

STATE OF MICHIGAN  
COURT OF APPEALS

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GERRY BAKER and JUANITA F. BAKER,

Plaintiffs-Appellants,

v

DANIEL M. ABRAMSON, ARLENE O.  
PEPLINSKI, JOHN PEPLINSKI, CONTINUUM  
OF CLIO, INC., d/b/a MAPLE WOODS MANOR,  
and JFB INVESTMENTS, L.L.C.,

Defendants-Appellees.

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UNPUBLISHED  
December 6, 2005

No. 262272  
Genesee Circuit Court  
LC No. 04-078193-CK

Before: Owens, PJ, and Fitzgerald and Schuette, JJ

PER CURIAM.

Plaintiff Gerry Baker entered into an agreement with defendant Daniel Abramson to purchase Abramson's shares of an elder care facility, Maple Woods Manor. After Abramson sold his interest in Maple Woods Manor to defendants Arlene and John Peplinski, plaintiffs brought this action for breach of contract against Abramson and tortious interference with a contractual or business relationship against the Peplinskis. The parties filed cross-motions for summary disposition. The trial court concluded that the agreement between Gerry Baker and Abramson was unenforceable because Baker failed to comply with the condition precedent to obtain financing that removed Abramson as guarantor on the mortgage. Accordingly, it granted summary disposition in favor of all defendants pursuant to MCR 2.116(C)(10). Plaintiffs appeal as of right. We affirm.

This Court reviews a trial court's decision on summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* Summary disposition should be granted if, except for the amount of damages, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiffs argue that the trial court erred in determining that the agreement between Gerry Baker and Abramson was an option contract that never ripened into an enforceable bilateral agreement because Baker failed to make required payments under the agreement. We disagree.

First, plaintiffs fail to address the merits of the court's findings. The court *did not* find that the contract was an option. The court did ask the Bakers' counsel, "Now would you characterize or do you believe it's inappropriate for the Court to characterize this as an option to purchase that was never fulfilled, because the terms and agreement had never really come to fruition, that is being i.e. the financing with respect to Mr. Abramson as well as the payments being made within a year after the contract had been entered into?" However, the court asked numerous questions before rendering its decision, and its decision never mentioned an option contract. Instead, the gist of the court's decision appeared to be that the contract of purchase contained conditions precedent, which, because they were never met, invalidated the contract. Failure to address the merits of the trial court's decision constitutes abandonment of the issue on appeal. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Nevertheless, plaintiffs argue that Abramson repudiated the contract by selling his shares to the Peplinskis before the time of performance on the instant contract was due, and this rendered Gerry Baker's nonperformance irrelevant. Anticipatory repudiation is "when the promisor unequivocally disavows any intention to perform when the time for performance comes." *Black's Law Dictionary* (8th ed). "[T]ransferring or contracting to transfer to a third person an interest in specific land, goods, or in any other thing essential for the substantial performance of . . . contractual duties" constitutes an anticipatory repudiation. Restatement Contracts, 2d § 318.

It is well settled that a repudiation of the contract by one party relieves the nonrepudiating party of the duty to perform any conditions precedent that may exist to the performance of the repudiating party. In other words, the performance of the condition precedent is waived where the other party has unequivocally declared by word or act that performance of the condition will not secure performance of the counterpromise. [13 Williston, Contracts (4th ed), §39:39, pp 672-673.]

A breach by one party to a contract excuses the performance of the other party, who may then recover damages sustained by the breach. *Thomas Canning Co v Johnson*, 212 Mich 243, 252-253; 180 NW 391 (1920). Here, Abramson entered into a purchase agreement with the Peplinskis on August 8, 2000, for the same shares of stock that he agreed to sell Gerry Baker. However, "[c]lear evidence of the intent to repudiate must be given to relieve the other party of the duty to perform." 17a Am Jur 2d, Contracts, §688, p 649. A party's intent to anticipatorily repudiate a contract must be manifested by his acts and words. *Stoddard v Mfrs Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999). Gerry Baker claimed at trial and claims on appeal that he did not find out about the purchase agreement between Abramson and the Peplinskis until discovery in the instant case.

It is essential that the promisor's conduct in repudiating the contract be the cause of the promisee's failure to perform a condition precedent. Thus, the rule excusing the nonoccurrence of conditions precedent where there has been a repudiation of the contract by the party whose performance is conditional does not apply when the promisee could not or would not have performed the condition in any event, that is, whether or not the promisor repudiated the contract. In other words, the repudiation must have caused or substantially contributed to the

nonoccurrence of the condition. If the condition would not have occurred in any event, its nonoccurrence is not excused. In such a case, both parties are discharged from their duty to perform the contract. [Williston, §39.41, pp 690-691.]

Because Gerry Baker admits he was unaware of the repudiation, he cannot claim that the repudiation substantially contributed to his failure to obtain financing, and the trial court did not err when it found that Abramson's actions were irrelevant.

Plaintiffs also argue that the trial court erred in dismissing their tortious interference claim against the Peplinskis. We disagree.

Plaintiffs alleged that the Peplinskis tortiously interfered with the agreement between Gerry Baker and Abramson because they entered into a separate agreement with Abramson in August 2000, to acquire the same shares of Maple Woods Manor that Baker agreed to purchase from Abramson. The trial court dismissed plaintiffs' tortious interference claim against the Peplinskis after determining that an enforceable bilateral contract between Abramson and Baker never arose.

In *Derderian*, *supra* at 382, this Court identified the elements of a claim for tortious interference with a contract:

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). "One 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 Internet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002).

If there is no valid contract, a plaintiff can still establish tortious interference under a business relationship or expectancy theory:

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. *Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.*" [*Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (emphasis added).] [*Badiee v Brighton Area Schools*, 265 Mich App 343, 365-366; 695 NW2d 521 (2005).]

Plaintiffs cannot establish a claim for tortious interference with a business relationship because they cannot show that the Peplinskis induced Abramson to breach his contract with Gerry Baker. Instead, evidence indicated that the impetus behind Abramson's breach was the motivation to avoid liability as guarantor of the mortgage. It was Baker's failure to perform the condition precedent that prevented the enforceability of the contract. The trial court properly granted summary disposition for the Peplinskis on plaintiffs' tortious interference claim.

Affirmed.

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Bill Schuette