 Mich App 642, 651; 637 NW2d 257 (2001). A determination of futility is based on the legal sufficiency of the claim on its face. *Liggett, supra* at 139.

Here, the trial court did not abuse its discretion by denying plaintiff's motion to amend. An implied covenant of good faith and fair dealing generally exists in all contracts, except employment contracts. *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992); *Dahlman v Oakland Univ*, 172 Mich App 502; 432 NW2d 304 (1988). The implied covenant applies to the performance and enforcement of contracts where a contractual term leaves the manner of performance to one party's discretion. *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984); *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). Where a party to a contract makes the manner of performance a matter of its own discretion, it must exercise that discretion honestly and in good faith. *Ferrell, supra* at 243. Michigan does not recognize a separate cause of action for breach of an implied covenant of good faith and fair dealing apart from a claim for breach of the contract itself. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 411; 295 NW2d 50 (1980); *Belle Isle Grill Group v City of Detroit*, 256 Mich App 463; 666 NW2d 271 (2003). A breach of contract may be found where bad faith or unfair dealing exists in the performance of a contractual term when the manner of performance was discretionary. *Ferrell, supra* at 243-244.

This case involves a concession contract between Big Boy and defendant Pontiac Stadium Building Authority (stadium authority). Plaintiff's proposed amended complaint alleged breaches of an implied covenant of good faith and fair dealing, but it does not allege any corresponding breach of the concession contract itself. The essence of the concession contract was that Big Boy had the exclusive right to be concessionaire for all events at the Pontiac Silverdome. The proposed amended complaint contained no allegations that the manner of performance of any express terms of the concession contract were discretionary with defendants and that the discretionary performance of those acts occurred in bad faith. Rather, plaintiff's proposed amended complaint is based on allegations that defendants improperly settled separate litigation with the Detroit Lions over their lease of the Pontiac Silverdome and, in allowing the Detroit Lions out of the lease, defendants interfered with plaintiff's reasonable expectations that the Detroit Lions would play at the Silverdome through 2005. This conduct, in turn, affected plaintiff's revenues under the concession contract. Plaintiff's claim, as pleaded, fails to state a cause of action for a recognized claim in Michigan. *Belle Isle Grill, supra*. The trial court properly denied plaintiff's motion to amend the complaint.

We reject plaintiff's argument that it adequately pleaded a cause of action based on an implied contractual term related to the booking and retaining of events at the Silverdome. Plaintiff argues that, because the booking and retaining of events was left to the discretion of defendants under the concession contract, the implied covenant of good faith and fair dealing applies to the contract and was breached by defendants' conduct in settling the separate litigation with the Detroit Lions without considering the concession contract. Plaintiff did not plead any facts, however, to support that the booking and retaining of events was actually contemplated or agreed upon by the parties as an implied term of the concession contract. To the contrary, plaintiff acknowledged in its proposed amended complaint that the concessions contract was silent with regard to the booking and retaining of events. A valid contract requires mutual assent on all essential terms. *Kamalath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). Although pleaded facts must be accepted as true when evaluating the

sufficiency of a complaint, this principle does not extend to conclusions of fact or law. *Stann v Ford Motor Co*, 361 Mich 225, 232-233; 105 NW2d 20 (1960). Thus, the conclusory allegation that the booking and retaining of events was a matter left to defendants' discretion under the concession contract is insufficient. Moreover, a review of the concession contract attached to the proposed amended complaint fails to reveal any terms from which it could be inferred that the act of booking and retaining of events was a matter of contract between the parties. The concession contract did not guarantee a specific number of events or specific revenues for Big Boy. The contract did not even guarantee that the Lions would play home games at the Silverdome. *Liggett, supra* at 136. Plaintiff failed to plead an essential element of a claim for breach of the implied covenant of good faith and fair dealing because it failed to adequately allege that defendants had discretion in the manner of performance of the term of the concession contract upon which the breach of the implied covenant is based.

In affirming the trial court's decision, we note that the primary factual assertions relied on by plaintiff in its proposed amended complaint are related to the Detroit Lions continued presence at the Silverdome for home games throughout 2005. Plaintiff alleges that the Detroit Lions continued presence was essential to the concession contract and that it had a reasonable expectation that the Detroit Lions would continue to play at the Silverdome. Plaintiff cannot rely on these assertions to state a valid claim. This Court previously determined that the concession contract contemplated that the Detroit Lions may not continue to play home games at the Silverdome. *Liggett, supra* at 135-136. This Court's previous determination respecting the concession contract is the law of the case. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

Plaintiff also claims that it adequately stated a cause of action because it alleged that defendants had discretion in the manner of performance of their lease contract with the Detroit Lions. Plaintiff did not actually plead that defendants had discretion with respect to any specific terms in their lease contract with the Detroit Lions. Nor did it allege any facts to support a finding that defendants were given discretion in the manner of performance under the terms of that contract. Rather, plaintiff pleaded its own legal conclusion that defendants could have compelled specific performance or obtained injunctive relief to keep the Lions at the Silverdome if they had chosen to do so. We are not required to accept this conclusory allegation as true when evaluating the sufficiency of the complaint. *Stann, supra* at 232-233. More importantly, we fail to see the relevance of defendants' discretion, if any, in the manner of performance under the lease contract with the Detroit Lions. Plaintiff has not cited any authority to support that the covenant of good faith and fair dealing may be imposed on one contract, here the concession contract, based on the fact that defendants had discretion with respect to their manner of performance under a separate contract, here the lease between the Lions and defendants for use of the Silverdome for football games. That issue is therefore abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

Finally, we find no merit to plaintiff's argument that the trial court made an improper factual determination when it found that defendants had no discretion under their lease with the Detroit Lions. Plaintiff alleged that defendants had a right under their lease with the Lions to compel specific performance or obtain injunctive relief. This allegation was a legal conclusion regarding the rights plaintiff believed were available to defendants. The trial court was not required to accept this allegation as true. *Stann, supra*. Moreover, the trial court's observation

that defendants had no discretion in their lease contract with the Detroit Lions was not improper where there was no allegation to support that defendants had such discretion.

Affirmed.

/s/ Alton T. Davis  
/s/ E. Thomas Fitzgerald  
/s/ Jessica R. Cooper