STATE OF MICHIGAN

COURT OF APPEALS

ENGEL MANAGEMENT, INC., LARRY JAMES ENGEL, LISA M. ENGEL, and JAMES ENGEL,

Plaintiffs-Appellants,

v

FORD MOTOR CREDIT COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 12, 2009

No. 279868
Wayne Circuit Court
LC No. 06-603319-CB

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiffs Engel Management, Inc. (the "dealership"), Larry Engel, Lisa Engel, and James Engel, appeal as of right from the trial court's order granting defendant Ford Motor Credit Company summary disposition of their various claims under MCR 2.116(C)(7), (C)(8), and (C)(10). We affirm.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Guerra v Garratt*, 222 Mich App 285, 288; 564 NW2d 121 (1997).

When a party moves for summary disposition on the basis that a claim is barred for any of the reasons listed in MCR 2.116(C)(7), a court accepts all well-pleaded factual allegations as true, unless contradicted by other evidence, and construes them in favor of the nonmoving party. *Maiden*, *supra* at 119; *Guerra*, *supra* at 289. The court must consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact. MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Guerra*, *supra* at 289. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred is to be decided as an issue of law. *Maiden*, *supra* at 122; *Guerra*, *supra* at 289. However, if a question of fact exists such that factual development could provide a basis for recovery, dismissal is inappropriate. *Id.*

A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the claim by the pleadings alone. *Maiden*, *supra* at 119; *Stopera v DiMarco*, 218 Mich App 565, 567; 554 NW2d 379 (1996). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, *supra* at 119; *Stopera*, *supra* at 567. "A motion

under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden, supra* at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must examine the documentary evidence submitted by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). If the nonmoving party fails to establish a material issue of fact, the motion is properly granted. *Id.* at 363.

Plaintiffs first argue that the trial court erred in dismissing their claim under the federal Automobile Dealer's Day in Court Act ("ADDCA"), 15 USC 1221 *et seq*. We disagree.

Section 1222 of the ADDCA, 15 USC 1222, provides:

> An automobile dealer may bring suit *against any automobile manufacturer* engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and *shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer* from and after August 8, 1956, *to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise* with said dealer: Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. [Emphasis added.]

Section 1221(c) of the ADDCA, 15 USC 1221(c), provides:

> The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

Section 1221(a) of the ADDCA, 15 USC 1221(a), provides:

> The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

The ADDCA permits an automobile dealer to bring suit against an automobile manufacturer. Hence, if defendant does not meet the definition of an automobile manufacturer,

plaintiffs cannot assert a claim against defendant under the ADDCA. Defendant argues that it is a financing company; not an automobile manufacturer as that term is defined under the ADDCA.

Some jurisdictions have held that captive financing companies such as defendant can meet the statutory definition. See *De Valk Lincoln Mercury, Inc v Ford Motor Co*, 550 F Supp 1199, 1202 (ND Ill, 1982), and *Colonial Ford, Inc v Ford Motor Co*, 592 F2d 1126, 1128-1130 (CA 10, 1979), and *In re Frank Meador Buick, Inc*, 13 BR 841, 844 (Va, 1981). These jurisdictions have concluded that the plaintiffs established that the defendant "acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." 15 USC 1221(a).

In this case, we need not determine whether plaintiff has presented evidence that defendant is sufficiently under the control of the manufacturer, Ford Motor Company, to meet the statutory definition of a manufacturer. Instead, we conclude that defendant is protected by the terms of a release. Specifically, upon the termination of the dealership's agreement with Ford Motor Company, Lisa Engel and James Engel, as owners of the dealership, signed a general release which states, in pertinent part:

> [T]he Dealer, each of the undersigned principal owners of the Dealer, and their officers, directors, shareholders, *partners, agents, employees,* heirs, representatives, successors, subsidiaries and assigns hereby jointly and severally, release and discharge Ford and its officers, directors, *agents*, employees, *representatives,* successors, and assigns, from *all claims* and demands the Dealer or any of the undersigned had, has or may have *by reason of anything whatsoever* occurring prior to the date of these presents, except only such obligations, if any, as Ford may have to the Dealer either under Subparagraph 19(f) and/or Paragraph 22 of said Sales and Service Agreement(s) or for sums of money which Ford may have agreed in writing to pay to the Dealer . . . .

This release is clear and unambiguous, and must be enforced as written. *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649; ___ NW2d ___ (2008); see also *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 540-541; 549 NW2d 612 (1996).

By executing this general release, Lisa and James Engel, as owners of the dealership, released not only Ford, but *its agents, employees, and representatives*, from *all* claims "by reason of *anything whatsoever*," which could have been asserted not only by the dealership, by Lisa, or by James, but also by their partners, employees, and successors, which would include their business partner and co-guarantor, plaintiff Larry Engel. Thus, to the extent that plaintiffs can show that defendant is Ford Motor Company's agent within the meaning of the ADDCA, then defendant would be covered by the terms of the release. Therefore, even if the individual plaintiffs have standing to sue under the ADDCA, and even if defendant were found to be an automobile manufacturer within the meaning of the ADDCA, plaintiffs' ADDCA claim would still be barred by the release. Accordingly, the trial court properly granted summary disposition of plaintiffs' claim under the ADDCA.

Next, plaintiffs argue that the trial court also erred in dismissing their claim under the Michigan Motor Vehicle Dealers Act ("MVDA"), MCL 445.1561 *et seq*. We again disagree.

Section 7 of the MVDA, MCL 445.1567, states:

> (1) Notwithstanding any agreement, a *manufacturer or distributor* shall not cancel, terminate, fail to renew, or refuse to continue any dealer agreement with a new motor vehicle dealer unless the manufacturer or distributor has complied with all of the following:
>
> (a) Satisfied the notice requirement of section 10.
>
> (b) Acted in good faith.
>
> (c) Has good cause for the cancellation, termination, nonrenewal, or discontinuance. [Emphasis added.]

Section 4(2) of the MVDA, MCL 445.1564(2), states that "'[m]anufacturer' means any person who manufactures or assembles new motor vehicles; or any *distributor*, factory branch, or *factory representative*." (Emphasis added). Section 3 of the MVDA, MCL 445.1563, states:

> (1) "Distributor" means any person, including an importer, resident or nonresident, who is engaged in the business pursuant to a dealer agreement, in whole or in part, of offering for sale, selling, or distributing new and unaltered motor vehicles to a new motor vehicle dealer, who maintains a factory representative for such purposes, resident or nonresident, or who controls any person, resident or nonresident, who in whole or in part offers for sale, sells, or distributes new and unaltered motor vehicles to a new motor vehicle dealer. Distributor does not include a person who alters or converts motor vehicles for sale to a new motor vehicle dealer.
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> * * *
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> (4) "Factory representative" means an agent or employee of a manufacturer, distributor, or factory branch retained or employed for the purpose of making or promoting the sale of new motor vehicles or for supervising or contracting with new motor vehicle dealers or proposed motor vehicle dealers.

In this case, plaintiffs fail to specify how defendant, a captive financing institution, can be held liable under the MVDA. Instead, plaintiffs rely on the analogous provisions of the ADDCA to argue that defendant is a party who may be liable under the MVDA. However, the MVDA must be interpreted according to its own clear and unambiguous provisions, which impose liability for wrongful termination only on a manufacturer or a distributor, as defined in the statute.

Defendant does not manufacture motor vehicles, so it does not fit the first part of the definition of "manufacturer." Defendant also does not offer motor vehicles for sale, nor does it distribute motor vehicles to dealerships, or maintain a factory representative for that purpose. Therefore, defendant does not fit the definition of "distributor." Thus, in order to sue defendant under the MVDA, plaintiffs would have to show that defendant is Ford Motor Company's "*agent* . . . retained or employed for the purpose of making or promoting the sale of new motor vehicles

or for supervising or contracting with new motor vehicle dealers or proposed motor vehicle dealers." Again, however, to the extent that plaintiffs can successfully show that defendant is Ford Motor Company's agent, their MVDA claim would be barred by the clear terms of the release. Accordingly, summary disposition of plaintiffs' MVDA claim was properly granted.

Plaintiffs next argue that the trial court erred in dismissing their claim for breach of the implied covenant of good faith and fair dealing. We disagree.

"[T]he covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992) (internal quotations and citation omitted). "Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975).

However, "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 13; 730 NW2d 29 (2006), vacated in part on other grounds 480 Mich 913 (2007) (citation omitted). Thus, defendant was entitled to summary disposition of this claim under MCR 2.116(C)(8).

Plaintiffs also challenge the trial court's dismissal of their tort claim for breach of fiduciary duty. In *Fultz v Union Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004), our Supreme Court held:

> [L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie.

While *Fultz* addressed a negligence claim brought by a nonparty to the contract, the "separate and distinct" analysis also applies in cases where, as here, a tort claim is asserted by a party to the contract. See *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84-85; 559 NW2d 647 (1997). Thus, the separate and distinct analysis applies to all of the plaintiffs, regardless of whether they were signatories to the wholesale agreement.

All the wrongful acts alleged in plaintiffs' amended complaint arise from defendant's duties under the parties' agreement. There was no other relationship between the parties. Plaintiffs have failed to show that defendant owed them an independent duty of care, separate and distinct from defendant's contractual obligations. The trial court correctly found that defendant was entitled to summary disposition of plaintiffs' breach of fiduciary duty tort claim under MCR 2.116(C)(8).

Plaintiffs also argue that the trial court erred in dismissing their claim for fraudulent misrepresentation because there was fraud in the inducement.

This Court has held that the economic loss doctrine does not apply where there is fraud in the inducement. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 371-373; 532 NW2d 541 (1995). While *Huron Tool & Engineering* makes clear that the economic loss doctrine is designed to avoid the strictures of the Uniform Commercial Code, we will assume here for the sake of argument that the separate and distinct analysis might not apply if there was fraud in the inducement.

Fraud in the inducement occurs when a party to a contract makes misrepresentations that induce the other party to enter into the contract. *Id*. at 375. However, the alleged misrepresentations must not in themselves constitute a contract or warranty term subsequently breached. *Id*. "[M]isrepresentations [that] relate to the breaching party's performance under the contract . . . do not give rise to an independent cause of action in tort." *Id*. at 373. Thus, a "plaintiff may only pursue a claim for fraud in the inducement extraneous to the alleged breach of contract." *Id*. at 374.

In their brief on appeal, plaintiffs allege that defendant misrepresented the amount and nature of their credit limit under the wholesale agreement, and the process by which inventory is ordered, purchased, and shipped. They allege that defendant did so knowingly or recklessly, for the purpose of inducing plaintiffs to enter into the wholesale agreement, that plaintiffs acted in reliance on those misrepresentations and signed the wholesale agreement, and that they suffered damages as a result. However, the amended complaint does not contain any such allegations. Rather, the amended complaint alleges that in October and November 2002, plaintiffs' fraudulently promised not to lower the dealership's credit limit if the individual plaintiffs invested more money in the business, but that defendant lowered the credit limit anyway. Clearly, post-contractual misrepresentations occurring in 2002 cannot constitute fraud in the inducement. Thus, plaintiffs' amended complaint fails to sufficiently allege fraud in the inducement.

Moreover, even if we were to consider the claims made in plaintiffs' brief, the misrepresentations concern the credit limit applicable to the wholesale agreement, which is a contract term that plaintiffs specifically allege that defendant breached. The alleged misrepresentations concerning the stated upper limits of the dealership's credit line were also made *after* the contract was signed and, therefore, could not have induced plaintiffs to enter into the wholesale agreement. Additionally, plaintiffs continued to perform under the wholesale agreement after discovering defendant's alleged misrepresentations, thereby affirming the contract. *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 295; 642 NW2d 700 (2001). Thus, plaintiffs have failed to show fraud in the inducement. The trial court did not err in dismissing plaintiffs' claim for fraud and misrepresentation.

For their final issue on appeal, plaintiffs argue that the trial court erred in dismissing their breach of contract claims. We again disagree.

In one claim, plaintiffs allege that defendant represented to them that they would have to wait longer to receive ordered vehicles because larger well-established dealerships had priority. Plaintiffs, believing alleged representations from defendant and Ford that vehicles ordered would not arrive for at least 14 weeks, began purchasing numerous vehicles to better position themselves to timely receive ordered vehicles. However, numerous cars began to arrive within weeks and inundated the dealership with vehicles. Further, plaintiffs were far beyond their credit

limit and defendant continued to credit plaintiffs for arriving vehicles. Plaintiffs thus claim that defendant violated the terms of the wholesale agreement, and of the personal guarantees, by extending dealership's credit above the credit limit to stop further inundation of vehicles.

In the other claim, plaintiffs allege that because the dealership was inundated with cars they began to struggle financially. Plaintiffs allege that after an annual credit review, defendant reduced their credit limits. Plaintiffs allege that at a meeting to discuss the reduction in credit, defendant represented the new credit limits would be phased in over 90 days and that, on this assurance, Larry Engel invested $20,000 to aid the dealership. Plaintiffs however allege that defendant reduced the credit limits.

The wholesale agreement states that defendant "at all times shall have the right *in its sole discretion* to determine the extent to which, the terms and conditions on which, and the period for which it will make such advances, purchase such contracts or otherwise extend credit to the Dealer . . . under the Plan or otherwise." (Emphasis added.) The agreement futher states that defendant "may, at any time and from time to time, *in its sole discretion*, establish, rescind or *change limits* or the extent to which financing accomodations under the Plan will be made available to Dealer." (Emphasis added.)

The wholesale agreement is clear and unambiguous, and must be enforced as written. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Having agreed that defendant could change the dealership's credit limits in its sole discretion, at any time, plaintiffs cannot maintain a breach of contract action based on defendant's decision to change the dealership's credit limits. Defendant's alleged "lack of good faith cannot override an express provision in a contract." *Eastway & Blevins Agency v Citizens Ins Co*, 206 Mich App 299, 303; 520 NW2d 640 (1994). Similarly, plaintiffs cannot claim that defendant violated the personal guarantees by changing the dealership's credit limits, because changing the credit limits was expressly permitted by the wholesale agreement.

We conclude that the trial court correctly found that plaintiffs failed to show that there was a question of material fact concerning whether defendant violated the wholesale agreement or the personal guarantees by raising the dealership's credit limit. Thus, defendant was entitled to summary disposition of plaintiffs' contract claims under MCR 2.116(C)(10).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter