STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN CONLEY, Plaintiff-Appellee,	UNPUBLISHED March 18, 2008
v	No. 276318 Wayne Circuit Court
PRICE WATERHOUSE COOPERS LLP, Defendant-Appellant.	LC No. 06-625476-CZ

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's January 29, 2007, order sua sponte granting summary disposition in favor of plaintiff, as well as judgment in the amount of $83,600 for the reimbursement of tuition, under a third party beneficiary theory that plaintiff never pled. Defendant argues that the trial court erred when it sua sponte granted summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2) because in doing so the trial court granted judgment in favor of plaintiff "on an unpled third party beneficiary claim without providing [defendant] adequate notice or an opportunity to assert defenses or prepare any response." We reverse the trial court's January 29, 2007, order, and remand this case with instructions to allow plaintiff to move to amend his complaint to include a breach of a third party beneficiary contract claim, and subsequently allow defendant time to prepare a response and assert defenses to the claim, and allow the parties time to conduct discovery and otherwise develop a record regarding the claim.

I. Facts and Procedural History

Plaintiff began working for defendant in April 1999. In late 2000 or early 2001, plaintiff approached one of defendant's partners, Stephen D'Arcy, about attending a two-year master's program at Northwestern University's Kellogg Graduate School of Management. Plaintiff asked D'Arcy if defendant would support his application to Northwestern and also inquired whether defendant would pay for his tuition. D'Arcy told plaintiff that defendant would "provide him with the necessary time away from work to attend the MBA program," and that he would look into the tuition issue. D'Arcy stated that he subsequently told plaintiff that defendant would not pay his tuition. To the contrary, however, plaintiff stated that, based on his agreement with defendant, a letter from defendant signed by D'Arcy, and the fact that fellow associates told him that defendant paid for their tuition, he was under the impression that defendant was going to pay his tuition. Plaintiff added that he would not have committed to the program if he was not under

the impression that defendant was going to pay his tuition. In support of his contention, plaintiff attached an undated letter from D'Arcy to one of Northwestern's deans, Erica P. Kantor, which in relevant part stated that defendant agreed "to fully sponsor [plaintiff]" and agreed "to provide the time away from work as described in your brochure and to pay the full tuition each year in advance of registration." On April 24, 2001, Northwestern billed defendant $48,350 for plaintiff's first year of tuition.

Defendant's human resources manager, John Murphy, stated that he spoke with plaintiff at an unspecified time and informed him that defendant would not pay his tuition in full, but would provide $5,000 a calendar year in tuition assistance. On June 6, 2001, plaintiff sent D'Arcy an email stating that he figured out a way to pay his tuition, was going to speak with Kantor to inform her that he would be handling his tuition, and that he spoke with Murphy regarding the $5,000 a year tuition reimbursement. D'Arcy never mentioned the aforementioned letter to Kantor, but stated that he "spoke" with Kantor in July 2001 and told her that defendant supported plaintiff's application and would accommodate his work schedule, but would not be paying his tuition. Plaintiff submitted a tuition reimbursement form to Murphy, and was subsequently given a check for $5,000 on December 13, 2001, March 22, 2002, and January 16, 2003.

After sending out plaintiff's last reimbursement check, Murphy sent plaintiff an email stating that the January 16, 2003, check for $5,000 would be the last check that plaintiff got for tuition reimbursement. Plaintiff never took issue with Murphy's email and never asked for further assistance. Plaintiff graduated from Northwestern on June 14, 2003. Plaintiff stated that he stopped pressuring defendant about full reimbursement of his tuition because three partners told him that he would be fired if he did not drop the issue. Plaintiff resigned in April 2004.

On September 7, 2006, plaintiff filed a complaint alleging that defendant and other named defendants (all of whom were later dismissed) (1) breached a contract, (2) violated the Michigan Wage and Fringe Benefit Act (MWFBA), (3) intentionally inflicted emotion distress (IIED), and (4) violated principles of promissory estoppel /detrimental reliance when it failed to pay his tuition. In lieu of filing an answer, defendants filed a motion for summary disposition on October 30, 2006. The parties subsequently stipulated to dismiss all defendants other than defendant, as well as dismiss plaintiff's breach of contract, MWFBA and IIED claims, while allowing plaintiff to amend his promissory estoppel/detrimental reliance claim and add a quantum meruit/unjust enrichment claim. The parties stipulation was summarized in the trial court's December 1, 2006, stipulated order granting in part defendants' motion for summary disposition and granting plaintiff leave to file an amended complaint.

On December 15, 2006, plaintiff filed his first amended complaint alleging promissory estoppel/detrimental reliance and quantum meruit/unjust enrichment claims. On January 2, 2007, defendant filed a renewed motion for summary disposition. On January 4, 2007, the trial court issued an order requiring that discovery be completed by July 19, 2007.

On January 26, 2007, the trial court heard defendant's renewed motion for summary disposition. After engaging in a brief discussion with the parties, the trial court declared that it was "ready to rule." The trial court subsequently granted defendant summary disposition in regard to plaintiff's quantum meruit/unjust enrichment claim, and then, without addressing plaintiff's promissory estoppel/detrimental reliance claim, sua sponte found that the letter from

D'Arcy to Kantor constituted a contract to which plaintiff was a third party beneficiary. The trial court concluded by granting summary disposition in favor of plaintiff on the basis that defendant breached a third party beneficiary contract when it failed to pay plaintiff's tuition.[1] On January 29, 2007, the trial court entered an order that did not include anything regarding its ruling on plaintiff's quantum meruit/unjust enrichment claim, but rather just expressed that it was granting summary disposition in favor of plaintiff and entering a judgment of $83,600 in plaintiff's favor.

