STATE OF MICHIGAN

COURT OF APPEALS

AAA MORTGAGE CORPORATION, Plaintiff-Appellant, v IRON WORKERS LOCAL NO. 25 PENSION FUND and DOVENMUEHLE MORTGAGE, INC., Defendants-Appellees.	UNPUBLISHED March 8, 2012 No. 301680 Oakland Circuit Court LC No. 2009-106558-CK

Before: SAAD, P.J., and K.F. KELLY and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff AAA Mortgage Corporation ("AAA") appeals as of right an order granting summary disposition in favor of defendants Iron Workers Local No. 25 Pension Fund ("the fund") and Dovenmuehle Mortgage, Inc. ("DMI"), pursuant to MCR 2.116(C)(8). We affirm.

This case concerns a residential mortgage lending program established for the benefit of various employees by trustees of the fund in accordance with the Employee Retirement Income Securities Act of 1974 (ERISA), 29 USC 1001 *et seq*. The trustees, using employer contributions, created, funded, and invested in an account to be utilized for mortgages, and AAA acted as a mortgage lender, originating, administering, and servicing mortgages pursuant to a contract between AAA and the fund. The dispute arose out of the decision by the fund's trustees to terminate the contract with AAA and to commence using the services of another mortgage lender, DMI.

AAA filed suit, alleging breach of contract, promissory estoppel, and unjust enrichment. AAA maintained that it was entitled to compensation for mortgage servicing rights that were lost and transferred upon termination of the contract, which compensation should have been paid by DMI as the new mortgage servicer. In support of its position, AAA relied on the contract, but also on standard industry practices and the parties' contract-negotiation history. The trial court found that the plain and unambiguous language of the contract did not provide AAA with any right to compensation when the fund terminated the contract. The July 2002 governing contract stated that it "may be canceled at no cost, any time upon 30 days written notice to [AAA]." The trial court further ruled that, even if AAA's interpretation of the contract were correct, AAA could not recover because allowing it to receive compensation would violate ERISA's

prohibitions against non-terminable contracts and the imposition of termination penalties. See 29 USC 1106(a)(1)(C); 29 USC 1108(b)(2); 29 CFR 2550.408b-2(c); *Lockheed Corp v Spink*, 517 US 882, 887-888; 116 S Ct 1783; 135 L Ed 2d 153 (1996); *In re Iron Workers Local 25 Pension Fund*, __ F Supp 2d __ (ED Mich, 2011), slip op at 24-25.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006), citing *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). Questions of law in general are reviewed de novo on appeal. *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011); *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). A decision regarding whether to allow a party an opportunity to amend a complaint is reviewed for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004).

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* "The motion should be granted if no factual development could possibly justify recovery." *Id.* at 130. All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997).

AAA first argues that the trial court erred in finding that the 2002 contract was clear and unambiguous and that the fund was entitled to summary disposition under contract law. AAA argues that the contract was silent regarding ownership of mortgage servicing rights, that the Plan Document[1] required the fund to hire a "mortgage lender" to service the mortgages, thereby precluding the fund from being the mortgage lender and owning the servicing rights, and that the fund's improper declaration that it owned the servicing rights deprived AAA of receiving compensation from DMI, where the servicing rights were in fact owned by AAA. AAA further contends that if there was no patent contractual ambiguity, there certainly was a latent ambiguity, given that an historic view of the case, including consideration of past contract proposals and drafts, reflects that everyone understood that servicing rights belonged to AAA and that it was entitled to compensation for those rights.

Under Michigan law, a party seeking recovery for breach of contract must show the existence of the contract, prove the terms of the contract, establish that the opposing party breached the terms, and show that the breach caused an injury. See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990); *Synthes Spine Co, LP v Calvert*, 270 F Supp 2d 939, 942 (ED

[1] Reference to the "Plan Document" pertains to the Iron Workers Local No. 25 Pension Fund Declaration and Agreement of Trust.

Mich, 2003). In *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007), this Court, setting forth basic contract principles, stated:

> That contracts are enforced according to their terms is a corollary of the parties' liberty to contract. This Court examines contractual language and gives the words their plain and ordinary meanings. An unambiguous contractual provision is reflective of the parties' intent as a matter of law, and if the language of the contract is unambiguous, we construe and enforce the contract as written. Courts may not impose an ambiguity on clear contract language. A contract is ambiguous when two provisions irreconcilably conflict with each other, or when a term is equally susceptible to more than a single meaning. Whether a contract is ambiguous is a question of law. Only when contractual language is ambiguous does its meaning become a question of fact. [Citations, internal quotation marks, and alterations omitted.]

We find that AAA's arguments lack merit. The July 2002 contract provided that it "may be canceled at no cost, any time upon 30 days written notice." The "at no cost" language is clear, unambiguous, and directly conflicts with AAA's assertion that it was entitled to compensation for lost mortgage servicing rights; "at no cost" means "at no cost" – the contract could be terminated absent any payment to AAA. The contract awarded AAA the right and obligation to service mortgages, and termination of the contract necessarily resulted in a discontinuation of AAA's contractual right to service mortgages, as well as its obligation to do so. The contractual rights and obligations could not exist outside the contract. AAA speaks of it owning the servicing rights, but any servicing rights did not survive the termination of the contract, and the loss of those rights was not compensable under the plain terms of the contract. There is no claim that the fund lacked the right to terminate the contract, and, consistent with the contract, termination was accomplished properly upon 30 days' written notice.

Contrary to AAA's argument, the contract was not silent regarding servicing rights. Rather, the contract plainly gave servicing rights to AAA, but those rights ceased to exist on termination. To the extent that AAA is arguing that the contract was silent regarding compensation for those rights upon transfer to a new entity, the argument lacks merit, where the contract was not silent, considering that it provided for termination at no cost. AAA repeatedly uses the word "ownership" in relationship to discussing servicing rights, as if ownership means that AAA retained the rights even after termination and up until the payment of compensation, but there is no contractual language that supports such a premise. The termination provision required AAA to deliver certain financial statements to the fund and to immediately pay all monies held in trust back to the fund upon termination, which clearly indicates that all of AAA's contractual servicing rights ended when the fund canceled the contract; a no cost cancellation. Additionally, whether industry practices generally included the payment of compensation is entirely irrelevant, is of no consequence, and cannot work to circumvent the contract's clear termination language.

AAA's arguments concerning the fund's declaration, made in its agreement with DMI, that it was the mortgage lender and owned the loans and servicing rights following termination may perhaps have conflicted with the language in the Plan Document, which defined a "mortgage lender" and contemplated an entity other than the fund as being the mortgage lender

and servicer. However, even assuming a violation of the Plan Document, it does not equate to a breach of the fund's contract with AAA, nor does it support the payment of compensation to AAA for loss of servicing rights. The actions of the fund relative to how it proceeded upon termination were irrelevant in the context of AAA's contractual rights. Even had the fund not declared itself the mortgage lender, the contract with AAA had nonetheless been terminated, with AAA having no right to continue servicing mortgages or to receive compensation. AAA has no standing to even complain about a violation of the Plan Document absent a correlation, which does not exist, between the violation and the contract claim or some other viable legal theory.[2] We note that, even though the fund may have declared itself the mortgage lender and the owner of the loans and servicing rights in the agreement with DMI, there is no evidence that the fund actually acted as the mortgage lender and originated and serviced mortgages. Indeed, the contract between the fund and DMI suggests that there was simply a transition from AAA to DMI for purposes of mortgage servicing.

AAA appears to argue that if the fund could not be a mortgage lender and own the loans and the servicing rights, AAA somehow retained the servicing rights despite the termination of the contract and was thus entitled to compensation from DMI. Assuming that the fund could not be the mortgage lender and own the loans and servicing rights, it does not negate the termination of the contract, nor does it mean that AAA retained servicing rights or had a right to compensation from DMI despite the termination. The fund certainly had the authority under the Plan Document to enter into a contract with a new mortgage service provider. Any suggestion by AAA that the fund lacked the authority to transfer servicing rights or to award servicing rights to a new servicer on termination of the contract finds no support in the contract or in the Plan Document.

With respect to AAA's latent ambiguity argument, a latent ambiguity arises when contractual language appears to be clear and intelligible, suggesting only a single meaning, but there is evidence outside the contract itself creating the necessity for interpretation or a choice among two or more potential meanings. *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 629 (2010). Ambiguities may either be patent or latent, and extrinsic evidence cannot be used to identify a patent ambiguity because such an ambiguity appears from the face of a document, but extrinsic evidence can be used to identify a latent ambiguity. *Id.* at 667. "To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation." *Id.* at 668. If indeed a latent ambiguity is found to exist, the court must then examine the extrinsic evidence once again in order to ascertain the meaning of the contractual language at issue. *Id.* The *Shay*

[2] AAA does not engage in any discussion or analysis whatsoever of the claims of promissory estoppel and unjust enrichment, so summary dismissal of those claims is affirmed. Moreover, promissory estoppel cannot be utilized to contradict and circumvent a clear and definite written contract, see *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999), and an unjust enrichment claim can succeed "only if there is no express contract covering the same subject matter," *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

Court recognized that in the context of an insurance contract, outside or parol evidence creating a doubt as to which person was to receive the benefit of an insurance policy could support application of the latent ambiguity doctrine, even though a specific person was clearly named as the beneficiary in the policy. *Id.* at 669.

We conclude that AAA's latent ambiguity argument, which relies on the exchanges between AAA and the fund in 1992 and proposed contracts that never came to fruition, actually reinforces the plain and unambiguous language in the 1995 and 2002 executed contracts, as opposed to giving support for a finding of an ambiguity. The proposed contracts that were rejected by the fund expressly called for the payment of compensation to AAA by any new servicing entity following termination and in connection with the transfer of servicing rights. The removal of said language in the executed contracts does not suggest an ambiguity in the executed contracts, nor does it indicate an acceptance of the proposition that compensation is due upon termination of servicing rights, as if it were so evident such that the parties did not even need to bother including the language in the contracts. Rather, the removal of the rejected language established that the contracting parties fully intended that there be no compensation to AAA upon termination of the contract, which is consistent with the "at no cost" language in the 1995 and 2002 contracts.

In sum, AAA's arguments on appeal lack merit and do not warrant reversal of the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(8). To the extent that resolution of the issues entail consideration of documentary evidence, including the contract and prior contract proposals and communications, summary disposition in favor of defendants was proper because no genuine issue of material fact existed and defendants were entitled to judgment as a matter of law. MCR 2.116(C)(10); *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997) (if matters outside of the pleadings have been relied upon, a motion is construed as having been granted under MCR 2.116[C][10]).

Given our ruling, it is unnecessary to address the issue whether the trial court erred in dismissing the lawsuit pursuant to ERISA, which was an alternative ground given by the court in support of dismissal. Moreover, because the plain and unambiguous language of the contract mandates summary dismissal of AAA's action, we need not reach the fund's alternative arguments that it was entitled to dismissal based on the doctrines of non-mutual, defensive collateral estoppel and federal ERISA preemption.

Finally, AAA argues that the trial court should have allowed it to amend its complaint. Aside from citing the principle that a court must give a party an opportunity to amend its pleadings when granting summary disposition under MCR 2.116(C)(8), unless amendment would be futile, the full extent of AAA's argument is as follows:

> In the case at bar, it is only fair that Plaintiff be allowed to amend its Complaint against Defendants as Local 25 must violate its own Trust Plan Document, which it cannot do, in order to achieve a dismissal in this case.

In *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), our Supreme Court explained:

> If a court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5). MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires."

MCR 2.116(I)(5) states that an opportunity to amend under MCR 2.118 need not be afforded if "the evidence then before the court shows that amendment would not be justified."

Here, AAA does not indicate the nature of any new cause of action that it wishes to plead predicated on the alleged Plan Document violation. Moreover, the existing complaint already alleged that the fund improperly claimed that it held the mortgage servicing rights upon termination, which is part of the basis for AAA's argument that the fund violated the Plan Document. Additionally, violation of the Plan Document as support for the breach of contract claim was argued below and on appeal, and, consistent with our analysis, it can be rejected without addressing whether the claim was insufficiently pled in the complaint. For the reasons stated above, we fail to see how the alleged violation of the Plan Document affords any basis for relief to AAA. Therefore, an amendment of the complaint would not be justified; it would be futile.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly