

STATE OF MICHIGAN
COURT OF APPEALS

W.A.G.S. HEALTH SERVICES, INC.,

Plaintiff- Appellant,

v

TOTAL HEALTH CARE, INC.,

Defendant- Appellee,

and

KENNETH RIMMER,

Defendant.

UNPUBLISHED

September 26, 1997

No. 183937

Wayne Circuit Court

LC No. 94-402127-NZ

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff filed a complaint alleging that it was a corporation formed primarily to re-open, reorganize, and manage Southwest Detroit Hospital ("the hospital"), which had filed a voluntary bankruptcy petition and was closed following the appointment of a Chapter 11 trustee. Plaintiff claims that defendant, Total Health Care, Inc., agreed to assist plaintiff in purchasing the hospital by paying plaintiff \$5,000,000, and that plaintiff would then sell the membership of the hospital's wholly owned subsidiary corporation, LifeChoice Quality Health Plan (HMO), to defendant. However, defendant never provided any funding and plaintiff was unable to purchase the hospital. The bankruptcy court subsequently agreed to allow the separate sale of the hospital and the HMO, and the trustee then sold the HMO to defendant, while the hospital was abandoned and given back to its mortgagor. Plaintiff alleged breach of contract and misrepresentation against defendant. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), finding that plaintiff had failed to establish the existence of a contract because there was no meeting of the minds.

Plaintiff's first argument on appeal is that the trial court erred in dismissing its misrepresentation claim. We disagree. This Court reviews an order granting a motion under MCR 2.116(C)(10) de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 554 NW2d 727 (1996). Such a motion tests the factual basis of plaintiff's allegations. *Id.* We must view the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the non-moving party. *Id.* We must then decide "whether a genuine issue regarding any material fact exists to warrant a trial." *Id.* The elements of fraud or misrepresentation are:

- (1) that defendant made a material representation; (2) that the representation was false;
- (3) when defendant made the representation, defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity; (4) that defendant made it with the intent that plaintiff would act upon it; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff suffered injury. [*Id.*, p 208.]

Further, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises cannot constitute actionable fraud." *Kamalnath v Mercy Hospital*, 194 Mich App 543, 554; 487 NW2d 499 (1992).

Here, plaintiff has failed to establish a material factual dispute regarding whether defendant made a misrepresentation concerning a past or existing fact. Plaintiff contends that defendant misrepresented that it would execute its obligation under the agreement to jointly acquire the hospital's assets. Such a representation constitutes a promise of future action rather than a statement concerning a past or existing fact. Plaintiff further contends that defendant misrepresented that funding for the acquisition had not been approved by defendant's board of directors. However, plaintiff has not produced any evidence to indicate that such a representation was false. Finally, plaintiff argues that defendant misrepresented that it was interested in the joint acquisition, and that defendant instead was using plaintiff as a "subterfuge" to cause the bankruptcy court to default another purchaser who was unable to close due to lack of funding. This argument also concerns a promise of future action. Further, there is no evidence that defendant was, in fact, using plaintiff as a "subterfuge." The evidence on record indicates that defendant clearly represented to plaintiff its strong desire to acquire the HMO and that it was prepared to do this either pursuant to an agreement with plaintiff or separately. We therefore conclude that plaintiff's misrepresentation claim was properly dismissed because plaintiff failed to establish that defendant made any misrepresentation concerning a past or existing fact.

Plaintiff's second argument on appeal is that the trial court erred in dismissing plaintiff's anticipatory breach of contract claim. This issue is not preserved for review because it was not decided by the trial court. "[A]ppellate review is limited to issues decided by the trial court." *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). We further note that it was not necessary for the trial court to reach this issue given its decision that plaintiff had failed to establish the existence of a contract.

Plaintiff's third argument on appeal is that the trial court erred in dismissing plaintiff's breach of contract claim. Again we disagree. This Court has stated that

In order to form a valid contract, there must be a meeting of the minds on all the material facts. [Citations omitted.] A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [*Heritage v Wilson*, 170 Mich App 812, 818; 428 NW2d 784 (1988).]

“Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract.” *Kamalnath, supra*, at 549. See also *Kirchoff v Morris*, 282 Mich 90, 95; 275 NW 778 (1937). Plaintiff carries the burden of establishing the existence of a contract, and “the court cannot make a contract for the parties when none exists.” *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960).

In the instant case, the evidence indicates that no meeting of the minds occurred between the parties. There remained differences between the parties regarding material terms of the contract. While defendant indicated, for example, that it would pay \$3,000,000 to plaintiff upon signing the purchase agreement and that the remaining unspecified balance would be paid *six months later*, plaintiff proposed that \$3,000,000 be disbursed at dosing with an additional \$2,000,000 to be paid *within ninety days*. Plaintiff also proposed that defendant allocate twenty-five percent of its existing patient base to the hospital, while defendant apparently never indicated assent to such a proposal. The timing and amount of the multi-million dollar payment is a material term of a proposed agreement, as is the provision relating to the allocation of a significant portion of defendant’s patient base. Given the differences in these regards between the terms of plaintiff’s and defendant’s proposed agreements, we conclude that no meeting of the minds occurred here. Rather, the parties were merely involved in negotiations and discussions that had not yet reached the level of a formal agreement.¹

Plaintiff’s final argument on appeal is that the trial court erred in dismissing plaintiff’s respondeat superior claim against defendant for the acts or omissions of defendant’s executive director. This issue is not preserved for appeal because it was not decided by the trial court. *Bowers, supra*, at 495. We further note that it was unnecessary for the trial court to reach this issue because no material factual dispute existed regarding the underlying theory of liability (i.e. misrepresentation) alleged against the executive director.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald

¹ We further note that statements of plaintiff’s own agents indicate that no agreement had been reached. For example, in a July 30, 1993, letter to defendant’s attorney, plaintiff’s attorney noted that if “the estate (i.e. the hospital and the HMO) is sold off piecemeal, there would be no obligation between (plaintiff and defendant) and each would be free to bid for any and all estate assets free from claim by the other.”