II. Analysis

As previously discussed, defendant argues that the trial court erred when it sua sponte granted summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2) because in doing so the trial court granted judgment in favor of plaintiff "on an unpled third party beneficiary claim without providing [defendant] adequate notice or an opportunity to assert defenses or prepare any response." We review a motion for summary disposition under MCR 2.116(I)(2) de novo. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). Summary disposition is properly granted to the opposing party under MCR 2.116(I)(2), "if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Id*.

When a court contemplates entering summary disposition against a party on its own motion, "that party is entitled to unequivocal notice of the court's intention and a fair chance to prepare a response," and a court that fails "to afford that constitutionally rooted courtesy has no authority to grant summary disposition." *Haji v Prenvention Ins Agency, Inc*, 196 Mich App 84, 90; 492 NW2d 460 (1992) (Corrigan, J., concurring);[2] See also *Bennett v City of Eastpointe*, 410 F3d 810, 816 (CA 6, 2005) (holding that a district court can only grant summary judgment sua sponte if "the losing party was on notice that it had to come forward with all of its evidence and had a reasonable opportunity to respond to all the issues to be considered by the court"), and *Rodriguez v Doral Mortgage Corp*, 57 F3d 1168, 1172 (CA 1, 1995) (holding that "[a]t a bare minimum, even in this age of notice pleading, a defendant must be afforded both adequate notice of any claims asserted against him and a meaningful opportunity to mount a defense.")[3]

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[1] When defense counsel objected to the trial court's sua sponte ruling on the basis that plaintiff's amended complaint did not contain a breach of contract claim, let alone a breach of a third party beneficiary contract, the trial court responded "[h]e doesn't have to amend, my mind is made up. You can appeal if I've done something sua sponte that offends the law."

[2] Although the *Haji* majority did not address the trial court's "procedural irregularities" (granting summary disposition "on grounds not raised either in the pleadings or in [the] defendants' previously denied motion for summary disposition") because it decided to reverse the trial court's order on the merits of its decision, it did note that the "procedure followed in this case was, at best, questionable." *Haji*, *supra* at 85-87.

[3] A federal circuit court reviews a federal district court's decision to sua sponte grant summary disposition for an abuse of discretion. *Bennett v City of Eastpointe*, 410 F3d 810, 816 (CA 6, 2005).

In the case at hand, plaintiff's amended complaint did not delineate a breach of contract claim,[4] let alone a breach of a third party beneficiary contract claim. Furthermore, plaintiff never requested to amend his complaint to include such a claim, nor did plaintiff ever bring up such a claim or argument in any of his pleadings, responses to defendant's motions for summary disposition or in his briefs in support of his pleadings and responses. In short, similar to *Rodriguez, supra*, "this is not a case in which a properly pleaded legal theory has been obscured by the parties' concentration on other theories, but, rather, a case in which a particular legal theory was never so much as a gleam in the pleader's eye." *Id*. at 1171 (citations omitted). Rather, and to once again borrow a phrase from the *Rodriguez* court, "[t]hough we fully appreciate that a complaint may be constructively amended as a case proceeds, this principle cannot mean that [plaintiff] may leave [defendant] to forage in forests of facts, searching at [its] peril for every legal theory that a court may some day find lurking in the penumbra of the record." *Rodriguez, supra* at 1172 (citations omitted). We therefore conclude that the trial court erred when it sua sponte granted summary disposition and judgment in plaintiff's favor based on an unpled breach of a third party beneficiary contract theory. *Haji, supra* at 90; *Bennett, supra* at 817; *Rodriguez, supra* at 1171-1172 (CA 1, 1995).

However, although plaintiff no longer has a right to amend his complaint as a matter of course, MCR 2.118(A)(1); *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006), he may still move to amend his complaint and be granted leave to amend his complaint if justice so requires unless the amendment would be futile, MCR 2.118(A)(2); MCR 2.116(I)(5); *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007); *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 352; 711 NW2d 801 (2005); *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001). An amendment would be futile if: (1) ignoring the substantive merits of the claim, it is legally insufficient on its face, (2) it merely restates allegations already made, or (3) it adds a claim over which the court lacks jurisdiction. *PT Today, Inc v Commissioner of the Office of Financial and Insurance Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). We note that it is unlikely that allowing plaintiff to amend his complaint to include a breach of a third party beneficiary contract claim would be futile because (1) the trial court's ruling clearly put defendant on notice that it would have jurisdiction over defendant if plaintiff chose to amend his complaint in such a manner, (2) amending plaintiff's complaint in such a manner would not be restating an allegation that was already made, and (3) such a claim could be legally sufficient. *Id*. We therefore reverse the trial court's January 29, 2007, order, and remand this case with instructions to allow plaintiff to move to amend his complaint to include a breach of a third party beneficiary contract claim, and subsequently allow defendant time to prepare a response and assert defenses to the claim, and allow the parties time to conduct discovery and otherwise develop a record regarding the claim.

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[4] Although plaintiff's original complaint contained a breach of contract claim, that contract claim did not involve a third party beneficiary theory, and furthermore, the parties stipulated to dismiss the claim.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood