STATE OF MICHIGAN

COURT OF APPEALS

THE ASHDOWN GROUP, LTD., and WAYNE B. KIDDER,

Plaintiffs-Appellants,

v

PRESTIGE PATTERN & MODEL, INC., a/k/a MACSIDE, INC., EAGLE INVESTMENT COMPANY, ALBERT D. VANDERMOLEN, JANE A. VANDERMOLEN, ESHRAGH ACQUISITION, INC., and SHAWN ESHRAGH,

Defendants-Appellees.

UNPUBLISHED
July 6, 1999

No. 208742
Ottawa Circuit Court
LC No. 96-026388 CK

Before: Hoekstra, P. J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Plaintiffs Wayne Kidder and The Ashdown Group, Ltd. filed a complaint against defendants Albert and Jane Vandermolen, Prestige Pattern & Model Company, Inc., and Eagle Investment Company, seeking specific performance and injunctive relief for breach of contract and promissory estoppel. Plaintiffs subsequently filed an amended complaint against Shawn Eshragh and Eshragh Acquisition, Inc., seeking specific performance and injunctive relief for intentional interference with economic advantage. Plaintiffs appeal from the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs first maintain that the trial court erred when it granted defendants' motion for summary disposition of their breach of contract claim. We review de novo a decision to grant or deny a motion for summary disposition pursuant to MCR 2.116(C)(10) to determine whether the moving party was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482 (1994). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). The nonmoving party must submit

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

to the trial court admissible evidence demonstrating the existence of a genuine issue of material fact in support of the claim presented. *Id*. Giving the nonmoving party every reasonable benefit of doubt, the trial court must determine whether the record leaves open an issue about which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

We conclude that plaintiffs failed to present evidence sufficient to demonstrate the existence of a genuine issue of material fact to support their claim that Kidder and Vandermolen entered into a binding contract for the sale of Prestige. A letter of intent may constitute a binding contract to enter into an agreement sometime in the future. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). A binding contract, however, requires mutual assent to all the essential terms of the transaction. If either party manifests an intent not to be bound, there is no mutual assent. *Angelo Di Pontio Equipment Co v Dep't of State Hwys*, 107 Mich App 756, 759-760; 309 NW2d 566 (1988). A party's intent to be bound is determined, not according to his subjective state of mind, but rather, according to the express words he utilizes while discussing the proposed transaction. *Marlo Beauty Supply, Inc v Farmers' Insurance Group of Cos*, 227 Mich App 309, 317; 575 NW2d 324 (1998). Similarly, if the letter of intent fails to include all the material terms of the transaction to be incorporated into the subsequent agreement, no contract exists. *Opdyke, supra* at 359.

We find that plaintiffs failed to present evidence sufficient to prove mutual assent to the sale of Prestige. Kidder's letter of intent explicitly, and unambiguously, stated:

> . . . all legal obligations of the parties hereto shall be set forth in the [asset purchase] agreement and other documents negotiated by the parties and their respective counsel. . . . *This letter of intent is not an offer* (*and acceptance hereof does not constitute an agreement*) *to consummate this transaction or to enter into the agreement.* [Emphasis added.]

Kidder acknowledged that his letter of intent merely constituted a first step in a series of negotiations for a possible purchase. Kidder further acknowledged that Vandermolen's October 11, 1995, response to his letter of intent incorporated its terms unless specifically modified in that response. Accordingly, the trial court properly concluded that there was no question but that Vandermolen expressed an intent not to be bound to the terms of Kidder's letter of intent[1].

Plaintiffs alternatively claim that the trial court erred when it failed to consider whether Kidder and Vandermolen "agree[d] to bind themselves to negotiate in good faith to work out the terms remaining open" [of the contract]. Plaintiffs' claim fails. Plaintiffs failed to either plead or argue this alternative theory before the trial court. Consequently, they cannot raise it on appeal. *Petrus v Dickinson Co Bd of Comm'rs*, 184 Mich App 282, 288; 457 NW2d 359 (1990). Also, plaintiffs presented absolutely no evidence to support a claim that Vandermolen failed to, in good faith, negotiate the terms of the asset purchase and other agreements that remained open. To the contrary, the evidence plaintiffs did submit demonstrates that Vandermolen negotiated exclusively with Kidder for several months beyond the time to which he had ostensibly agreed to do so and made several attempts to reach a mutually satisfactory agreement. Accordingly, we conclude that the trial court did not err

when it failed to consider whether Kidder and Vandermolen bound themselves to negotiate in good faith the terms of the asset purchase and other agreements.

Plaintiffs next argue that the trial court erred when it granted defendants' motion for summary disposition of their promissory estoppel claim. We disagree. To establish a claim for promissory estoppel, the plaintiff must prove: "(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).

Plaintiffs claimed that, in reliance on Vandermolen's October 11, 1995, response to the letter of intent, Kidder sold his home in Clarkston, discarded a substantial number of personal items, uprooted his wife and son, left behind his closest relationships, and moved his family to Holland. We find that plaintiffs failed, however, to present evidence sufficient to demonstrate the existence of a genuine issue of material fact that Vandermolen ever promised to sell Prestige to Kidder. To the contrary, the record shows that the only promises plaintiffs could legitimately argue Vandermolen ever made were to permit Kidder twenty days to conduct due diligence and to negotiate exclusively with Kidder during that same twenty-day period.

More importantly, plaintiffs failed to present evidence sufficient to demonstrate the existence of a genuine issue of material fact that Vandermolen in any way induced Kidder to sell his home and move to Holland. According to deposition testimony, Kidder put his home up for sale on August 15, 1995; more than a month before he sent Vandermolen the letter of intent. When Kidder mentioned to Vandermolen that he had placed his home up for sale, Vandermolen warned that it was "premature" for him to do so. Although Kidder claims that Vandermolen repeatedly encouraged him to move to Holland by offering to lease to him a home that his family owned there, the only evidence presented by plaintiffs demonstrated that Vandermolen made the lease offer only after Kidder told him the Clarkston home had been sold. Accordingly, we conclude that the trial court properly granted defendants' motion for summary disposition of plaintiffs' promissory estoppel claim.

Finally, plaintiffs argue that the trial court erred when it granted defendant Eshragh's motion for summary disposition of plaintiffs' intentional interference with economic advantages claim. "The elements of tortious interference with a 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 breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). To establish an intentional interference, the plaintiff must prove that the defendant either (1) intentionally engaged in a wrongful act per se or (2) engaged in a lawful act with malice and for an improper purpose. *Michigan Podiatric Medical Ass'n v National Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989). A wrongful act per se 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).

We find that plaintiffs failed to present evidence sufficient to demonstrate the existence of a genuine issue of material fact that Eshragh intentionally interfered with Kidder's expectations of purchasing Prestige from Vandermolen. There was no evidence to support the claim that Eshragh induced or caused Vandermolen to terminate his relationship with Kidder. Vandermolen stopped negotiating with Kidder no later than February 1996. The unrebutted evidence shows that Eshragh first learned that Vandermolen was still interested in selling Prestige in June 1996. According to Vandermolen, he told Eshragh that negotiations with Kidder were "dead." Plaintiffs presented no evidence that Eshragh engaged in any form of wrongful conduct or that he purchased Prestige for anything other than legitimate business reasons. *BPS Clinical Laboratories*, *supra* at 699. Accordingly, we conclude that the trial court properly granted defendants' motion for summary disposition of plaintiffs' claim of intentional interference with economic advantage.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns

[1] Plaintiffs' protestations notwithstanding, the effect of unambiguous language is a question of law to be determined by the trial court. *Gortney v Norfolk & W R Co*, 216 Mich App 535, 541; 549 NW2d 612 (1996). Contractual language is unambiguous if it is reasonably susceptible to but one construction. *Id*., 540. Summary disposition is only inappropriate when the parties employed ambiguous language. *Opdyke, supra*, 361.