STATE OF MICHIGAN

COURT OF APPEALS

LIGGETT RESTAURANT GROUP, INC., Plaintiff-Appellant, v CITY OF PONTIAC and CITY OF PONTIAC STADIUM BUILDING AUTHORITY, Defendants-Appellees.	FOR PUBLICATION December 18, 2003 9:10 a.m. No. 240495 Oakland Circuit Court LC No. 01-036350-CZ Updated Copy February 27, 2004

Before: Gage, P.J., White and Cooper, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion that the circuit court correctly dismissed plaintiff's complaint for failure to state a claim. I do not agree that the contract language precludes as a matter of law a claim of frustration of purpose or a claim of unjust enrichment.

Plaintiff brought its two-count complaint in November 2001, alleging frustration of purpose, as grounds for rescission, and unjust enrichment. Defendants filed a motion for summary disposition under MCR 2.116(C)(8), failure to state a claim. The motion was heard in January, 2002, and granted, solely on the pleadings, in February.

The original contract provision concerning the possibility that the Lions would play fewer than eight home games addressed the amount of the minimum annual payment due from plaintiff's predecessor. Plaintiff does not seek to be relieved of, or to reform or rescind, this provision. Under this provision, plaintiff is relieved of any minimum payment.

The 1990 contract amendment concerns, inter alia, provisions of the lease respecting the percentages of gross proceeds due defendant authority. These amounts were significantly and immediately increased by the 1990 amendment, although without the amendment the lesser amounts would have been contractually binding until 2000. Plaintiff asserts that these increased percentages were agreed upon in exchange for a provision granting plaintiff's predecessor the option to extend the contract from 2000 until 2005, the ending date of the Lions' agreement with

defendants. Plaintiff claims that its predecessor paid over $6 million dollars in additional concession fees to defendants, from 1990 until 2000, over and above those required in the original lease, in exchange for the option to extend the original lease for five years, from 2000 to 2005, until the end of the Lions' sublease. Although the option was exercised as anticipated, plaintiff received, in effect, only a two-year extension, because the Lions departed after two seasons.

The original terms of the lease were, indeed, continued. And, under those terms, plaintiff was relieved of the $100,000 annual minimum payment once the Lions left the Silverdome. However, the agreement was silent concerning the consequences of the Lions' departure before the expiration of the option term. I do not agree that the agreement, on its face, precludes application of the frustration of purpose doctrine to the instant circumstances.

Plaintiff alleged that its predecessor agreed to an increase in concession fees in exchange for an extension of the lease to a date to be co-terminus with the Lions' sublease, and that the additional payments were made on the "mutual understanding and premise that the Lions were to play their home games at the Silverdome for the entire term of such extension." In the course of negotiations, plaintiff's predecessor requested verification of the term of the Lions' obligation to the Silverdome. Plaintiff produced a letter from defendant stating:

> In conjunction with the proposed Sixth Amendment to the Concession Contract, you requested *verification as to the term the Detroit Lions were obligated to play football* at the Pontiac Silverdome. . . . Although the Sublease and License was entered into on April 23, 1973, the *30-year term began in 1975*. . . . . [Emphasis added.]

This response is consistent with plaintiff's claim that both parties to the contract amendment proceeded on the assumption, and with the intent and agreement, that the Lions were *obligated* to play at the Silverdome through the 2004-2005 season, and that they would do so.

The presence of paragraph 37, addressing the minimum annual payment and the effect on that payment of the Lions' failure to play at least eight games in the stadium, does not preclude a finding that the Lions' early departure, and defendants' decision to accept monetary compensation from the Lions, and apparently forgo whatever rights defendants may have had to seek an injunction to restrain the Lions from abandoning the Silverdome,[1] resulted in a frustration of the purpose of the sixth amendment of the concession contract.

[1] Plaintiff asserts that defendants had such a right under their sublease with the Lions.

I would hold that plaintiff properly pleaded a cause of action for rescission/frustration of purpose,[2] and the circuit court erred in granting defendants' motion for summary disposition dismissing that claim.

I also disagree with the majority's determination that the contract provision precludes an action for unjust enrichment. Plaintiff alleged that the increase in concession payments was agreed to in exchange for the right to be the sole concessionaire at the Silverdome until the end of the Lions' sublease, an additional five-year period, that defendants accepted $6 million in additional payments from 1990 to 2000, and that defendants would be unjustly enriched if they are permitted to retain the entire sum under the circumstances that the Lions only played for two of the five years of the extension, and that, additionally, defendants were able to recover damages from the Lions, including damages resulting from the loss of concession revenues. I do not agree that the provision in the original concession contract precludes plaintiff 's claim for unjust enrichment. As discussed above, that contract provision addresses the effect on the annual minimum payment should the Lions fail to play eight games in the Silverdome. It does not address the parties' rights and obligations in the event the Lions breach their agreement with defendants to play in the Silverdome through the 2004-2005 season.

I would reverse the grant of summary disposition under MCR 2.116(C)(8),[3] and remand for further proceedings.

/s/ Helene N. White

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[2] The cause of action is described in the 3 Restatement of Contracts, 2d, § 377, p 224:

> A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

[3] I concur in the majority's rulings with respect to plaintiff 's request to amend its complaint and whether the case should be reassigned to a different judge.