STATE OF MICHIGAN

COURT OF APPEALS

INSURANCE REPAIR CONSTRUCTION,

Plaintiff-Appellant,

v

SAXON MORTGAGE SERVICES, INC.,

Defendant-Appellee,

and

ERIC R. WILLIAMS and LISA R. WILLIAMS,

Defendants.

UNPUBLISHED
November 18, 2008

No. 280976
Wayne Circuit Court
LC No. 06-628910-CH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff Insurance Repair Construction appeals as of right from a circuit court order granting summary disposition in favor of defendant Saxon Mortgage Services, Inc. ("defendant"). For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendants Eric and Lisa Williams owned a house on which defendant held the mortgage by assignment. The house was damaged by fire. The Williamses hired plaintiff to adjust the loss with their insurer and to repair the damage in exchange for the insurance proceeds. The insurance company issued a check, which was tendered to defendant to hold in escrow with instructions to include plaintiff as a payee on checks issued against the funds. Defendant issued one such check and plaintiff received the funds. Thereafter, relations between plaintiff and the Williamses broke down. The Williamses fired plaintiff, who had not yet been paid in full and directed defendant to issue any additional checks in their name alone. Defendant did as requested. The Williamses never paid plaintiff and later declared bankruptcy. Plaintiff then sought payment from defendant, alleging a claim for breach of contract.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."

West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra*.

The trial court did not err in granting defendant's motion. Although plaintiff had a right to assignment of the proceeds pursuant to its agreement with the Williamses, that agreement was terminated. Plaintiff has failed to show the existence of a contract between itself and defendant requiring defendant to honor the assignment in the event the agreement with the Williamses was terminated.[1] Plaintiff's argument that it is a third-party beneficiary is unpersuasive because it has not shown the existence of a contract between defendant and the Williamses in which defendant promised to give or to do something directly for plaintiff. See MCL 600.1405(1). Plaintiff's argument that it has a claim against defendant for conversion is also unpersuasive because plaintiff sued defendant for breach of contract only. Conversion is a tort action, *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992); *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), and plaintiff did not allege such a claim in its complaint.

Plaintiff sought leave to amend its complaint to add claims of promissory estoppel and unjust enrichment, which the trial court denied without sufficient explanation. When a trial court fails to specify its reasons for denying a motion for leave to amend, this Court is required to reverse the trial court's decision unless amendment would be futile. *Noyd v Claxton, Morgan, Flockhart & VanLiere*, 186 Mich App 333, 340; 463 NW2d 268 (1990). An amendment is futile if it is legally insufficient on its face. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

"The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 589; 487 NW2d 849 (1992). "To support a claim of estoppel, a promise must be definite and clear." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). "In determining whether a requisite promise existed, [this

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[1] Plaintiff's reliance on cases such as *Commercial Savings Bank v G & J Wood Products Co, Inc*, 46 Mich App 133; 207 NW2d 401 (1973), *First Bank of Marietta v Roslovic & Partners, Inc*, 86 Ohio St 3d 116, 118-119; 712 NE2d 703 (1999), and *Independent Nat'l Bank v Westmoor Electric, Inc*, 164 Ariz 567, 570-571; 795 P2d 210 (1990), is misplaced. Those cases involved an assignment of an account in which the assignee had a security interest perfected under Article 9 of the Uniform Commercial Code. See MCL 440.9404 and MCL 440.9406. Plaintiff has not shown that defendant is an account debtor or that it has a perfected security interest in the account.

Court is] to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999).

Plaintiff has not presented any evidence to sufficiently demonstrate that it has a viable claim of promissory estoppel against defendant. No evidence has been elicited or suggested which would indicate that defendant expressly promised to pay plaintiff the insurance proceeds in the event plaintiff undertook repairs of the Williamses' house or that plaintiff undertook repairs in reliance on such a promise. To the contrary, plaintiff undertook repairs in reliance on the Williamses' assignment of their insurance proceeds, well before defendant knew that the Williamses had hired plaintiff. While plaintiff contends that it completed its repairs in reliance on defendant's promise to disburse the funds and has alluded to "discussions on the repair project and payment from the insurance proceeds," it has not disclosed when those discussions took place, who was involved in those discussions, or otherwise shown that defendant made a definite and clear promise to pay plaintiff pursuant to the Williamses' assignment in the event the Williamses terminated their agreement with plaintiff. Absent such a showing, the proposed amendment would be futile.

"In order to sustain a claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). When such elements exist, "the law operates to imply a contract in order to prevent unjust enrichment." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

Plaintiff has shown that defendant received a benefit from plaintiff by virtue of the fact that plaintiff's repair work restored the value of defendant's collateral. However, that alone is not sufficient to sustain an implied contract claim because plaintiff has not shown that it is inequitable for defendant to retain that benefit. Defendant did not contract with plaintiff to make the repairs and was not consulted in the hiring process. Plaintiff looked to the Williamses for payment and expected to be paid from the insurance proceeds, which defendant held in escrow and paid out according to the Williamses' instructions. It thus did not reap a double benefit, retaining both the value of the repair work plus the insurance proceeds paid for that work. See *Kossian v American Nat'l Ins Co*, 254 Cal App 2d 647, 649-650; 62 Cal Rptr 225 (1967). Accordingly, the proposed amendment would be futile.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis