ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 08-884

	Opinion Delivered MAY 6, 2009
DAVID MOORE, JOHN MOORE and FREDA MOORE APPELLANTS	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. CIV 2006-1554-1]
V.	HONORABLE JOHN HOMER WRIGHT, JUDGE
KEITH SMITH COMPANY, INC. APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

This case arises out of a breeder-hen contract between appellants David Moore, John Moore, and Freda Moore and appellee Keith Smith Company, Inc. The Garland County Circuit Court granted appellee partial summary judgment on appellants' claims for fraud and fraudulent inducement, promissory estoppel/breach of contract, and negligence and certified the order as final pursuant to Ark. R. Civ. P. 54(b). Appellants raise four points for reversal, contending that there are genuine issues of material fact undecided that render the summary judgment inappropriate. Finding no error, we affirm.

Background

In 2003, appellants were interested in purchasing a poultry farm.[1] They located what they believed to be a suitable farm owned by Bill Grassie, who had a contract with appellee.

[1]Freda and John Moore are the parents of David Moore.

Prior to the purchase of the Grassie farm, David Moore met with Jim Jones, manager of appellee's breeder-hen operation. Jones indicated that appellee would enter into a contract with appellants and gave David Moore a list of previously prepared updates that needed to be made to the facility. Appellants purchased the Grassie farm and the transaction closed on December 22, 2003.

In February 2004, David Moore and appellee entered into a breeder-hen contract. Under the contract, appellants agreed to house, feed, care for, and raise to marketing age, in an approved house, any and all birds placed in their custody by appellee. Appellants were to furnish all land, buildings, equipment, water, labor, and other facilities required. The contract provided that it was for one flock. The contract also provided that either party could terminate the contract for any reason by mailing written notice to the other party. A flock of hens was placed with David Moore at that time.

In September 2004, appellee sent a letter to John Moore, stating that it had received customer complaints about the quality of eggs coming from appellants' farm. The letter continued that, in order for appellee to leave the current flock with David Moore, John Moore would have to assume total management for the farm. John Moore and appellee entered into a contract dated September 16, 2004, for the remainder of the term of the original contract between David Moore and appellee.

In November 2004, appellee informed appellants that they would have to replace the nest system before appellee would renew the contract with appellants. It was explained that

the existing system was worn out to the point that appellee was experiencing production problems and customer complaints. The nests were replaced.

A second flock of hens was placed at the farm pursuant to a February 2005 contract between John Moore and appellee. In November 2005, appellee sent a letter stating that it would place a probationary flock with David Moore in early 2006. If David Moore's management was satisfactory to appellee, he would be placed back in the normal rotation to receive a flock; however, if his management was deemed to be substandard, his contract would be terminated. In December 2005, appellee decided not to enter into a contract with David Moore for a probationary flock in 2006.

Appellants filed their complaint on December 21, 2006, asserting causes of action for fraud, fraud in the inducement, breach-of-contract/promissory estoppel, and negligence. The complaint was based on allegedly false representations Jim Jones made to David Moore prior to appellants' purchase of the farm. The misrepresentations included (a) that as long as David Moore's management of the flocks of hens placed with him was satisfactory, appellee would continue to place additional flocks of hens; (b) that the hen facility at the Grassie farm was in good condition and would be in very good condition after certain required updates were completed; and (c) that the plaintiffs would not be required to replace nests in the hen house for at least four to five years. Appellants sought compensatory and punitive damages. They

later amended their complaint to add another claim for breach of contract.[2] Appellee denied the material allegations of the complaint.

On October 10, 2007, appellee filed its motion for summary judgment. Appellants responded by filing a list of material facts that remain in dispute. Both parties submitted excerpts of deposition testimony in support of their respective positions.

In his deposition, David Moore testified that he and his now-wife met with Jim Jones prior to the purchase of the farm. He said that Jones told him that it was a flock-to-flock contract. Moore said that he asked Jones about the conditions of the nests and was specifically told that new nests would not be needed for four or five years. Moore did not inspect the facility or the nests prior to the purchase and said that he was relying solely on what Jones had told him. Moore further testified that Jones told him that the facility was in good condition and would be in very good condition once the updates were completed. Moore also related that Jones and another employee of appellee, Rodney Standridge, informed him that before he would receive a second flock, he would have to replace all of the nests. He opined that the facility was in terrible condition and that appellee should have known of all the problems.

In his deposition, John Moore testified that he did not talk with Jim Jones or Bill Grassie prior to the purchase of the farm. He said that, prior to the purchase of the farm, he was told to check the condition of the nests and that he did this by having David Moore ask

---

[2]The second breach-of-contract claim was for appellee's failure to purchase market eggs at a price of $0.10 per dozen. This claim was not resolved by the summary judgment and is still pending in the circuit court.

Jones. In his affidavit, Moore stated that he and David Moore were not able to go into the facility until after the Grassie flock was removed in October 2003. At that time, there was no way to determine how the nests worked because they had been raised in order to remove the flock. He also asserted that, had Jones indicated that the nests might need to be replaced in less than four or five years, or that market conditions might prevent appellee from offering future contracts, he would not have purchased the farm.

Jim Jones testified by deposition that the update list given to David Moore contained items that were required in a newly constructed house. Although he did not personally inspect the facility after the Grassie flock was removed, he said that Rodney Standridge did and found nothing wrong with the nests. He said that Standridge would be expected to inform him if there were problems with the nests prior to a new owner taking over. Jones was not aware of any problems with the nests during the last two or three years that Grassie operated the farm, adding that the nests were in "good shape" prior to Grassie's 2003 flock. He acknowledged that the condition of the nests could not be determined if the birds were in the nests. Although he did not recall a specific discussion with David Moore about the nests, Jones said it was "possible" that he had said the nests "might" have to be replaced in four or five years, but there was "no possibility" that he told Moore the nests "would not" have to be replaced in that time frame. Jones denied discussing the condition of the facility once the updates were made and could not recall whether those updates would be all that would be required for several years.

Jones discussed appellee's policy on extending new contracts to current growers. He said that, as long as management is satisfactory, appellee would issue new contracts and the growers would be in the regular rotation to receive birds. Jones acknowledged that there were times when appellee failed to extend contracts based on a downturn in market conditions. He said that he meant what he said about placing a probationary flock with David Moore in 2006 but that, collectively, appellee changed its mind. He said that the decision not to place the probationary flock was made because appellants fell short on their numbers, there was poor management, and that David Moore was not at the farm for most of the second flock. Jones also said that he was concerned about other growers having longer-than-normal down time between flocks.

Rodney Standridge, who had considerable experience as a grower, testified that he gave David Moore advice prior to Moore receiving the first flock of birds. He said that it was important to have the slats that the nests rest upon level and straight and that they were not level and straight in Moore's case, causing him trouble from the start. Standridge denied knowing from the first that Moore was going to have trouble, adding that it became obvious when the birds came into peak production. According to Standridge, the nests were approximately fifteen years old and could be repaired so as to be serviceable. He did not recall whether he inspected the farm and made a list of things needed to be done in order to have the farm meet appellee's standards for a new grower. He did not recall seeing the list of updates given to David Moore. Standridge also said he knew that, with good management

on his part as a grower, he would receive another flock, but that market conditions could change that.

Bret Humphreys, an employee of appellee, testified that the nests could not be repaired.

The Circuit Court's Ruling

On March 9, 2008, the circuit court entered an order granting partial summary judgment to appellee. In its order, the court found that any representation by Jim Jones as to the quality and condition of the nests was a matter of opinion and could not be the basis of a fraud action. The court also found that appellants could have discovered the condition of the nest had they exercised due diligence and inspected the Grassie farm before they purchased it. The circuit court also granted summary judgment on appellants' breach-of-contract/promissory estoppel claim, finding that, because the contract was for one flock, the contract was not breached. The court noted that promissory estoppel was not available to appellants because there was an enforceable contract between the parties. The court also noted that the contract contained a provision stating that either party could terminate the contract at any time for any reason. The court then addressed appellants' claim that appellee was negligent in failing to determine that the nests needed to be replaced before appellants purchased the Grassie farm and entered into a contract with appellee. The court found that appellee had no duty to inspect the nests and that the contract put the onus on the appellants to have adequate facilities. Finally, the court also granted summary judgment to appellee on

appellants' claim for punitive damages. The court certified the order as a final judgment pursuant to Ark. R. Civ. P. 54(b). This appeal followed.

Standard of Review

The law is well settled that summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Felton v. Rebsamen Med. Ctr., Inc.*, 373 Ark. 472, ___ S.W.3d ___ (2008). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *See id*. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *See id*. We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *See id*. Our review focuses not only on the pleadings, but also on the affidavits and documents filed by the parties. *See id*.

Arguments on Appeal

Appellants first argue that the circuit court erred in granting summary judgment on their fraud or fraud in the inducement claims. Appellants' argument is that there are material facts remaining in dispute concerning appellee's representations about receiving future flocks and the condition of the facility, specifically, the nests. We disagree.

Appellants insist that appellee had a duty to inform them that a downturn in the market may prevent appellee from extending another contract, even if their management was

satisfactory. However, liability for nondisclosure may be found only in special circumstances. *See Ward v. Worthen Bank & Trust Co.*, 284 Ark. 355, 681 S.W.2d 365 (1984). Appellants did not plead that there were special circumstances in the present case. Moreover, an action for fraud or deceit may not be predicated on representations relating solely to future events. *Delta School of Commerce, Inc. v. Wood*, 298 Ark. 195, 766 S.W.2d 424 (1989). The representations in question illustrated appellee's policy concerning future renewals. Since these representations were made before any contract was signed, they could not have represented a past event or present circumstance. These representations could only have alluded to appellee's future performance of contracts yet to be executed.

With regard to appellants' fraud claim as it relates to the condition of the facility, the circuit court was correct in granting summary judgment because the alleged misrepresentation was an expression of opinion. A good-faith expression of opinion, concerning a matter not susceptible of accurate knowledge, cannot furnish the basis for deceit or fraud. *Delta School of Commerce*, *supra*. Our supreme court has said that statements that things are "good," or "valuable," or "large," or "strong," necessarily involve to some extent an exercise of individual judgment, and even though made absolutely, the hearer must know they can be only expressions of opinion. *Cannaday v. Cossey*, 228 Ark. 1119, 1121, 312 S.W.2d 442, 444 (1958). In the present case, the statement by Jones that the facility was in "good shape" involved Jones's individual judgment and was an expression of his opinion. Also, there is no evidence that Jones was not acting in good faith when he made the

statement. Therefore, the circuit court correctly granted summary judgment on the fraud claim.

Appellants next argue that there are material issues of fact concerning their breach-of-contract and promissory estoppel claim. Appellants rely on the same alleged misrepresentations that formed the basis for their fraud claim. Promissory estoppel is not to be used as a vehicle to engraft a promise on a contract that differs from the written terms of the contract. *See*, *e.g.*, *Halls Ferry Inv., Inc. v. Smith*, 985 S.W.2d 848 (Mo. App. 1998). Promissory estoppel is a basis for recovery when formal contractual elements do not exist. *Community Bank of N. Ark. v. Tri-State Propane*, 89 Ark. App. 272, 203 S.W.3d 124 (2005). However, in the present case a formal contract does exist. Therefore, appellants cannot proceed on the basis of promissory estoppel. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005).

In their third point, appellants argue that there were genuine issues of material fact remaining as to whether appellee was negligent in determining what updates to the facility were needed. Appellants' argument is that, because appellee undertook to provide a list of updates to be made to the facility prior to their purchase, appellee was negligent in not determining that the nests would have to be replaced.

The law of negligence requires as essential elements that the plaintiff show that a duty was owed and that the duty was breached. *Lacy v. Flake & Kelley Mgmt., Inc.*, 366 Ark. 365, 235 S.W.3d 894 (2006). The issue of whether a duty exists is always a question of law, not

to be decided by a trier of fact. *Id*. If no duty of care is owed, summary judgment is appropriate. *Id*.

According to appellants, the negligence occurred when appellee prepared the list of needed updates or repairs in July 2003. Although a duty can arise from contractual relationships, *see Tackett v. Merchant's Sec. Patrol*, 73 Ark. App. 358, 44 S.W.3d 349 (2001), the contractual relationship between the parties in the present case arose *after* appellee's allegedly negligent inspection of the facility. Assuming without deciding that appellee undertook a duty to inspect the nests, there is no evidence that appellee was negligent in its inspection. Just because appellee inspected the nests and did not find that the nests needed to be replaced at the time the update list was prepared does not establish that appellee was negligent in its inspection. We cannot find from this record that appellee assumed any duty to inspect the facility, and, therefore, the circuit court correctly granted summary judgment on this claim.

We need not discuss appellants' fourth point because we have affirmed the circuit court's summary judgment on the claims for compensatory damages. *See generally Hudson v. Cook*, 82 Ark. App. 246, 105 S.W.3d 821 (2003) (recognizing that, in the absence of an award for compensatory damages, punitive damages are barred).

Affirmed.

PITTMAN and GRUBER, JJ., agree.