STATE OF MICHIGAN

COURT OF APPEALS

GREENVILLE MANUFACTURING, L.L.C., Plaintiff-Appellant,	UNPUBLISHED July 31, 2012
v	No. 304229 Wayne Circuit Court
NEXTENERGY CENTER, Defendant-Appellee.	LC No. 09-020090-CK

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(dissenting)*

I agree with the majority's disposal of plaintiff's fraud claims, but I respectfully disagree with the majority's disposition of plaintiff's breach of contract claims. While the courts are indeed not bound by the labels used by a party, I do not believe that the breach of contract claim here was merely another attempt to bring a fraud claim while calling it a breach of contract. Furthermore, I conclude that it is possible that plaintiff's entrance into the lease agreement could itself have been consideration for a binding contract based on oral promises made by defendant, and I would find sufficient questions of fact to warrant remanding for further proceedings.[1]

Initially, "a statement made by a party or his counsel, in the course of trial, is considered a binding judicial admission if it is a distinct, formal, solemn admission made for the express purpose of, *inter alia*, dispensing with the formal proof of some fact at trial." *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). See also *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993) (arguments of counsel are neither evidence nor stipulations of fact). Plaintiff "is entitled to the benefit of testimony in support of a verdict in his favor despite his expression of an opinion inconsistent therewith." *Ortega*, *supra*, 382 Mich 223. Therefore, plaintiff's counsel's concession at oral argument that plaintiff could not prove that defendant never intended to perform at the time defendant made its alleged promises is not, standing alone, sufficient to preclude plaintiff's fraud claim. However, when viewed in context of the entire case, I am persuaded that plaintiff is substantively pursuing relief premised on defendant ultimately breaking its promises rather than having never meant those promises in the first place.

[1] I do not, however, have any views as to the strength or substantive merits of this claim.

Consequently, I view this matter as a legitimate and good-faith breach of contract action. The critical issue, as the majority explains, is whether any consideration existed such that defendant's alleged promises would be binding contractual obligations. In my view, there is no reason why plaintiff's entrance into the lease agreement itself cannot be consideration for an independent binding contract under which defendant was obligated to perform the promises that defendant allegedly made. After all, defendant presumably expected to profit from the lease agreement.

However, more significantly, I cannot agree with the majority's dismissal of the absence of a merger clause in the lease agreement as essentially irrelevant. As the majority states, the parol evidence rule generally precludes the admission of evidence of other negotiations or agreements between parties to vary the clear and unambiguous terms of a contract. *Hamade v Sunoco Inc (R & M)*, 271 Mich App 145, 167; 721 NW2d 233 (2006). But the parol evidence rule does not bar the admission of extrinsic evidence to show that the parties did not intend their written instrument to be fully integrated. *Id*. at 167-168. The presence of an integration clause would be conclusive as to that issue. *Id*. at 169. I agree with the majority that a contract might be integrated notwithstanding the absence of an explicit integration clause, but we cannot say so conclusively without either weighing the facts or determining that there is no factual dispute. This Court is not a fact-finding court, and I believe there is a genuine question of material fact.

Therefore, I would hold that the trial court erred in dismissing plaintiff's breach of contract claim, and I would remand for, inter alia, a resolution of the factual question of whether the parties' lease agreement was, in fact, fully integrated.

/s/ Amy Ronayne Krause