STATE OF MICHIGAN

COURT OF APPEALS

ROBERT CURRY and KATHLEEN CURRY, d/b/a EV WAL FARMS, Plaintiffs-Appellants,	UNPUBLISHED May 23, 2000
v	No. 211104 Iosco Circuit Court
CITIZENS BANK, f/k/a STATE BANK OF STANDISH, Defendant-Appellee.	LC No. 96-000150-CH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) and denying their motion to amend their complaint. We affirm.

This case concerns a satisfaction of judgment and release arising out of a previous lawsuit between the parties, which was initiated by defendant when it filed an action for claim and delivery. Plaintiffs counterclaimed, alleging breach of duty of good faith and fair dealing, fraud, duress, and promissory estoppel. Ultimately, the trial court granted summary disposition in favor of the bank on its action of claim and delivery. The trial court also granted summary disposition in favor of the bank on all of plaintiffs' claims except the promissory estoppel claim. Following a jury trial regarding plaintiffs' promissory estoppel claim, a jury found in favor of plaintiffs and, after a setoff for loans owed to the bank, plaintiffs' net judgment was $56,243.44. The parties appealed to this Court, which affirmed the trial court's grant of summary disposition in favor of the bank, but reversed the jury's verdict in favor of the Currys. *State Bank of Standish v Curry*, 190 Mich App 616; 476 NW2d 635 (1991). The Currys appealed to our Supreme Court, which reversed in part this Court's decision and reinstated the jury's verdict in favor of the Currys. *State Bank of Standish v Curry*, 442 Mich 76, 78-79; 500 NW2d 104 (1993).The trial court's grant of summary disposition on the Currys' claims of breach of duty of good faith and fair dealing, fraud, and duress was otherwise affirmed. *Id.*, p 82.

To fully understand this case, we include some of the facts surrounding the underlying action. Plaintiffs were dairy farmers who also grew crops to feed their cows. Beginning in 1975, plaintiffs annually obtained loans from defendant to purchase seed, fertilizer, and chemicals for spring planting. The amount of these operating loans varied little from year to year and was used exclusively for planting the crops. Any outstanding balance on the previous year's loan would be rolled over and added into a new loan bearing an interest rate of two points over the bank's prime rate, which was then amortized over a five-year period. Monthly payments were made directly from the Michigan Milk Producers Association to defendant by assignment of the proceeds form plaintiffs' milk contract. As collateral, defendant had a security agreement on plaintiffs' personal property, which was at least twice the value of the loan.

By the mid-1980s, plaintiffs were becoming discouraged with the economic difficulties in the dairy farming business. In 1986, the federal government implemented a dairy herd buy-out program in an effort to stabilize prices in the dairy market. In January and February 1986, plaintiffs were seriously considering the buy-out program and went to the bank to discuss whether they should remain in the dairy farming business. In this regard, plaintiffs contend that bank officials told them that they would be supported by the bank if they remained in the dairy farming business. However, by May 1986, defendant informed plaintiffs that it would not renew their operating loan. Plaintiffs sought alternative loans from an arm of Farm Credit Services, but were told that they would first have to pay off the existing loan with defendant because it held all of their personal property as collateral. Plaintiffs were unable to pay off the loan and so obtained credit from suppliers to sustain their dairy farming operation. Plaintiffs subsequently defaulted on the outstanding promissory note.[1] This promissory note was guaranteed by the Farmers Home Administration (now known as the Farm Service Agency), and for which plaintiffs paid a fee of one percent of the amount guaranteed.[2]

Following the litigation and appeals, the parties entered into settlement negotiations in May 1993. Ultimately, the parties entered into a release, dated May 24, 1993. The release provided that in consideration of receiving $31,246.01 from defendant, the promissory note would be canceled and plaintiffs would release defendant from any claims. A satisfaction of judgment was also signed by plaintiffs on May 24, 1993. It is undisputed by the parties that the promissory note was returned to plaintiffs and stamped "paid" and that defendant released all the collateral. However, defendant later contacted the Farmers Home Administration on June 21, 1993, stating that it was owed money in the amount of $221,684.36 based upon the loan note guarantee. The Farmers Home Administration paid defendant $135,377.45 on September 21, 1993, which represented the principal amount of $134,939.29 and a small portion of the interest. Because of this payment, plaintiffs were later unable to obtain operating loans at more favorable interest rates and unable to obtain loans guaranteed by the Farm Service Agency.

Plaintiffs subsequently filed suit on September 9, 1996, claiming breach of contract, tortious interference with a prospective business relationship, fraud, and innocent misrepresentation. Plaintiffs also moved to add a count of unjust enrichment to the complaint. The trial court ultimately granted defendant's motion for summary disposition under MCR 2.116(C)(10) with regard to all of plaintiffs' claims and denied the motion to amend the complaint to add the count of unjust enrichment. Plaintiffs appeal from these orders, contending that the trial court erred in granting summary disposition with respect to their four claims and that the trial court abused its discretion in denying the motion to amend the complaint.

We review de novo the trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek*, *supra,* p 337. The pleadings, affidavits, depositions, admissions, and documentary evidence submitted must be considered by the court. MCR 2.116(G)(5). The court's task is to review the record evidence and all reasonable inferences from that evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co,* 445 Mich 153, 161-162; 516 NW2d 475 (1994).

Plaintiffs' claim for breach of contract arises out of the terms of the release. The release provided that plaintiffs, in consideration of $31,246.01 and cancellation of the promissory note, released defendant from "all actions, claims and demands whatsoever, and from all suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, liens or claims of lien, claims and demands whatsoever, in law or equity, that [plaintiffs] have, now have, or that their heirs, personal representatives or partners hereafter may have against [defendant] by reason of any matter, cause or thing whatsoever up to and including the day or date of this release." The release specifically references the promissory note with the accompanying security agreement and financing statement, and the judgment of the circuit court in the first action.

The release, however, is signed by plaintiffs and their counsel, but not by defendant. Further, the release does not preclude defendant from filing a loss claim under the loan note guarantee with the Farm Service Agency. Rather, the release requires defendant to pay plaintiffs $31,246.01, cancel the promissory note, and release the collateral. It is undisputed that defendants did this because plaintiffs were paid, received the promissory note stamped "paid" on it, and termination statements were filed regarding the collateral. Plaintiffs contend that the release, the negotiation letters drafted by the attorneys involving the release, the promissory note, and the loan note guarantee, must all be read together to create the contract that defendant breached. See *Forge v Smith,* 458 Mich 198, 207; 580 NW2d 876 (1998) (where one writing references another instrument for additional contract terms, the two writings should be read together). Having carefully reviewed the three letters (one dated May 8, 1993, and two letters dated May 10, 1993), the release, the promissory note, and the loan note guarantee, we find that none of these documents indicate that defendant would be precluded from filing a loss claim under the loan note guarantee after the signing of the release.

We acknowledge, as noted by plaintiffs, that the loan note guarantee terminates, by its own terms, upon full payment of the guaranteed loan. Although the promissory note was stamped "paid" and returned to plaintiffs, and defendant would not seem to have any further claim under the loan note guarantee because of the cancellation of the promissory note, there is nothing in the documents that precludes defendant from filing a loss claim under the loan note guarantee. Whether defendant was to be paid pursuant to its claim under the loan note guarantee was a matter for the Farmers Home Administration to decide, which it did to defendant's benefit.

The trial court ruled that the terms of the release were clear and unambiguous and that plaintiffs received what they were entitled to pursuant to the terms of the release. The trial court further stated that the breach of contract claim failed because the post-settlement acts of defendant were not contrary to the express terms of the release. We agree and affirm the trial court's dismissal of the breach of contract claim in this regard. See *Gortney v Norfolk & Western Railway Co,* 216 Mich App 535, 540-541; 549 NW2d 612 (1996) (if the text of a release is clear and unambiguous, the parties' intention must be ascertained from that plain, ordinary meaning of the language of the release and the legal effect of the release is a question of law to be resolved summarily). Because none of the terms of the letters, release, promissory note, or loan note guarantee preclude defendant from pursuing the loss claim with the guarantor Farmers Home Administration, whether rightly or wrongly, defendant did not breach the terms of any contract and the trial court properly granted summary disposition in favor of defendant concerning this claim.

Next, plaintiffs claim that the trial court erred in granting summary disposition in favor of defendant with respect to their claim of tortious interference with a prospective business relationship. The elements of this claim are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. *BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan (On Remand),* 217 Mich App 687, 698-699; 552 NW2d 919 (1996). "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in the law for the purpose of invading the plaintiff's contractual rights or business relationship." *Feldman v Green,* 138 Mich App 360, 369; 360 NW2d 881 (1984). To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. *Id.,* pp 369-370. Improper means illegal, unethical, or fraudulent. *Weitting v McFetters,* 104 Mich App 188, 197; 304 NW2d 525 (1981).

The trial court ruled that there was no factual support for plaintiffs' claim that defendant's pursuit of the loss claim from the Farmers Home Administration was predicated on false or fraudulent information, and that the Farmers Home Administration was in fact apprised of the terms of the parties' settlement. The trial court further ruled that defendant's effort to mitigate its losses by recourse to the Farmers Home Administration for payment under the terms of the loan note guarantee is a valid business purpose, and a legitimate business reason cannot constitute improper motive or interference. *BPS Clinical Laboratories, supra,* p 699. We affirm the trial court's ruling, but for the reason that there is no factual evidence that defendant intentionally interfered with plaintiffs' business relationship with the Farmers Home Administration (and later the Farm Service Agency), of receiving loan guarantees, and causing it to terminate this relationship.

After the release was signed, defendant contacted the Farmers Home Administration by letter dated June 21, 1993. Defendant included a loan note guarantee report of loss in the amount of \$246,315.96. Of this amount, defendant claimed that \$134,939.29 was the principal balance remaining on the loan and that \$111,376.67 was interest. Because the loan note guarantee was for ninety percent of the loan, the balance due to the lender was $221,684.36. Subsequently filed reports of loss indicated a much lower interest amount and, thus, defendant ultimately claimed to be owed $146,631.60. Defendant was paid $135,377.45 in September 1993. Although the loss claim was highly dubious in light of the fact that defendant lost a judgment at the underlying trial, leaving plaintiffs with a net gain and a canceled promissory note, the propriety of the loss claim was for the Farmers Home Administration, as the guarantor, to fully investigate. Moreover, this fact does not compel the conclusion that defendant intentionally interfered causing a termination of the business relationship between plaintiffs and the Farm Service Agency. In other words, there was no indication that defendant acted for the purpose of invading the business relationship between plaintiffs and the Farm Service Agency. Rather, the evidence was that defendant filed the loss claim to recoup the loan guaranteed by the Farm Service Agency, but not to cause a termination of any business relationship between plaintiffs and the Farm Service Agency.[3] Accordingly, the trial court did not err in granting summary disposition in favor of defendant with respect to this claim.

Plaintiffs next argue that the trial court erred in granting summary disposition to defendant with respect to the claim of fraud. The elements of actionable fraud are: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation it was known to be false or it was made recklessly without any knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff should act on it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered injury as a result. *Kassab v Michigan Basic Property Ins Ass'n,* 441 Mich 433, 442; 491 NW2d 545 (1992), quoting *Hi-Way Motor Co v Int'l Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976).

The trial court in essence ruled that defendant made no false representation of existing fact and that plaintiffs' claim of fraud must fail. The trial court's ruling is correct because there is no evidence that defendant informed plaintiffs that it would not seek to recover under the loan note guarantee. Plaintiffs' counsel from the underlying case indicated in his deposition that defendant did not inform him that it would pursue a loss claim under the loan note guarantee. Thus, there being no representation regarding this point, much less a false representation, plaintiffs cannot maintain an action for fraud. See *M&D, Inc v McConkey,* 231 Mich App 22, 27; 585 NW2d 33 (1998). Therefore, the trial court did not err in granting summary disposition to defendant on this claim.

Plaintiffs also argue that the trial court erred in granting defendant's motion for summary disposition with respect to the claim of innocent misrepresentation. "A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge, supra,* pp 211-212. Although it is not necessary to prove that the person making the representation knew that it was false, it is necessary to show privity of contract. *Id.,* p 212.

The trial court again ruled that there was no false representation. As we have previously stated, there is no evidence that defendant made any representation concerning its intention to pursue a loss claim under the loan note guarantee, much less a false representation. There being no evidence of any false representations made by defendant plaintiffs in regard to the pursuit of the loss claim under the loan note guarantee, plaintiffs' claim of innocent misrepresentation must fail. Therefore, the trial court did not err in granting summary disposition to defendant on this claim.

To the extent that plaintiffs argue that defendant had a duty to disclose that it intended to file a loss claim under the loan note guarantee, this would constitute a claim of silent fraud, a claim not pleaded in plaintiff's complaint. See *M&D, Inc, supra,* pp 28-29. However, even if plaintiffs alleged a claim of silent fraud, it too would fail for the same reasons that the claims of fraud and innocent misrepresentation fail; that is, defendant made no false representation to plaintiffs regarding its pursuit of the loss claim under the loan note guarantee. Further, plaintiffs have cited no authority for the proposition that defendant had a duty to disclose that it intended to file a loss claim pursuant to the loan note guarantee; a document involving only defendant and the guarantor. Thus, there can be no claim for silent fraud.

Lastly, plaintiffs argue that the trial court abused its discretion in denying their motion to amend the complaint to add a claim of unjust enrichment. We review a trial court's decision regarding a motion to amend pleadings for an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997). MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." A motion to amend should ordinarily be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility. *Weymers, supra,* p 658. An amendment is futile where, ignoring the substantive merits of the claim, the claim is legally insufficient on its face. *McNees v Cedar Springs Stamping Co,* 184 Mich App 101, 103; 457 NW2d 68 (1990).

The trial court in this case granted the motion, essentially ruling that amendment would be futile because plaintiffs' allegations were legally insufficient. Plaintiffs contend that they are entitled to an unjust enrichment recovery based on the fact that defendant was paid for the promissory note following the underlying judgment in plaintiffs' favor, and paid again by the guarantor of the promissory note when the bank received payment from the Farmers Home Administration under the loan note guarantee. As explained in *Kammer Asphalt Paving Co, Inc v East China Twp Schools,* 443 Mich 176, 185; 504 NW2d 635 (1993), although no contract may exist between two parties, under the equitable doctrine of unjust enrichment, a party who has been unjustly enriched at the expense of another is required to make restitution to the other. This remedy is one by which the law may imply a contract with an obligation to pay for the benefits received to ensure that justice is obtained. *Id.,* pp 185-186. Thus, the elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Barber v SMH (US), Inc,* 202 Mich App 366, 375; 509 NW2d 791 (1993), citing *Dumas v Auto Club Ins Ass'n,* 437 Mich 521, 546; 473 NW2d 652 (1991). A contract will be implied, however, only if there is no express contract covering the same subject matter. *Barber, supra,* p 375; *Martin v East Lansing School Dist,* 193 Mich App 166, 177; 483 NW2d 656 (1992).

The trial court properly ruled that plaintiffs' claim of unjust enrichment is legally insufficient because there is an express contract, that being the release, the promissory note, and the loan note guarantee. There being an express contract or contracts, we will not imply a contract under the doctrine of unjust enrichment. *Barber*, *supra*, p 375. Moreover, any inequitable retention of a benefit by defendant would seem to involve the Farm Service Agency rather than plaintiffs since defendant filed its loss claim after it was paid by plaintiffs based on the loan note guarantee which should have otherwise terminated with the payment of the promissory note. The Farm Service Agency has decided, however, not to recoup the payment to defendant. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to amend the complaint to add a claim of unjust enrichment because the claim is legally insufficient on its face based on the evidence in this case.

The trial court's orders granting summary disposition in favor of defendant and denying plaintiffs' motion to amend the complaint are affirmed.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] This promissory note is dated April 19, 1985, and was for a principal amount of $167,000 and a finance charge of $60,985.60, for a total of $227,985.60.

[2] The loan note guarantee was for ninety percent of the principal amount of the loan, or $150,300.

[3] We note that documentary evidence provided by the parties indicates that although the Farm Service Agency denied plaintiffs' application for an operating loan in early 1996 because the agency had paid a loss claim under a guaranteed loan, the agency later determined, in August 1997, that plaintiffs would be eligible for guaranteed loans.