STATE OF MICHIGAN

COURT OF APPEALS

ALBERT TRESCONE and JNL VENTURES, INC.,

Plaintiffs-Appellants,

v

LOTSADOUGH, INC., and DEAN BACH,

Defendants,

and

COMERICA BANK,

Defendant-Appellee.

UNPUBLISHED
August 21, 2012

No. 304750
Oakland Circuit Court
LC No. 2010-108583-CK

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant Comerica Bank summary disposition on plaintiffs' claim against it. Plaintiffs also challenge the trial court's subsequent order denying them leave to amend their complaint to add Comerica back into the lawsuit on additional claims against it. We affirm.

This case arises out of a failed commercial transaction for the sale of plaintiffs' pizza franchise. Plaintiffs asserted a breach of contract claim, premised on third-party beneficiary status allegedly conferred on plaintiffs by MCL 600.1405, against Comerica, buyer Lotsadough's lender. At closing, Comerica refused to fund Lotsadough's loan to purchase the franchise. The essential facts are undisputed; the primary question presented is whether plaintiffs, as the sellers of the pizza franchise, were third-party beneficiaries, within the meaning of MCL 600.1405(1), of the financing agreement between Lotsadough and Comerica. The trial court concluded that there was no genuine issue of material fact and plaintiffs were not third-party beneficiaries of the financing agreement. It summarily dismissed plaintiffs' claim against Comerica.

This Court reviews de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). 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). When reviewing the trial court's decision, this Court likewise must "consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exch*, 461 Mich 1, 5; 597 NW2d 47 (1999); *Downey v Charlevoix Bd of Comm'rs*, 227 Mich App 621, 626; 576 NW2d 712 (1998). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

MCL 600.1405 provides in relevant part:

> Any person *for whose benefit a promise is made* by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to *have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person*. [Emphasis added.]

Our Supreme Court explained in *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003).

> A person is a third-party beneficiary of a contract *only when that contract establishes that a promisor has undertaken a promise directly to or for that person.* By using the modifier directly, the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, *directly referred to in the contract*, before the third party is able to enforce the contract. An objective standard is to be used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status. . . . [Citations omitted, emphasis added.]

The word "directly" is of fundamental importance in describing the nature of the actions that must be agreed to relative to a third-party beneficiary. *Id.*; see also *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999); *Vanerian v Charles L Pugh Co, Inc*, 279 Mich App 431, 434-435; 761 NW2d 108 (2008). Further, as this Court explained in *Kisiel v Holz*, 272 Mich App 168, 170-171; 725 NW2d 67 (2006):

> Only intended, rather than incidental, third-party beneficiaries may sue when a contractual promise in their favor has been breached. More specifically, an incidental beneficiary has no rights under a contract. *A third person cannot maintain an action on a simple contract merely because he or she would receive a*

> *benefit from its performance or would be injured by its breach.* Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract. [Citations and quotation marks omitted; emphasis added.]

See also *Real Estate One v Heller*, 272 Mich App 174, 177-178; 724 NW2d 738 (2006). Thus, to establish a claim as a third-party beneficiary in this case, plaintiffs must establish, under an objective standard and from the language of the contract itself, that Comerica undertook a promise—to loan funds to the buyer upon, and subject to, the satisfaction of certain conditions—directly to plaintiffs or for plaintiffs' direct benefit. MCL 600.1405; *Schmalfeldt*, 469 Mich at 428; *Kisiel*, 272 Mich App at 170-171.

Plaintiffs argue that they are intended third-party beneficiaries of the commercial financing agreement between the buyer and Comerica merely because Comerica was aware of plaintiffs' role as seller in the transaction for which the buyer sought financing, and because information in a closing statement for the sale of the pizza franchise indicated that plaintiff JNL Ventures, Inc., would be receiving a disbursement in excess of the loan amount. Plaintiffs do not allege that this transaction presents any circumstances atypical of the usual commercial transaction involving financing; they do not point to any particular language in the contractual documents between the buyer and Comerica setting forth any direct promise to act, or refrain from acting, for plaintiffs' benefit. Simply stated, "[w]here a contract is primarily for the benefit of the contracting parties, the incidental benefit that a third person derives from the contract does not vest that person with the right to sue for breach of contract." *Frick v North Bank*, 214 Mich App 177, 180; 542 NW2d 331 (1995), citing *Kammer Asphalt Paving Co v East China Twp Schs*, 443 Mich 176, 190; 504 NW2d 635 (1993). It is indisputable that the financing agreement between Comerica and the buyer was primarily for the benefit of those parties, and while plaintiffs would have benefitted incidentally from that contract, plaintiffs have not established any genuine issue of material fact, under an objective standard and from the form and meaning of the financing agreement itself, that Comerica made any promise to them, or for their direct benefit. *Schmalfeldt*, 469 Mich at 427-429; *Kisiel*, 272 Mich App at 170-171. The trial court correctly determined that plaintiffs are not intended third-party beneficiaries of the financing agreement between the buyer and Comerica.

Plaintiffs also assert that the trial court's grant of summary disposition was premature, considering that discovery was not yet closed. While plaintiffs are correct that the granting of summary disposition can be premature where discovery is ongoing, such was not the case here. As this Court explained in *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292-293; 769 NW2d 234 (2009):

> Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete. However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. *The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position.* [Footnotes containing citations omitted; emphasis added.]

As stated above, "[a]n objective standard is to be used to determine, from the form and meaning of the contract itself whether the promissory undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status." *Schmalfeldt*, 469 Mich at 420. Thus, "[w]hen determining whether MCL 600.1405 applies to a purported third-party beneficiary, 'a court should look no further than the form and meaning of the contract itself' and should view the contract objectively." *Boylan v Fifty Eight Ltd Liability Co*, 289 Mich App 709, 729; 808 NW2d 277 (2010), quoting *Schmalfeldt*, 469 Mich at 428. Therefore, the question whether plaintiffs are intended third-party beneficiaries of the financing agreement between the buyer and Comerica was to be answered solely by reference to the documents comprising that agreement. Plaintiffs do not point to any documents missing from the record for which additional discovery was needed; rather, plaintiffs argue that additional discovery in the form of deposition testimony from Comerica's employees would have provided additional factual support for its assertion of third-party beneficiary status. However, any such testimony would have been wholly irrelevant to the determination whether plaintiffs were intended third-party beneficiaries of the agreement between the buyer and Comerica. *Id*. Accordingly, the trial court's ruling was not premature. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292.

Plaintiffs next argue that the trial court erred by concluding that Comerica did not breach its contractual obligations to the buyer under the financing agreement. However, absent third-party beneficiary status, plaintiffs are not permitted to raise a claim as to whether Comerica breached any contractual obligations to the buyer to fund the loan; any such claim is enforceable only by the buyer itself. *Schmalfeldt*, 469 Mich at 427. Moreover, and contrary to plaintiffs' assertion otherwise, at no time did the trial court make any finding as to whether Comerica breached its agreement with the buyer, determining instead only that plaintiffs were not third-party beneficiaries of the commercial loan agreement between those parties, and thus, were not entitled to bring a claim seeking to enforce that agreement. Having reached the same conclusion, we, too, need not address the issue of whether Comerica may have breached its contract with the buyer.

Finally, plaintiffs argue that the trial court abused its discretion by denying them leave to amend their complaint to add additional claims, sounding in tortious interference, against Comerica after their initial third-party beneficiary claim against Comerica was dismissed. We disagree.

This Court "review[s] for an abuse of discretion a circuit court's decision to grant or deny leave to amend a pleading; we will only reverse the court's ruling if it occasions an injustice." *Boylan*, 289 Mich App at 727. "A court does not abuse its discretion if it selects an outcome falling within the range of reasonable and principled outcomes." *Id.*

> Except in limited circumstances, 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." A court should freely grant the nonprevailing party leave to amend the pleadings *unless the amendment would be futile or otherwise unjustified.* Motions to amend a complaint should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the part of the movant, a repeated failure to cure deficiencies in the pleadings, undue

> prejudice to the opposing party by virtue of allowing the amendment, or the futility of amendment. [*Id.* at 727-728 (citations omitted, emphasis added).]

"An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face, (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *PT Today, Inc v Comm'r of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (citation omitted); see also *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

The elements of tortious interference with a contractual agreement or business relationship are "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, *an intentional interference by the defendant inducing or causing a termination of the relationship or expectancy*, and resultant damage to the plaintiff." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010) (emphasis added); see also *PT Today, Inc*, 270 Mich App at 148; *Joba Constr Co v Burns & Roe, Inc*, 121 Mich App 615, 634; 329 NW2d 760 (1982).

> In order to establish tortious interference with a contract or business relationship, plaintiffs must establish that the interference was improper. *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 457; 502 NW2d 696 (1992). In other words, the intentional act that defendants committed must lack justification and purposely interfere with plaintiffs' contractual rights or plaintiffs' business relationship or expectancy. *Winiemko v Valenti*, 203 Mich App 411, 418 n 3; 513 NW2d 181 (1994) (citations omitted); *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984). The "improper" interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship. *Id*. [*Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003).]

A "per se" wrongful act is one "that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). If the plaintiff does not allege a per se wrongful act by the defendant, then the plaintiff must "demonstrate specific, affirmative acts that corroborate the improper motive of the interference." *Cedroni Assocs v Tomblinson, Harburn Assocs Architects & Planners, Inc*, 290 Mich App 577, 600; 802 NW2d 682 (2010).

In its proposed amended complaint, plaintiffs alleged that Comerica intentionally and improperly interfered with their relationship with the buyer by refusing to fund the loan despite the buyer having satisfied all of the necessary conditions to obtain that loan. However, the factual allegations underlying plaintiffs' proposed new claims against Comerica did not identify or allege with any specificity an act "that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak*, 193 Mich App at 12-13. Instead, plaintiffs made only bare, unsupported allegations that Comerica's conduct in declining to fund the loan constituted a *per se* wrongful act. But, absent unusual circumstances, none of which are alleged here, we find nothing "inherently wrongful" about a refusal to fund a commercial loan premised on an assertion of a failure of a condition precedent to that obligation. Nor can we conclude that

declining to fund a commercial loan premised on a disagreement over whether a condition precedent was satisfied "can never be justified under any circumstances." *Id*. Thus, to state a claim for tortious interference, then, plaintiffs must "prove, with particularity, affirmative acts taken by [Comerica] that corroborate the improper motive of the interference." *Cedroni Assocs*, 290 Mich App at 600. But, again, plaintiffs make only bare allegations that Comerica acted with an improper motive; they offer no facts to substantiate, or even suggest, that Comerica had any improper motive when it declined to fund the loan. And, plaintiffs presented no evidence whatsoever demonstrating any "affirmative acts" taken by Comerica "that corroborate the improper motive of the interference."

Moreover, the factual allegations underlying the proposed new claim were the same as those alleged in the initial complaint – that Comerica wrongfully refused to fund the loan despite the buyer having complied with all necessary conditions for such funding, as a result of which the buyer was unable to complete its purchase of plaintiffs' pizza franchise. Plaintiffs were aware of the facts and evidence supporting their claims at the time they filed their initial complaint; the amended complaint seeking to add new counts was based on the same facts previously before the trial court. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998), citing *Dukesherer Farms, Inc v Director of the Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988). And, the general rule is "[w]here a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice." *Rinke v Auto Moulding Co*, 226 Mich App 432, 439; 573 NW2d 344 (1997) (quotations omitted). Considering that the new claims proposed by plaintiffs were premised on the same facts, and arose from the same transaction or occurrence, as the third party beneficiary claim previously dismissed on its merits, the trial court did not abuse its discretion by denying plaintiffs leave to amend the complaint to add these proposed new claims against Comerica.[1]

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

[1] In light of our ruling on this issue, it is unnecessary for us to address the question whether plaintiffs' proposed claims were barred by MCR 2.203 and/or by res judicata. Although the trial court relied on these grounds, in part, in denying plaintiffs' motion for leave to amend their complaint, this Court may affirm a trial court's decision where it reaches the right result, even if for the wrong, or for a different, reason. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009).