STATE OF MICHIGAN

COURT OF APPEALS

JOHNNY G. COOPER and JCDD HOLDINGS, L.L.C.,

Plaintiffs-Appellants,

v

DAVID DEAN, PURSUIT ENGINEERING, L.L.C., PURSUIT TECHNOLOGY, INC., and PURSUIT MANUFACTURING, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
March 30, 2010

No. 283244
Oakland Circuit Court
LC No. 2007-080020-CK

Before: SERVITTO, P.J., and O'CONNELL, and ZAHRA, JJ.

PER CURIAM.

In this action seeking the recovery of monies plaintiffs allegedly paid to defendants, plaintiffs appeal as of right an order of dismissal with prejudice, which followed an order granting defendants summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

I. INTRODUCTION

Plaintiff Johnny Cooper owns Stargate, P.C., which configures heavy-duty laptop computers for installation in commercial trucks. David Dean is part owner of defendants Pursuit Engineering, L.L.C., Pursuit Technology, Inc., and Pursuit Manufacturing, L.L.C. Pursuit Engineering researches and develops night vision technology for military purposes. Pursuit Manufacturing assembles night vision technology and Pursuit Technology leases labor to Pursuit Engineering and Pursuit Manufacturing. Cooper and Dean met in 2005 and discussed the potential development of a mobile night vision product that could transmit images to Stargate computers mounted inside military vehicles or elsewhere. The parties began to research and develop the product during which time Cooper allegedly personally provided Dean with $15,000 and procured in excess of $100,000 for the project. Pursuit Engineering largely researched and developed the product. Cooper and Dean signed Articles of Incorporation creating JCDD Holdings, L.L.C., to market the potential new product, and Cooper and Dean began meeting with potential customers. Cooper attempted to finalize an operating agreement, but Dean refused to sign a proposed operating agreement claiming that the terms that Cooper had included in the agreement entitled JCDD to licenses owned by Pursuit Engineering. Dean later claimed that he

was informed the Stargate computer was not rugged enough for military application and returned the product to StarGate.

II. FIDUCIARY DUTY

Plaintiffs first argue that the trial court erroneously concluded that no fiduciary relationship existed between Johnny Cooper and David Dean. We disagree.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). Pursuant to a motion brought under MCR 2.116(C)(10), this Court construes the pleadings, admissions and other evidence submitted by the parties in a light most favorable to the non-moving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). A motion brought under MCR 2.116(C)(10) operates to test the factual support for a claim. *Spiek v Dept of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998). "The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Spiek, supra* at 338, citing *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 138; 565 NW2d 383 (1997). Because a "mere promise" to offer factual support for a party's position at trial is insufficient to overcome a motion brought under MCR 2.116(C)(10), this Court considers "the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "Whether to recognize [a] plaintiff's cause of action for breach of fiduciary duty in this context is a question of law." *Teadt v St John's Evangelical Church*, 237 Mich App 567, 574; 603 NW2d 816 (1999). Questions of law are subject to de novo review. *Id*.

"A breach of fiduciary claim requires that the plaintiff 'reasonably reposed faith, confidence and trust' in the fiduciary." *Rose v National Auction Group*, 466 Mich 453, 469; 646 NW2d 455 (2002), quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260; 571 NW2d 716 (1997) (Emphasis deleted). "A person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Teadt, supra* at 581. "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Id.* A person under a fiduciary duty is obligated "to act in the utmost good faith" in the interest of the principal to whom the duty is owed. *Rose, supra* at 473.

MCL 450.4404 provides, in pertinent part:

> (1) A manager shall discharge his or her duties as a manager in good faith, with the care of an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the limited liability company.

Plaintiffs, in the lower court and on appeal, contend that a fiduciary relationship arose between Dean and plaintiffs by operation of MCL 450.4404(1), because Dean executed the articles of organization of JCDD, and, as such, Dean was a member, manager, or both, of JCDD. We conclude that the trial court correctly determined that plaintiffs failed to show that Dean was either a member or manager of JCDD.

MCL 450.4501 provides, in pertinent part:

> (1) A person may be admitted as a member of a limited liability company in 1 or more of the following ways:
>
> > (a) In connection with the formation of the limited liability company, by signing the initial operating agreement.
> >
> > (b) After the formation of the limited liability company, in 1 or more of the following ways:
> >
> > > (i) In the case of a person acquiring a membership interest directly from the limited liability company, by complying with the provisions of an operating agreement prescribing the requirements for admission or, in the absence of provisions prescribing the requirements for admission in an operating agreement, upon the unanimous vote of the members entitled to vote.

Plaintiffs admitted in their brief on appeal that it "is undisputed that the written operating agreement was never signed." Plaintiffs argues that the trial court erroneously concluded that a person becomes a member of a limited liability company only by executing an operating agreement because the language of MCL 450.4501 is permissive and not mandatory. We agree with the trial court. The only manner MCL 450.4501 provides to become a member of a limited liability company "in connection with the formation" is "by signing the initial operating agreement." The remaining methods of becoming a member plainly apply "After the formation of the limited liability company."

Further, Dean did not become a member and manager of JCDD because he executed the articles of organization. The articles of organization do not identify the members of JCDD, and Dean, according to the articles of organization, executed the document as an "organizer" and not as a "member" or "manager." Further, MCL 450.4202 provides that, "One or more persons, *who may or may not become members*, may be the organizers of a limited liability company by filing executed articles of organization." (Emphasis added.) Contrary to plaintiffs' contention, the articles of organization do not suggest that Dean was a member or manager of JCDD. Accordingly, plaintiffs failed to present evidence that Dean acquired fiduciary duties to plaintiffs through his membership and/or management position with JCDD. The trial court properly granted defendants summary disposition.

III. JOINT VENTURE AND OR ENTERPRISE

Plaintiffs next argue that the trial court improperly concluded that there was no "Joint Venture and or Enterprise" between plaintiffs and defendants. We disagree. As an initial matter, we observe that plaintiffs did not ask the trial court to determine whether any "Joint Venture and or Enterprise" or partnership existed between plaintiffs and defendants; instead, plaintiffs alleged

that there was a contract between Cooper and Dean that required Dean to execute the operating agreement for JCDD. Alternately, plaintiffs sought relief through a claim of promissory estoppel.[1]

The elements of an enforceable contract are: "(1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). "It is hornbook law that a valid contract requires a 'meeting of the minds' on all the essential terms." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). A promise to enter into a future contract may give rise to an enforceable contractual obligation. *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). However, such a "contract to contract" will fail for indefiniteness unless it includes all essential terms to be incorporated into the subsequent contract. *Id.*

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 promise, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). "In determining whether a requisite promise existed, we are 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." *Id*. at 687. Moreover, this Court "exercise[s] caution in evaluating the estoppel claim and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted." *Id*.

We conclude the trial court correctly determined that plaintiffs failed to present sufficient evidence to support its contention that there was an oral or written contract between the parties that required Dean to execute the operating agreement for JCDD. Specifically, plaintiffs failed to present admissible evidence demonstrating that: (1) Dean promised to execute the operating agreement, or that (2) there was a "meeting of the minds" with regard to the essential terms of the alleged contract for Dean to execute the operating agreement. *Kamalnath*, *supra* at 549. Rather, Dean's unrebutted deposition testimony reveals that he refused to execute the operating agreement because the terms of the operating agreement were unacceptable. Given there was no evidence presented that Dean was required to execute the operating agreement, the trial court correctly concluded that there was no contract, and properly granted defendants' motion for summary disposition.

Similarly, plaintiffs failed to support their promissory estoppel claim. Plaintiffs claim that defendants promised Cooper "that they owned patents and licenses to night vision technology which they would contribute to JCDD Holdings and which JCDD Holdings could then use to sell the product(s) Dean and Cooper had agreed to sell under the auspices of JCDD

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[1] We note that plaintiffs admitted in their motion for summary disposition that a joint venture was never consummated. Thus, the trial court correctly concluded that a joint venture did not exist between Cooper and Dean.

Holdings." Plaintiffs also claim that Dean promised "to enter into the LLC and sign the operating agreement to perfect the formation of the LLC." Even assuming there is evidence that Dean indicated he would sign an operating agreement, we cannot conclude that plaintiffs could reasonably conclude that Dean would execute an operating agreement that purported to contribute licenses for the patents held by defendant Pursuit Engineering, L.L.C. There is no evidence of this promise, and thus, the trial court properly granted summary disposition in favor of defendants on plaintiffs' promissory estoppel claim.

IV. STANDING/PROPER PARTY

Plaintiffs next argue that the trial court incorrectly concluded that plaintiffs lacked standing. Whether a party has standing is a question of law that we review de novo." *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008).

"Standing ensures that a genuine case or controversy is before the court." *Michigan Citizens for Water Conservation v Nestle Waters North America*, 479 Mich 280, 294; 737 NW2d 447 (2007). Our Supreme Court has articulated a three-element test to determine whether a plaintiff has standing to bring an action:

> "First, the plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual and imminent,' not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" [*Id*. at 294-295, quoting *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629; 684 NW2d 800 (2004).]

Defendants argue that Cooper lacks standing to pursue his claim against defendants because much of the funds and equipment received by defendants were provided by Cooper's limited liability company, Stargate, Cooper's father, or an entity identified as "South Tower Park." We disagree. There is no dispute that Cooper provided $15,000 to Pursuit Engineering, which, alone establishes standing to bring a claim. Further, even though much of the funds and equipment were provided by other entities, there is no dispute that Cooper procured these funds and provided the funds to defendants. A reasonable factfinder could infer that was responsible for these funds and that Cooper could be held liable for repayment of the funds. Cooper thus has not provided "mere allegations," but "set forth" by affidavit "specific facts" to establish standing. C*ounty Road Ass'n Of Michigan v Governor Of State*, ___ Mich App ___; ___ NW2d ___ (2010), quoting *National Wildlife Federation*, 471 Mich at 630. Given this evidence, we conclude that plaintiffs have established "a substantial interest which will be detrimentally affected in a manner different from the citizenry at large." We also conclude that Cooper has a legitimate interest in the outcome of litigation to ensure sincere and vigorous advocacy. *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993). Thus, Cooper has a real interest in the case, and thus has standing to bring a claim.

V. CAPITAL CONTRIBUTION

Plaintiffs next argue that the trial court improperly considered defendants' claim that the $110,000 was Cooper's capital contribution to a joint venture between Dean and Cooper, because the defense constituted an affirmative defense which defendants had waived. We disagree. Generally, in order to preserve an issue on appeal, the issue must have been raised before, and decided by, the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Plaintiffs failed to raise the argument, that defendants waived their affirmative defense, before that trial court, and the trial court did not decide the issue. In a civil case, where a party fails to preserve an issue on appeal, this court will not review the issue unless manifest injustice would result from failure to review the issue. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). We can perceive no manifest injustice that would result from our failure to review the issue; therefore, we decline to discuss it further. *Id*.

VI. UNJUST ENRICHMENT

Plaintiffs next argue that the trial court erred when it granted defendants' motion for summary disposition on plaintiffs' unjust enrichment claim on the basis that there was no evidence that plaintiffs conferred a benefit on defendants. We agree there was evidence that Cooper provided a benefit to defendants, and as such, summary disposition was improperly granted.

Generally, the question of whether a specific party has been unjustly enriched is an issue of fact. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). However, the issue of whether an unjust enrichment claim may be maintained is a question of law, which this Court reviews de novo on appeal. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). This Court reviews a trial court's decision on an equitable matter de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

The elements of unjust enrichment are "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US)*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Where the elements of unjust enrichment are established, "the law will imply a contract in order to prevent unjust enrichment." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). "[A] contract will be implied only if there is no express contract covering the same subject matter." *Id*.

Here, the trial court incorrectly concluded that defendants did not receive a benefit from plaintiffs as a matter of law. At his deposition, Dean testified that he understood that this loan or advance described in the September 21, 2005, correspondence was subject to repayment. Dean also admitted that the $15,000 had not been repaid. In regard to the other funds provided to defendants, Dean testified at his deposition that he committed "[a]lmost 100 percent" of his resources to "[t]he R and D effort," which was intended to "validate and produce a product that combined Night Vision technology, wireless communication, and STARGATE Mobil reggedized computer," after meeting Cooper in 2005. However, Dean stated that he was unsure that he could provide documents showing that the deposits covering the payroll expenses were used to pay only people involved in the research and development of the night

vision/STARGATE product. Thus, the evidence demonstrates that there is a genuine issue of material fact regarding whether Dean, his entities, or any of them, received a benefit from Cooper, and to what extent, if any, defendants benefited from the funds. In other words, it is a question of fact for the trier of fact to decide whether defendants used the funds exclusively for the research and development effort, as defendants contend, or if defendants used the funds to pay its overhead expenses, as plaintiffs allege.

Further, the trier of fact must decide to what extent, if defendants used part of the funds to pay overhead, defendants received a benefit from the funds. If, for example, Dean used part of the funds to pay his own salary, then, viewing the evidence in a light most favorable to plaintiffs, Dean would have received a benefit. In turn, if the trier of fact concludes that defendants, or any of them, received a benefit, the trier of fact must then decide whether it would be inequitable for defendants to retain the benefit. *Barber, supra* at 375. Conversely, if the trier of fact determines that the funds were expended exclusively on research and development of the STARGATE/night vision product, or if it determines that it would not be inequitable for defendants to retain the benefit, if any, then it should return a verdict of no cause for action. *Id*. Moreover, there is also a question of fact regarding whether the funds were provided to defendants by Cooper, individually, as argued by plaintiffs, or a non-party, as argued by defendants. Because, the trial court erred when it concluded, as a matter of law, that defendants did not receive a benefit from plaintiffs, we reverse and remand to determine whether defendants received a benefit from plaintiffs' alleged advances or loans, and whether it would be inequitable to allow defendants, or any of them, should retain the benefit, if any. *Id*.

Plaintiffs next argue that they were entitled to entry of judgment in the amount of $15,000, because defendants set forth no valid defense. However, as explained in the above paragraph, plaintiffs were not entitled to entry of judgment for $15,000; instead, there was a genuine issue for trial regarding whether defendants were unjustly enriched, and, if so, to what extent defendants were enriched.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra