STATE OF MICHIGAN

COURT OF APPEALS

DONALD F. EBY and DIANE M. CREASY,

Plaintiffs-Appellants,

v

A & M CUSTOM BUILT HOMES, INC. and BILTMORE BUILDING COMPANY,

Defendants-Appellees,

and

WYNDHAM POINTE DEVELOPMENT, CO., L.L.C.

Intervening Defendant-Appellee.

UNPUBLISHED
May 15, 2001

No. 218826
Oakland Circuit Court
LC No. 97-001062-CK

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Plaintiffs Donald Eby and Diane Creasy appeal as of right from an order granting summary disposition in favor of defendants A & M Custom Built Homes, Inc., ("A & M") and Biltmore Building Company ("Biltmore"), and intervening defendant Wyndham Pointe Development, Co., L.L.C., pursuant to MCR 2.116(C)(10). We affirm.

Defendants A & M and Biltmore entered into an agreement with plaintiffs to sell lots in the first two phases of Wyndam Pointe subdivision. A written letter pertaining to the agreement provided, in pertinent part:

> Please recognize this letter as a commitment from A & M Custom Built Homes and Biltmore Building Company for the Wyndham Pointe sales position. This sales position will encompass all aspects of the building process from greeting new customers to selections and closings.
>
> The compensation will be based on the following breakdown: A straight 1.5% commission rate will be applied to the base price of the house plus any lot premium and if applicable a walk out or a look out premium. A straight 5%

> commission rate will apply to all other extras that were included in the sales contract and/or added or installed during the construction process via work orders.

The letter did not contain a specific integration clause.

During their tenure of employment, plaintiffs sold three homes for defendants. Plaintiffs also obtained 18 lot reservations during this time; however, six of the reservations were lost. In September 1997, defendants' representatives expressed their concerns about the limited sales progress and decided to bring in another person, Shelton Rott, to assist with the sales. Although plaintiffs allege that Rott "replaced" them, defendants maintain that Rott's appointment did not affect plaintiffs' compensation schedules. According to defendants, Rott's appointment made plaintiffs "antagonistic" and they "refused to work with Mr. Rott." Therefore, defendants terminated plaintiffs' employment on October 1, 1997.

Plaintiffs subsequently commenced this action, alleging claims for breach of contract, fraud, implied contract and unjust enrichment, promissory estoppel, and quantum meruit. Defendants filed a motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiffs' employment was terminable at will. The trial court granted the motion, holding that the written letter agreement failed to establish a just-cause employment relationship and that plaintiffs were barred from introducing parol evidence of previous or contemporaneous discussion to contradict the letter agreement. The court also held that plaintiffs could not prevail on their fraud claim because plaintiffs failed to allege fraud in the inducement and there was no evidence that defendants knowingly made false representations to support an action for fraud. Plaintiffs filed a motion for reconsideration, requesting in the alternative that they be allowed to amend their complaint to allege fraud in the inducement, which the trial court denied.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The party opposing the motion must, by documentary evidence, set forth specific facts showing that there is a genuine issue of material fact for trial. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998); *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990).

On appeal, plaintiffs argue that the trial court erred in refusing to consider parol evidence of pre-employment discussions concerning the nature of their employment relationship with defendants. We agree that the trial court erred in failing to consider plaintiffs' parol evidence.

In *Romska v Opper*, 234 Mich App 512, 516 n 3; 594 NW2d 853 (1999), this Court stated:

> The parol evidence rule excludes evidence of prior contemporaneous agreements, whether oral or written, which contradict, vary or modify an unambiguous writing intended as a final and complete expression of the agreement. *Ditzik v Schaffer*

> *Lumber Co*, 139 Mich App 81, 87-88; 360 NW2d 876 (1984), citing *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 410; 285 NW2d 770 (1979).

Thus, where two parties have entered into a written contract and have expressed their intention that the writing constitutes the complete and accurate integration of that contract, such as when the parties use an explicit merger provision, parol evidence of previous or contemporaneous understandings and negotiations is not admissible for the purpose of varying or contradicting the writing, with the very narrow exceptions of fraud and the rare situation where a written document is obviously incomplete on its face. See *NAG*, *supra* at 409-410; *Michigan National Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998); *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492-93; 579 NW2d 411 (1998).

A prerequisite to the application of the parol evidence rule is a determination that the parties intended the written instrument to be a complete expression of their agreement concerning the matters covered. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 669; 591 NW2d 438 (1999). As this Court observed in *UAW*, *supra* at 492-493:

> [P]arol evidence of prior or contemporaneous agreements or negotiations is admissible on the threshold question whether a written contract is an integrated instrument that is a complete expression of the parties' agreement. *In re Skotzke Estate*, 216 Mich App 247, 251-252; 548 NW2d 695 (1996); *NAG*, [*supra* at 410-411]. The *NAG* Court noted four exceptions to the parol evidence rule, stating that extrinsic evidence is admissible to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. *NAG*, *supra* at 410-411. See also 4 Williston, Contracts, § 631.

Thus, where there is no express integration clause, "[p]arol evidence is admissible to establish the full agreement of the parties [to a contract] where the document purporting to express their intent is incomplete." *Skotzke*, *supra* at 251-252; see also *Greenfield Construction Co, Inc v Detroit*, 66 Mich App 177, 185; 238 NW2d 570 (1975).

In the instant case, it is apparent that the letter agreement is not, by any objective standard, a "complete expression of the parties' agreement." *UAW*, *supra* at 492. The letter agreement not only fails to contain any type of merger clause, it also fails to delineate numerous terms regarding the responsibilities of the parties with respect to a myriad of other issues that would be applicable to the parties' employment relationship. Therefore, we conclude that the trial court erred in refusing to consider the parol evidence offered by plaintiffs in support of their position that the employment relationship was not simply an at-will arrangement.

Nonetheless, we conclude that the error was harmless because, even if plaintiffs' proffered parol evidence is considered, it fails to establish a genuine issue of material fact with

respect to whether plaintiffs' employment relationship with defendants properly may be considered other than at-will.

Generally, contracts of employment for an indefinite term are terminable at the will of either party. *Toussaint v BCBSM*, 408 Mich 579, 596; 292 NW2d 880 (1980); *Bracco v Michigan Technological University*, 231 Mich App 578, 598; 588 NW2d 467 (1998). An employee hired under an at-will contract can generally be discharged at any time and for no reason. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993); *Bracco, supra*.

"However, the presumption of at-will employment may be overcome by proof of an express contract for a definite term or by a provision forbidding discharge without just cause." *Bracco, supra* at 598, citing *Rood*, *supra* at 117. Such restrictions can become part of the contract by express agreement, oral or written, or as the result of the employee's legitimate expectations grounded in the employer's policies or procedures. *Rood, supra* at 117-118; *Toussaint, supra* at 618-619; *Manning v Hazel Park*, 202 Mich App 685, 692; 509 NW2d 874 (1993).

A just-cause employment relationship based on express agreement is based on contract principles "relative to the employment setting." *Rood, supra* at 118, citing *Rowe v Montgomery Ward & Co*, 437 Mich 627, 632; 473 NW2d 268 (1991). Thus, just cause employment based upon contract requires mutual assent to be bound. *Rood, supra*. The existence of such assent is determined under an objective standard, focusing on how a reasonable person in the position of the promisee would interpret the promisor's statements and conduct under all the relevant circumstances. *Id*. at 118-119. The employer's pre-employment negotiations with the employee regarding job security is also important to the establishment of a contractual just-cause standard. *Bracco, supra* at 590.

Nonetheless, a party hoping to show this mutual assent through oral assertions has a higher burden then one simply asking the court to interpret a written agreement. As stated by the majority in *Rood, supra* at 118-119:

> In *Rowe*, this Court recognized "the difficulty in verifying oral promises," *Rowe* at 641, especially in the employment relations context, because individuals often harbor "optimistic hope of a long relationship" that causes them to misinterpret their employer's oral statements as manifestations of an intention to undertake a commitment in the form of a promise of job security. *Rowe* at 640. Accordingly, and in an effort to recognize oral contracts for job security only where the circumstances suggest both parties intended to be bound, *id.* at 636, the *Rowe* Court held that "oral statements of job security *must be clear and unequivocal* to overcome the presumption of employment at will." *Id.* at 645. [Emphasis added.]

In the instant case, plaintiffs rely on the letter agreement signed by the parties, as well as concurrent statements allegedly made by defendants to the effect that plaintiffs would be employed selling houses at Wyndham Pointe until all of defendants' lots were purchased, as evidence that they had a just-cause employment relationship with defendants. However, we conclude that plaintiffs' evidence fails to establish a genuine issue of material fact regarding the

existence of a just-cause relationship. First, the letter agreement itself fails to contain any language that would cause a reasonable person to believe that the contemplated employment relationship was terminable only for just cause. Second, plaintiffs have not alleged any specific oral assertions made by defendants that would constitute the required "clear and unequivocal" language to overcome the presumption of employment at will. *Rood, supra*. Defendants' deposition testimony, while slightly confusing, does not support plaintiffs' position. Indeed, we note that plaintiff Creasy's deposition testimony and an additional letter written by plaintiffs after the employment relationship began both refute plaintiffs' claim that they believed at the time of their employment that the relationship was terminable only for just cause. Accordingly, the trial court did not err in granting summary disposition with respect to plaintiffs' breach of contract claim.

We also conclude that the trial court did not err in concluding that plaintiffs failed to present sufficient facts to support their action for common law fraud or misrepresentation, and that a claim of fraud in the inducement would not afford them relief under the circumstances.

As a general rule, an action for fraud requires proof of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damages as a result. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994). Moreover, a party's reliance on the alleged misrepresentation of another must be reasonable in light of the circumstances to support a claim of misrepresentation. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-690; 599 NW2d 546 (1999).

These elements, by their very nature, require that actionable common law fraud be based on a statement relating to a past or existing fact. See, e.g., *Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 4; 506 NW2d 857 (1993); *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208-209; 544 NW2d 727 (1996). As our Supreme Court stated in *Hi-Way Motor Co, supra* at 336:

> In *Boston Piano and Music Co v Pontiac Clothing Co*, 199 Mich 141; 165 NW 856 (1917), we affirmed the rule that an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud.

However, Michigan also recognizes fraud in the inducement, a claim that appears to be based in contract law rather than tort. See *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995). "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Wild Bros, supra*, citing *Kefuss v Whitley*, 220 Mich 67, 82-83; 189 NW 76 (1922). The recovery for this narrower cause of action is more limited, however. Fraud in the inducement renders a contract voidable at the option of

the defrauded party. *Wild Bros, supra* at 640; *Whitcraft v Wolfe*, 148 Mich App 40, 52; 384 NW2d 400 (1985).

Plaintiffs' have alleged specific instances of alleged misrepresentation by defendants, which they claim resulted in reasonable reliance and damages on their part.

First, plaintiffs assert that in March 1997, when they first went on site to begin marketing the subdivision, defendants misrepresented to plaintiff Eby that the subdivision plats had been approved when they had not. According to plaintiff Eby's affidavit, however, defendants did not tell plaintiffs that the plat had been approved, only that there was "no problem" with the approval. Plaintiffs have not shown this to be a false statement, particularly considering that the subdivision plat was ultimately approved and plaintiffs admit that Mr. Rott is still selling subdivision lots and houses. Additionally, plaintiffs failed to present any evidence indicating that the lack of approval resulted in their continued decision to remain employed by defendants and to continue to attempt to sell homes in Wyndham Pointe. Nor have plaintiffs provided any evidence that the absence of subdivision plat approval affected their ability to close a specific sale. Plaintiffs' bare allegations of damages are insufficient to survive a motion for summary disposition. *Maiden, supra* at 120-121; *Quinto, supra* at 362. Thus, the trial court did not err in granting defendants' motion for summary disposition concerning plaintiffs' claim of fraud with respect to this "misrepresentation."

Plaintiffs also maintain that defendants fraudulently misrepresented the amount of commissions they could earn by "misrepresenting" that they could sell a total of 80 lots instead of the 40 that defendants actually owned. However, even accepting this allegation as true, plaintiffs cannot show "damages," considering that plaintiffs sold only three homes during the course of their employment relationship, obtained "probable commitments" for three others, and only had reservations for 18 lots total. This is not a case where plaintiffs were actually denied some tangible dollar amount because their commissions were directly tied to the sale of individual homes, and plaintiffs were not prevented from selling more homes than their efforts would allow. Plaintiffs do not present any evidence that the fact that they could sell a maximum of only 40 homes, instead of 80, led them to only being able to obtain commitments for 18 lots or to somehow "waste their sales efforts" in some way. There is simply no evidence that the fact that plaintiffs relied on defendants' assertion that they could possibly sell 80 homes instead of 40 led to any recoverable damage. Thus, the trial court did not err in finding that this alleged "misrepresentation" provided no basis for a valid cause of action for fraud.

Lastly, plaintiffs allege, somewhat haphazardly, that they were fraudulently induced to begin and continue their employment based upon false allegations of job security. Plaintiffs maintain that they were misinformed about Mr. Rott's status, claiming on appeal that "[w]hen Plaintiffs noticed Mr. Rott conferring secretly with Defendants, they were told by Defendants not to worry, that he was just a consultant." However, no reference is made to this alleged statement in the record or in the materials attached to plaintiffs' brief. Because this disputed fact has not been established by admissible evidence, summary disposition on the basis of this alleged misrepresentation was proper. See *Maiden, supra* at 121.

Additionally, plaintiffs' claim for fraudulent inducement, even if factually supported, would not entitle plaintiffs to relief under the circumstances. Assuming arguendo that

defendants' statements could be construed as material misrepresentations of future conduct "under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon," plaintiffs' remedy would be limited to voiding their contract without rendering them liable for breach of contract. *Wild Bros, supra* at 640; *Whitcraft, supra* at 52.

Accordingly, we conclude that the trial court properly recognized the futility of allowing plaintiffs to amend their complaint to make further allegations of fraudulent inducement and did not abuse its discretion in denying plaintiffs' motion to amend. See *Detroit/Wayne County Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins