STATE OF MICHIGAN

COURT OF APPEALS

In re ARBIB Estate.

CHRISTINE ARBIB, Former Personal Representative of the Estate of EUGENE ARBIB, and JAMES HALVORSON, Personal Representative Successor,

Respondents-Appellees,

v

CATHERINE J. ARBIB, CYNTHIA J. PIERSON, CHARLES ALLAN ARBIB and STPEHANIE ANN MCCALISTER f/k/a STEPHANIE ANN ARBIB,

Petitioners-Appellants.

UNPUBLISHED
September 8, 2009

No. 282004
Mackinac Probate Court
LC No. 04-007221-DE

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Petitioners appeal as of right from an order of the probate court granting summary disposition in favor of respondents according to MCR 2.116(C)(8).[1] Petitioners' sought specific performance of an alleged contract between themselves and their father, decedent Eugene Arbib. The court dismissed the claim because it did not comply with the requirements for contracts involving promises to make a devise in a will according to MCL 700.2514. We affirm.

Petitioners argue on appeal that the probate court erred in applying MCL 700.2514 to petitioners' contract claim, because the statute applies only to contracts to make a will, and not

[1] Petitioners claim that the Eugene Arbib's will should be set aside due to a lack of testamentary capacity, fraud, or the undue influence of his wife in making the will remains to be decided in probate court. This issue had initially been decided when the probate court granted respondents' motion for summary disposition under MCR 2.116(C)(10), but that order was reversed by the probate court on remand from the Court of Appeals because of additional evidence that had been discovered.

contracts to convey property. We disagree. A grant of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Eugene Arbib owned a number of businesses on Mackinac Island that had been operated by his family for three generations. One of the properties that he owned was a family residence and attached to it was a building known as the Victorian Lodge, which had been used to house employees of the family businesses. During Eugene's lifetime he decided to sell the family businesses to petitioners on five-year land contracts with the payments equal to what petitioners were paying to rent those properties. Petitioners claim that Eugene made an agreement with them that he would ensure that petitioners receive all of the family money used to operate the businesses, the residence, and the Victorian Lodge if they agreed to purchase the businesses. In 2003, Eugene changed the terms of his will executed in 1996. Under the terms of the new will, additionally monies, the residence on Mackinac Island, and a life estate in the Victorian Lodge were bequeathed to his wife, Christine Arbib.

Summary disposition may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). The pleadings alone are considered in testing the legal sufficiency of a claim under MCR 2.116(C)(8). *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). All factual allegations in support of the claim are accepted as true and viewed in the light most favorable to the non-moving party. *Maiden*, *supra* at 119. Also, any reasonable inferences or conclusions that can be drawn from the facts are likewise accepted as true. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

Petitioners seek specific performance of the alleged oral agreement. They argue that because they had fully performed their promise to buy the properties, the terms of the contract must be fulfilled even if it was not in writing. See *Guzorek v Williams*, 300 Mich 633, 638-639; 2 NW2d 796 (1942). However, a party seeking specific performance must first to demonstrate the existence of a valid, enforceable contract. *Bowkus v Lange*, 196 Mich App 455, 460; 494 NW2d 461 (1992).

Here, it is unclear that a contract was formed. Petitioners discussed an agreement, but its formation is not apparent from the record. Petitioners were unanimous in expressing their expectation that they would receive the promised properties and money based on conversations that they referenced within the family. However, only Charles Arbib specifically recounted a conversation about an exchange of the family's business capital, island residence, and Victorian Lodge for petitioners' acquisition of the family businesses. Charles said that his father simply said during a conversation on the topic that "everything is taken care of" and, "don't worry about capital, the capital is there." From these very broad statements it is not possible to discern what Eugene specifically promised to do. There is no information about what amount of money, or what property, if any, was promised to the children. Eugene did not say what capitol he was willing to provide, where it was coming from, or how and when he was going to provide it. Even though all of Eugene's children claimed to have an agreement with their father, because this conversation only included Charles it is not clear to which children a promise was being

made. The ambiguity of these statements could not be considered as forming a specific and definite agreement that the courts should enforce. See *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997): "Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract."

Even if definite contract terms could be ascertained, the contract would have been made to transfer properties and money to the children upon their father's death. Contracts to make a devise in a will are governed by MCL 700.2514. *In re VanConett Estate*, 262 Mich App 660, 663; 687 NW2d 167 (2004). Pursuant to MCL 700.2514(1):

> If executed after July 1, 1979, a contract to make a will or devise, not to revoke a will or devise, or to die intestate may be established only by 1 or more of the following:
>
> (a) Provisions of a will stating material provisions of the contract.
>
> (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
>
> (c) A writing signed by the decedent evidencing the contract.

Petitioners stated that the agreement was to convey the properties, rather than to bequeath, devise, or make a will, thereby rendering MCL 700.2514 inapplicable. However, Charles testified that he believed that the agreement with his father related to the terms of his will because that was the context of the conversation. Furthermore, petitioners testified that they expected to receive a substantial amount of money and all the properties on Mackinac Island upon Eugene's death. Because MCL 700.2514 concerns contracts "to make a . . . .devise," it clearly applies to the circumstances of this case.

In the instant case, there was no writing from Eugene evidencing a contract with his children, and there was no mention of any such contract in a will. See MCL 700.2514(1)(a). Petitioners contend that Eugene's 1996 will stated the material provisions of the contract. However, the 1996 will could not have contained the contractual provisions upon which petitioners rely, because the petitioners' alleged contract regarding the property conveyances was not formed until 1999. Further, the 1996 will is silent as to the children purchasing any property from Eugene, but rather makes various devises of the properties to his children.

Petitioners also stated that, because they believed that there was a valid contract and they fully performed their promises, they are entitled to specific performance of the contract or relief in the form of promissory estoppel. As discussed above, proving a valid contract has eluded petitioners and Eugene's 1996 will was simply a statement of his wishes, as they existed at the time of execution. *In re VanConett Estate*, *supra* at 663. Petitioners were required to prove clearly and convincingly an actual express agreement, rather than a mere unexecuted intention. *In re Estate of Fritz*, 159 Mich App 69, 75; 406 NW2d 475 (1987). In granting respondents' motion to dismiss the contract claims for failure to state a claim, the probate court found that "to attempt to boot-strap a series of events three years apart . . . and to incorporate them into some kind of, uh, promissory estoppel or contract is simply beyond, uh, my comprehension and belief." Petitioners' assertions that there was a contract, or that a contract was compliant with

MCL 700.2514, are unsupported by allegations of fact. See *Churella v Pioneer State Mut Ins Co* (*On Remand*), 258 Mich App 260, 272; 671 NW2d 125 (2003).

Petitioners also appeal the probate court's decision to deny their motion to amend their petition to elaborate on a claim for promissory estoppel. A trial court's decision to grant or deny leave to amend a pleading is reviewed for an abuse of discretion and will only be reversed if it results in an injustice. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006). A trial court does not abuse its discretion if it selects a reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Plaintiff sought to amend its complaint as provided for in MCR 2.116(I)(5), which provides as follows:

> If the grounds asserted are based on subrule (C)(8), (9), or (10), 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 amendment would not be justified.

MCR 2.118(A)(2) states: "[A] party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Leave to amend the pleadings should be freely given to the nonprevailing party unless the amendment would be futile or otherwise unjustified. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). Motions to amend a complaint should ordinarily be granted, and should be denied only for particularized reasons, such as: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies in the pleadings, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment. *Casey*, *supra* at 401.

In the instant case, the probate court said that it was denying both of petitioners' motions to amend their pleadings because discovery was closing or closed, petitioners had the knowledge to bring its promissory estoppel claim for over three years, and because any contract claim was precluded by operation of MCL 700.2514.

Delay alone does not justify denying a motion to amend, but a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Franchino v Franchino*, 263 Mich App 172, 191; 687 NW2d 620 (2004). But regardless whether allowing the amendment would have prejudiced respondents, the amendment qualified as futile. "The sine qua non of promissory estoppel is a promise that is definite and clear." *Merrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). Because petitioners failed to establish a definite and clear contract, they lacked the ability to

prove a promissory estoppel claim. Accordingly, the trial court did not abuse its discretion by denying petitioners' motion to amend.

Affirmed.

/s/ William C. Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher