STATE OF MICHIGAN

COURT OF APPEALS

HASSEN HARP,

Plaintiff-Appellant,

v

EQUILON ENTERPRISES, L.L.C., d/b/a SHELL OIL PRODUCTS US,

Defendant-Appellee,

and

TERRY G. BENNETT, JUDY BLOCKAGE, JOHN BURDZIAK, CHARTER TOWNSHIP OF CANTON, COMMISSIONER DEMOPOULOS, COMMISSIONER JOHNSON, COMMISSIONER WADE, DOUGLAS FALZONE, VIC GUSTAFSON, ELAINE KIRCHGATTER, KNIGHT ENTERPRISES INC., CARROLL L. KNIGHT, PHIL LAJOY, RONALD LIEBERMAN, AARON MACHNIK, TRUSTEE SHEFFERLY, VENTURA & ASSOCIATES INC., THOMAS YACK, and KARL ZARBO,

Defendants.

UNPUBLISHED
March 22, 2012

No. 302084
Wayne Circuit Court
LC No. 10-006229-CZ

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

This case is about the sale of a gas station and the interpretation of an accompanying fuel supply agreement. Six months after filing suit, plaintiff Hassen Harp realized that he had focused his claims on the wrong course of unsavory actions committed by the seller, defendant Equilon Enterprises, L.L.C. The trial court disregarded Harp's request to file an amended complaint and summarily dismissed his claims against Equilon. We vacate the summary dismissal order to the extent it was entered with prejudice and remand to allow Harp to file an amended complaint. Harp established that amendment of his complaint was justified under MCR 2.116(I)(5) and MCR 2.118(A)(2) through his averments that Equilon breached ¶ 1(b) of

the September 2004 "Amendment to Retail Sales Agreement" by exercising in bad faith its "sole discretion" to determine whether "market area pricing" was warranted. We affirm the trial court's order in all other respects.

I. BACKGROUND

Equilon was a large corporate entity that purchased raw fuel, refined it and shipped it to Shell gas stations across the nation. Equilon also owned many Shell gas stations, which it leased to individual franchisees.[1] Harp began leasing the Shell gas station on the corner of Michigan Avenue and Lotz Road in Canton Township from Equilon in 1994. Under the triennial lease agreements, Harp agreed to sell only Shell-brand gasoline and to purchase its gasoline inventory solely from Equilon.

In 2004, Equilon decided to sell the subject Shell station. Pursuant to the parties' 2000 renewed lease agreement, Equilon extended a sale offer to Harp in May 2004. Harp agreed to purchase the Shell station for $1,374,000. As a condition of the sale, Equilon required Harp to enter a 10-year fuel supply agreement (FSA) under which Harp was bound to purchase only Shell-brand gasoline and to do so only through Equilon. The FSA provided that Harp would purchase 192,000 gallons of gasoline each month, a significant increase over its previous fuel purchase quotas. The parties entered a special agreement regarding fuel pricing under the FSA—the "Amendment to Retail Sales Agreement"—which provided in relevant part:

> (a) Retailer shall pay Seller for the Products the Shell **marketer tank wagon price**[2]/Shell's terminal rack price[3] in effect at the time loading commences at the Plaint for the place of delivery **plus $0.02 plus freight** . . . . [Emphasis in original.]
>
> (b) *If Seller determines, in its sole discretion, that market conditions warrant the use of market area pricing*, upon notification to Retailer and for as long as such market conditions exist, Retailer shall pay Seller's price in effect for Retailer's Station in the geographic market or trading area established by Seller at the time of Seller's delivery to Retailer. [Emphasis added.]

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[1] Equilon was created by Shell, Texaco and Saudi Aramco and has since been dissolved. See <http://www.equilonmotivaequiva.com/> (accessed February 29, 2012).

[2] "Marketer tank wagon price" is the price at which a "company or person that retails . . . motor fuels" as a middleman sells gasoline "to a retail outlet." American Business Brokers, *Glossary of Gas Station and Convenience Store Terms*, available at <http://www.abbunitedstates.com/glossary_gas_convenience.asp> (accessed on February 29, 2012).

[3] "Rack price" is the price at which "[l]arge multinational oil companies" "and independent refineries sell branded or unbranded gasoline to" local suppliers. "It is related to commodity spot price, but adjusted for transportation, overhead, and profit." *Id.*

After servicing the contract for about a year, Equilon assigned the FSA to a "jobber,"[4] True North Energy. In the years following his purchase of the Shell station, Harp's business languished. His fuel sales declined dramatically and he eventually filed for bankruptcy.

Harp initially blamed his faltering business on the construction of a Sunoco gas station on neighboring property by former defendant Knight Enterprises. In 2002, Knight approached Canton Township officials with a plan to construct the Sunoco station and sought a special land use permit. Unlike most gas stations, Knight's Sunoco station would not be located at an intersection; it would be built on Michigan Avenue, one lot east of Harp's Shell station. Westbound Michigan Avenue traffic would reach the Sunoco station before reaching the Shell. Moreover, Knight sought to construct a service drive from Lotz Road, along the border of the Shell station property to the Sunoco station, thereby diverting Lotz Road traffic to the Sunoco. The Township notified Equilon of Knight's proposal and each public hearing, but Equilon failed to forward this information to its tenant, Harp. Equilon neither responded to the Township nor appeared at any of the hearings. Absent any objection, the Township granted Knight a special land use permit.

Harp claimed that he entered the purchase agreement negotiations with Equilon in 2004 ignorant of the looming Sunoco station. Yet, Harp sought an independent appraisal of the property in 2003. The appraisal report included a photograph of the Sunoco "gas station/truck stop," which was already under construction. The report also stated, "In the case of the subject there was; [sic] . . . most importantly, a brand new Sunoco gas station/truck stop (with food service) under construction adjacent to and wrapping around the subject." The parties secured a second appraisal during the 2004 sale negotiations. That report noted, "To the east of the subject a mixed use Sunoco Gas Station/Arby's Restaurant is being constructed. This new station/Arby's is expected to be competition for the subject . . . ."

Harp did not file suit until June 2, 2010. His complaint focused on Equilon's failure to take any action to oppose Knight's request for a special land use permit or to notify Harp so he could protect his own interests. Harp asserted that Equilon's failures violated the parties' 2000 lease and FSA. Harp further contended that Equilon withheld information about the Knight Sunoco station proposal to artificially inflate the Shell station's value and influence Harp's decision to purchase.[5]

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[4] A "jobber" is "[a] local company that owns or supplies properties with petroleum products obtained from local supply points." *Id.*

[5] Harp also levied several claims against Canton Township and individual township trustees and planning commissioners, challenging their approval of the special land use permit. Harp filed various claims against the individuals and business entities responsible for the Sunoco station. Harp also sought unjust enrichment, exemplary damage, negligence and fraudulent concealment claims against Equilon. Those claims were all dismissed by stipulation or summarily dismissed with prejudice by the trial court and Harp does not challenge those dismissals.

Harp asserted claims of fraud and breach of the implied covenant of good faith and fair dealing related to the 2000 lease and the 2004 purchase agreement/FSA. In the general factual allegations, Harp averred that Equilon made the sale of the gas station contingent upon Harp's acceptance of the 10-year FSA under which Harp would be penalized for failing to meet his monthly fuel-purchase quota. Harp asserted that he was ignorant of the impending Sunoco station when he signed the FSA. Harp claimed that his sales "plummeted" after the February 2006 opening of the Sunoco.

In relation to his fraud claim, Harp exclusively contended that Equilon intentionally withheld information about the impending Sunoco station when negotiating the 2004 land purchase agreement, thereby falsely inflating the value of the property. In relation to the claimed breach of the implied covenant of good faith and fair dealing, Harp asserted that a duty arose from the 2000 lease and the 2004 purchase agreement/FSA. Harp alleged that Equilon breached that duty by intentionally and wrongfully "failing to challenge and/or object to Special Land Use approval," failing to take any action to prevent the approval in 2002, and failing to alert Harp of the same. Harp accused Equilon of withholding this material information that affected "the present and future value of the" property and business assets thereby inducing Harp to pay significantly more than the property was worth. Harp also accused Equilon of inducing him to sign the 10-year FSA in 2004, knowing that Harp "would be unable to meet the [192,000-gallon monthly] quota because of the" impending construction of the Sunoco station.

Equilon sought summary disposition of Harp's fraud and breach of implied covenant claims under MCR 2.116(C)(7) (release),[6] (C)(8) (failure to state a legally cognizable claim), and (C)(10) (failure to create a genuine issue of material fact). Relevant to the arguments now before us, Equilon argued that any claims arising directly or indirectly from the 2000 lease or FSA were barred by a mutual release entered by the parties in connection with the 2004 sale. Equilon noted that any claims founded on Harp's alleged ignorance of the impending Sunoco station must fail as the record evidence established that Harp was on notice months before the purchase negotiations began. Equilon further argued that Michigan does not recognize a claim for breach of the implied covenant of good faith and fair dealing.

Harp responded on December 6, 2010, and for the first time, based his claim of loss on Equilon's breach of its duty to employ good faith and fair dealing when exercising its sole discretion to apply "market area pricing" (MAP) under the 2004 FSA. According to Harp, MAP is not based on Equilon's actual costs; it is calculated by considering competitive factors, such as local competitors' pump prices. Fuel prices calculated using MAP may be higher or lower than the supplier's actual costs. "Rack price," on the other hand, includes the supplier's desired profit and is therefore generally higher than MAP-calculated prices. Harp asserted that, under the lease agreement, Equilon had always sold him gasoline at MAP-calculated rates. Harp claimed that Equilon often reduced or eliminated its own profit margin to sell fuel based on MAP when it owned the Shell station because it had a vested interest in the station's success. Fearing that

[6] Equilon also raised the statutes of limitations as a ground for reversal, which was rejected by the trial court.

Equilon would discontinue this practice after the sale, Harp allegedly negotiated the contract terms ensuring that Equilon would provide fuel at no greater than rack price and continue to provide fuel at MAP prices whenever possible. Harp asserted that Equilon representatives verbally assured him that it would continue to apply MAP as a general practice despite the contractual provision leaving this decision in Equilon's sole discretion.

Harp accused Equilon of intentionally selling the FSA to True North knowing that True North was a jobber that could not calculate prices with MAP (True North had to sell the fuel over MAP in order to remain in business). As a result, Harp was required to purchase gasoline from True North at the often more expensive rack price. Essentially, Harp accused Equilon of knowingly misrepresenting its intentions during the land sale negotiations and quickly arranging for a more profitable plan when the deal was sealed, thereby violating its covenant of good faith and fair dealing. Harp also filed a counter-motion for summary disposition pursuant to MCR 2.116(I)(2), stating that "as a matter of law[,] Equilon's failure to continue [MAP] and subsequent assignment of the Plaintiff's [FSA] to a jobber it knew did not engage in [MAP] violated the implied duty of good faith and fair dealing inherent in Equilon's self-reserved discretion to apply [MAP]."

The circuit court granted summary disposition in Equilon's favor. The court dismissed Harp's breach of the implied covenant of good faith and fair dealing claim pursuant to MCR 2.116(C)(8) as that cause of action is not recognized in Michigan. The court dismissed Harp's fraud action pursuant to MCR 2.116(C)(10) as the evidence conclusively established that Harp was on notice that the Sunoco gas station would be built months before he signed the gas station purchase agreement. The court determined that Harp had not raised his claims regarding fuel prices in his complaint and declined to find any breach of good faith in that regard. The court also rejected Harp's assertion that he raised a violation of the 2000 lease/FSA in his complaint.

II. STANDARD OF REVIEW

We review de novo a trial court's resolution of a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition is appropriate under MCR 2.116(C)(7) when the claims are barred by a settlement or release entered between the parties. "When determining whether a motion for summary disposition brought pursuant to MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it." *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a party's motion under (C)(8), the court must construe the pleadings in the light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.

> Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (quotation marks and citations omitted).]

Summary disposition is warranted under MCR 2.116(I)(2) "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment . . . ."

III. ANALYSIS

Harp does not challenge the trial court's dismissal of his claims rooted in Equilon's failure to disclose the impending construction of the Knight Sunoco station. Indeed, any such challenges would lack merit given the record evidence that Harp was on notice by September 2003, eight months before the purchase negotiations began, that the Sunoco station was under construction. At issue in this appeal is Equilon's conduct in regard to the 2004 FSA.

A. Trial Court Erroneously Failed to Address Harp's Motion to Amend

Harp challenges the trial court's dismissal of his claims without any discussion of Harp's request to file an amended complaint. In his sur-reply to Equilon's motion for summary disposition, Harp challenged dismissal based on his FSA-related arguments. Harp continued, "To the extent the Court dismisses any claim . . . or finds that the Plaintiff has not adequately pled any of the claims herein asserted, the Plaintiff respectfully requests leave to amend the Complaint pursuant to MCR 2.118." The circuit court failed to address this request.

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." MCR 2.116(I)(5) further provides that, when the court dismisses a party's claims pursuant to MCR 2.116(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." "[A]mendment is generally a matter of right, rather than grace." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). An amendment is not justified, however, when the party has engaged in undue delay, acted in bad faith or with a dilatory motive, or repeatedly failed to cure pleading deficiencies despite prior opportunities to amend; when allowing an amendment would cause undue prejudice to the nonmoving party; or when such amendment would be futile. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

We note that contrary to Equilon's suggestion, Harp was not required to file a free-standing motion for leave to file an amended complaint. Nothing in the court rules requires such a request to be raised in a separate pleading or motion. We also reject Equilon's complaint that Harp failed to specifically identify the claims he would assert in his amended complaint. Harp was exceedingly clear on the record that he would challenge Equilon's failure to employ MAP after the Shell station sale and its subsequent transfer of the 2004 FSA to a third party that could not employ MAP. Harp argued that he intended to prove that Equilon violated its duty to exercise its vast retention of discretion in good faith.

There is no evidence of undue delay, bad faith, dilatory tactics, failure to cure deficiencies, or the potential of undue prejudice to Equilon. Moreover, as we find below, Harp's proposed amendments to his claims would not be futile. Amendment of Harp's complaint was therefore "justified" and should have been freely granted as "justice so require[d]." MCR 2.116(I)(5); MCR 2.118(A)(2). On remand, the trial court is directed to allow Harp the opportunity to amend his complaint to include his claims related the 2004 FSA.

B. Harp's Claims Related to the 2004 FSA Are Not Futile

The 2004 FSA specifically provided that Harp was guaranteed rack price plus two cents plus freight. The FSA gave Equilon sole discretion to decide whether to calculate rates using MAP. Given the plain language of the FSA, Harp cannot rely upon the verbal assurances of Equilon representatives to support his claimed entitlement to MAP-calculated rates. *Hamade v Sunoco, Inc*, 271 Mich App 145, 166-167; 721 NW2d 333 (2006) (stating that extrinsic evidence may not be used to alter or contradict a contract's plain and unambiguous terms). Moreover, the 2004 FSA plainly states that it "cancels and supersedes all prior and contemporaneous representations, inducements, agreements, commitments, and undertakings with respect to the subject matter of this Agreement" and that it "may be amended or supplemented only in writing." An express merger or integration clause nullifies all prior or contemporaneous agreements of the contracting parties. *Id.*; *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 493-496; 579 NW2d 411 (1998). Harp's proposed claims, however, do not rely solely on the alleged verbal assurances made by Equilon representatives. Harp also claims that Equilon acted in bad faith and did not engage in fair dealing when deciding whether MAP-calculated rates should be applied.

"An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Amended claims are also futile when the plaintiff seeks to add theories "that had essentially already been dismissed by the trial court." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006). Stated another way, "[a]n amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane*, 231 Mich App at 697. The claims Harp seeks to raise against Equilon are not repetitive of the claims already dismissed by the trial court. Moreover, the proposed claim is legally cognizable on its face.

As noted, ¶ 1(b) of the 2004 FSA provides, "If Seller determines, in its sole discretion, that market conditions warrant the use of [MAP]," then Equilon may choose to employ that pricing method. Harp labels the violation of this provision as a breach of the implied covenant of good faith and fair dealing. As noted by Equilon and the trial court, Michigan does not recognize an independent tort-like action for the breach of this implied covenant. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 422-423; 295 NW2d 50 (1980); *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). But Harp is actually asserting a direct breach of Equilon's use of its sole discretion by acting in bad faith. That claim *is recognized* under Michigan law.

In *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975), this Court held that "[w]here 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." The proviso applies only where the acting party "has unbridled discretion," not where the parties' contract provides conditions for the use of discretion. *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 302-303; 520 NW2d 640 (1994). The 2004 FSA imposes no limitations on Equilon's discretion in determining when the use of MAP is warranted. As there are no guidelines within the contract to govern Equilon's use of its sole discretion, Equilon had a legal duty to exercise that discretion "honestly and in good faith." This claim is facially cognizable and the trial court was required to permit Harp's amendment.

Equilon argues in the alternative that, even had the court permitted Harp to amend his complaint, the court could have dismissed the claim pursuant to MCR 2.116(C)(10). Yet, the record evidence creates at least a genuine issue of material fact that Equilon breached its duty to employ its discretion honestly and in good faith. Equilon did not rebut Harp's assertion that Equilon had always calculated fuel rates using MAP while acting as Harp's landlord. Equilon also did not deny that it used MAP calculations for only one month after the sale of the Shell station. Harp averred that Equilon self-servingly discontinued MAP-calculated rates to increase its own profit margin fully understanding that Harp would be financially crippled by this decision. Equilon provided no alternative good-faith explanation for its actions. The implication is that Equilon had always been able to calculate rates using MAP and acted in bad faith when it suddenly and inexplicably stopped doing so.

Equilon further argues that Harp's amended complaint would be futile because the 2004 FSA includes a shortened period of limitations and therefore Harp's claims would be dismissed pursuant to MCR 2.116(C)(7). Specifically, ¶ 16(c) of the 2004 FSA provides that Equilon would not be liable for claims arising out of the contract unless Harp provided written notice of his claim "within 180 days after the date on which the claim arose."

> [P]arties to a contract may agree to a shortened period of limitations. An unambiguous contractual provision providing for a shortened limitations period is to be enforced as written unless the provision violates the law or public policy or is otherwise unenforceable under traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability. [*Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009).]

Harp contends that the shortened limitations period in the 2004 FSA is unenforceable because Equilon committed fraud by entering into the MAP contract term when it "never intended to honor" that provision. Harp also contends that the 180-day limitations period is unconscionable because he was an individual business owner who had leased the gas station for several years and was suddenly faced with a nonnegotiable contract to purchase the property. Accordingly, Harp was forced to either accept Equilon's terms or lose his gas station business.

We note that Harp presented evidence from which a reasonable factfinder could determine that Equilon never intended to employ MAP-pricing under the contract and thereby fraudulently induced Harp's signature. Harp also presented Equilon's May 28, 2004 letter describing the terms of sale as nonnegotiable. However, Equilon failed to raise this defense in the trial court and the parties' appellate arguments in this regard are minimalistic. As such, we

are unable to resolve this issue as a matter of law. Equilon is free to raise this defense on remand to the circuit court and Harp would then be able to fully argue his contract defenses.

C. Claims Based on 2000 Lease Agreement

Harp also contends that the trial court erroneously determined that he had not included within his breach of the implied covenant of good faith and fair dealing count a claim based on the 2000 lease and FSA. At the summary disposition hearing, Harp argued that Equilon's duty was born in the 2000 agreements. The circuit court expressed its doubt that this argument was adequately made in the complaint and rejected Harp's reliance on various generalized allegations, asserting that the complaint was not specific enough to place Equilon on notice.

We disagree with the trial court's over-broad reading of the complaint. In Harp's "Breach of the Implied Covenant of Good Faith and Fair Dealing" count, he made the following allegations:

> 185. Plaintiff leased and operated the Business from the Defendant Sellers for approximately ten (10) years pursuant to the Lease and Franchise Agreement.
>
> * * *
>
> 188. The Lease and Franchise Agreement, Purchase Agreement, and Brand Covenant imposed duties of good faith and fair dealing between the Defendant Sellers and Plaintiff.

Harp cited as breaches of the 2000 lease and FSA Equilon's failure to do anything to prevent construction of Knight's proposed Sunoco station or to notify Harp so he could take action. Harp clearly asserted that Equilon breached a duty arising from the 2000 lease and FSA.

It is irrelevant, however, whether the complaint was specific enough to notify Equilon of any claims based on the 2000 lease and FSA. Unlike Harp's claim related to Equilon's discretion under the 2004 FSA, Harp's claim that Equilon breached its duty to act in good faith by failing to react to the proposed Sunoco gas station is not based on any contract provision allowing Equilon to act in its sole discretion. This claim is therefore *not recognized* under Michigan law. *Kewin*, 409 Mich at 422-423; *Fodale*, 271 Mich App at 35. Ultimately, correction of the trial court's error could not resuscitate the claim as summary dismissal would have been appropriate under MCR 2.116(C)(8).

Further, to the extent Harp now seeks to add claims related to Equilon's fuel-pricing system under the 2000 FSA, those claims are barred by MCR 2.116(C)(7). In August 2004, in connection with the sale of the Shell station, the parties signed the following release: "Each party hereby releases the other . . . from all claims and demands which each has against the other (whether or not now known to either party) arising directly or indirectly under, out of, or in connection with" the 2000 contracts. As the release precludes Harp's suggested amendments for violation of the 2000 agreements, those claims would be futile.

Affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher