STATE OF MICHIGAN

COURT OF APPEALS

FIRST INTERNATIONAL EXCHANGE GROUP, INC., DHAFIR DALALY, and DEBRA DALALY Plaintiffs-Appellants,	UNPUBLISHED November 16, 2010
v	No. 293181 Oakland Circuit Court
ERHARD MOTOR SALES, INC., ERHARD MOTOR SALES OF FARMINGTON HILLS, INC., and WINFRIED DAHM, Defendants-Appellees.	LC No. 2008-093650-CK

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Plaintiffs, First International Exchange Group, Inc. ("FIEG"), Dhafir Dalaly and Debra Dalaly, appeal as of right an order granting summary disposition in favor of defendants, Erhard Motor Sales, Inc., Erhard Motor Sales of Farmington Hills, Inc., and Winfried Dahm. Plaintiffs' suit, claiming breach of contract and unjust enrichment, arises from a series of business transactions in which plaintiffs claimed they extended loans to defendants and were never repaid in full. We affirm in part, reverse in part, and remand.

A. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

B. BREACH OF CONTRACT CLAIM

Plaintiffs argue that the trial court erred when it granted defendants' motion for summary disposition with respect to the breach of contract claim. We disagree.

At issue in this case is the status of two payments given to defendants: one for $400,000 and another for $100,000. Plaintiffs argued that, while there was no explicit agreement, an implied-in-fact contract existed between the parties that established the loan. An implied-in-fact contract can exist when "the parties do not explicitly manifest their intent to contract by words, [but] their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction." *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). The key requirement is that mutual assent is required even though it is not manifested by direct or explicit words. See *Erickson v Goodell Oil Co, Inc*, 384 Mich 207, 211-212; 180 NW2d 798 (1970).

Here, there were no facts presented to suggest that there was any mutual assent between the parties. At the trial court, plaintiffs relied almost exclusively on the mere fact that $500,000 was paid to defendants. However, the mere existence of this payment is insufficient to establish that there was mutual assent between the parties. Even when viewing the parties' course of dealings, as plaintiffs suggest, it is clear that there was no evidence of mutual assent. Plaintiffs' position is that the $400,000 and $100,000 payments to defendants were unrelated to the prior Whirly Ball and real estate deals because the real estate deal satisfied the Whirly Ball debt. Thus, the only circumstances to consider are the $400,000 and $100,000 payments themselves. But, aside from the fact that the $400,000 check had "com'l loan 5200070011" written on the back, there were no other circumstances of note associated with these payments. Even this "com'l loan" notation is not helpful to plaintiffs because the check was made out to "Standard Federal Bank," with "Erhard BMW" written in the memo section, and the parties do not dispute that the check was applied to a loan Dahm had with the bank. Dahm admitted in his deposition that either he or one of his Erhard BMW companies had a loan account with Standard Federal with an account number of 5200070011. Thus, the notation was the method of communicating to Standard Federal that the funds were to be applied to this specific loan account and could not reasonably be viewed as a notation that FIEG was providing a "commercial loan" to anyone. Moreover, Dhafir admitted in a deposition, taken July 23, 2007, that no one owed him any money, and FIEG's tax records indicated that no loans were provided to anyone from the years 2003 through 2007.

Thus, there were no other facts presented that demonstrated any intent to contract for a $500,000 loan, let alone one "with the understanding that the funds would be repaid to the Plaintiffs upon demand with interest at the rate of 5%," as plaintiffs alleged in their complaint. Accordingly, there was no genuine issue of material fact, and the trial court's decision to grant defendants' motion for summary disposition with respect to the breach of contract count is affirmed.

C. UNJUST ENRICHMENT COUNT

Plaintiffs argue that the trial court erred in granting summary disposition with respect to its unjust enrichment claim. We agree.

Unjust enrichment occurs where (1) the defendant has received a benefit from the plaintiff and (2) it would be inequitable to allow defendant to retain that benefit. *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues and has the initial burden of supporting that position by affidavits, depositions, admission, or other documentary evidence. *Coblentz v Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006). Then the party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of material fact exists. *Id.* 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 could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Regarding the first element of unjust enrichment, there is no dispute that defendants received a benefit of $500,000, in the form of $400,000 and $100,000 payments, from plaintiffs. Thus, the only question remaining is whether there is a genuine issue of material fact related to the fairness or equity of defendants retaining that benefit.

Defendants met their initial burden of showing that there would be no inequity in retaining the $500,000 by submitting, *inter alia*, deposition statements from Dhafir, Debra, and FIEG's accountant, Andrew Glazer. Dhafir's deposition was from a prior, unrelated proceeding where he stated that no one owed him any money. Glazer testified that FIEG's tax records for the years 2003 through 2007 showed that no loans were provided by FIEG during that time. Thus, defendants presented proofs that the $400,000 and $100,000 they received were not "loans," and accordingly, established that there would be no inequity in allowing them to keep those benefits.

The evidentiary burden then shifted to plaintiffs to show that a genuine issue of material fact existed. *Coblentz*, 475 Mich at 569. In other words, plaintiffs had to produce evidence that would demonstrate that defendants' retention of the $500,000 would be inequitable.

Plaintiffs rely on the fact that Dahm paid $72,000 to plaintiffs as proof that Dahm was acknowledging the existence of the $500,000 debt by paying off a portion of it. However, there was nothing associated with the $72,000 payments themselves that linked them to this supposed $500,000 debt. In fact, these payments, as described by both parties, were made to help pay a lumber company's judgment against plaintiffs. Defendants provided a document that established that Dahm took on the "financial responsibility related to the completion of the house" on 4660 Quarton Road. Thus, plaintiffs failed to provide evidence that the $72,000 was for anything but paying off a contractor in conjunction with Dahm's obligation to pay for the house's completion. Furthermore, Dahm's deposition statement that he felt "pressured" by Dhafir to make the payment is insufficient to create a genuine issue of material fact. Plaintiffs argue that this feeling of "pressure" could only exist because of the existence of the $500,000 debt. However, with no evidence to support this view, such a view is mere conjecture, and "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden." *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

However, there is one area that does present a genuine issue of material fact. While there is no dispute that plaintiffs paid defendants the $500,000, there is a dispute regarding *why* those payments were made. Dahm claimed that he received the $500,000 in satisfaction of the prior Whirly Ball agreement debt. However, there was evidence presented to show that the prior Whirly Ball debt was paid off when Dahm was credited with a $500,000 deposit for the 4660 Quarton Road purchase, when no money actually changed hands. Thus, if plaintiffs paid the $500,000 to satisfy the Whirly Ball debt, then Dahm and defendants would clearly be justified in retaining that benefit. On the other hand, if receipt of the $500,000 was not in satisfaction of any debt, then retaining that benefit could be inequitable. Because there is a genuine issue of material fact with respect to *why* the $500,000 was given to Dahm, summary disposition was not appropriate on plaintiffs' unjust enrichment claim.

Defendants argue that a statement Dhafir made under oath in another proceeding[1] precludes finding any genuine issue of material fact related to the existence of any loan between Dhafir and defendants. The relevant portion from Dhafir's prior deposition provides:

> *Q.* Other than the people[2] that are holding this money for you or property in the Middle East is there anybody that owes you any money at all?
>
> *A.* No.

Consequently, any affidavits submitted by Dhafir that contradicted this statement (i.e., any claims that people "owed" him money) would not be allowed. However, here the genuine issue of material fact related to the unjust enrichment claim is discovered without relying on any such particular statements, and Dhafir never filed a contradictory affidavit. Dahm's own statements from his deposition revealed that he was owed $500,000 from the Whirly Ball agreement. Dahm also admitted that, even though he knew he was purchasing the house from the Dalalys for $2,500,000, he only mortgaged $2,000,000 of that total and did not recall providing the remaining $500,000 to the Dalalys. Viewing this evidence in a light most favorable to plaintiffs, as this Court is required to do, *Wilson*, 474 Mich at 166, leads to the inference that Dahm did not pay the $500,000 deposit for the home because it was paid in the form of a satisfaction of the $500,000 Whirly Ball debt he was owed. However, Dahm also stated that the Whirly Ball debt was satisfied by virtue of the $400,000 and $100,000 payments at issue in this case.

An obvious inequity would exist if Dahm received the $500,000 for what he thought was the satisfaction of the Whirly Ball debt, when in actuality that prior debt already was satisfied. As a result, plaintiffs successfully established a genuine issue of material fact related to the nature and, consequently, the potential inequity in allowing defendants to retain the $400,000

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[1] The deposition was taken in *Bednarsh v Dalaly*, as part of a creditor's examination.

[2] Prior to this section of the deposition, Dhafir indicated that he gave part of $150,000 to his children and an individual named Art Brickner.

and $100,000 payments; therefore, we reverse the trial court's granting of summary disposition on the unjust enrichment claim.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck