STATE OF MICHIGAN

COURT OF APPEALS

ABC BARREL & DRUM SITES, ETHONE OMI, INC., FORD MOTOR COMPANY, GENERAL MOTORS COMPANY, HENKEL CORPORATION, PVS NOLWOOD CHEMICALS, INC., and VAN WATERS & ROGERS, INC., Plaintiffs/Counterdefendants-Appellees/Cross-Appellants,	UNPUBLISHED February 19, 2002
V DETREX CORPORATION, Defendant/Counterplaintiff-Appellant/Cross-Appellee.	No. 220784 Oakland Circuit Court LC No. 96-526357-CK

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right the judgment entered on the jury verdict awarding plaintiffs $754,320.28 in damages. We affirm.

In 1992, the United States, at the request of the Environmental Protection Agency ("EPA"), filed a civil complaint against defendant and several of the plaintiffs in this matter, seeking to recover costs incurred in responding to the release of hazardous substances at two ABC Barrel and Drum Sites ("ABC") sites located in Detroit. The defendants in that action ("the Group")[1] drafted an agreement to form a joint defense team and to allocate the percentage of response costs each party would pay. The attorney for defendant, Robert Currie, was concerned about the lack of an "escape clause" in the agreement and the allocation percentage the group had assessed against defendant. Currie met with the common counsel for the Group, Steven C. Kohl, so that Kohl could explain the potential magnitude of the EPA's cost recovery claim and what defendant could expect in terms of financial exposure if it signed the agreement. Twelve days after the meeting, Currie signed the agreement on behalf of defendant.

[1] Apparently, ABC had gone bankrupt.

In 1995, the majority of the Group decided to settle the case. Defendant signed a consent decree, but opposed the settlement and refused to pay its allocated share. The remaining members of the Group paid defendant's allocated share and sued defendant for its share of the settlement. Defendant filed a counterclaim and affirmative defenses, alleging, *inter alia*, fraud in the inducement and breach of contract.

Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(8), (C)(9), and (C)(10), seeking entry of a judgment on their complaint and dismissal of defendant's affirmative defenses and counterclaim. The trial court denied plaintiffs' motion as to defendant's breach of contract counterclaim, but granted the motion as to defendant's other claims as well as to plaintiffs' breach of contract claim. At trial, the jury found that plaintiffs did not breach their obligations under the agreement and that plaintiffs had suffered $754,320.28 in damages as a result of defendant's breach of the agreement.

On appeal, defendant first argues that the trial court erred in granting plaintiffs' motion for summary disposition with regard to defendant's fraud in the inducement counterclaim and affirmative defense, because defendant presented sufficient evidence of fraudulent inducement to create a factual dispute. We disagree.

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10).[2] A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, *supra* at 120. Only substantively admissible evidence may be considered in opposition to a motion for summary disposition under MCR 2.116(C)(10). *Maiden*, *supra* at 121. The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue as to any material fact. *Id.* at 120-121.

Defendant alleged in its counterclaim that plaintiffs fraudulently induced it to sign the agreement by making the following representations: (1) the litigation would be aggressively defended until a verdict was reached, (2) the Group would institute an extensive third-party practice against ABC's other former customers in order to reduce defendant's allocated share, and (3) under no circumstances would defendant's allocated share exceed $100,000. In opposition to plaintiffs' motion for summary disposition and in support of these allegations of

[2] With regard to the trial court's grant of plaintiffs' motion for summary disposition under MCR 2.116(C)(8), we find that the trial court erred in granting the motion after considering facts not contained in the pleadings. Only the pleadings may be considered when a motion for summary disposition is based on MCR 2.116(C)(8). MCR 2.116(G)(5). In granting plaintiffs' motion, the trial court considered facts found outside of the pleadings, such as the integration clause and other terms of the agreement. However, as discussed below, summary disposition was warranted under MCR 2.116(C)(10).

fact, defendant presented Currie's affidavit as well as that of John Gerald Gleeson, who was present at Currie's meeting with Kohl.

Defendant argues that the trial court erred in granting plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10) because a question of fact was thus presented regarding its claim of fraud in the inducement. We disagree because, even if defendant's claims regarding promises made prior to the written agreement are accepted as true, they are insufficient to establish fraud in the inducement.

In *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 490-507; 579 NW2d 411 (1998), a panel of this Court comprehensively summarized Michigan case law regarding agreements purportedly made prior to parties entering into a written contract that does not include those agreements but does include a merger clause specifying that all agreements are contained in the document. We agree with the conclusion reached there, that:

> a contract with a merger clause nullifies all antecedent claims. In our view, this includes any collateral agreements that were allegedly an inducement for entering into the contract. In the context of a contract that included a merger clause, parol evidence regarding false representations in a collateral agreement that induced the plaintiff to enter into the contract would vary the terms of the contract. [*Id*. at 502 (Citations omitted.)].

Of similar import are precedents holding that a fraud in the inducement claim must rest upon promises of future conduct made "under circumstances in which the assertions may reasonably be expected to be relied upon," *Samuel D. Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), and that it is unreasonable for a party to rely on statements or promises not contained within a written agreement, when that agreement contains an integration clause. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 689; 599 NW2d 546 (1999).

Currie's and Gleeson's affidavits allege that Kohl made representations that were not in the written agreement in order to induce defendant to sign it. The alleged representations were inconsistent with the signed agreement and provided defendant greater protections than did that agreement. Because the agreement contained a clear integration clause, these prior representations were thereby nullified and defendant could not reasonably rely upon them as an inducement to sign the agreement.[3] Accordingly, the trial court did not err in granting plaintiffs' motion for summary disposition with regard to defendant's fraud in the inducement counterclaim.

Defendant also argues that the trial court issued "inconsistent" rulings on summary disposition motions brought by the parties. The argument here is not that either ruling on summary disposition was, by itself, improperly rendered. Instead, defendant claims that, taken

[3] We note that plaintiff does not allege that, through some "artifice or concealment," see *UAW*, *supra* at 503, it was somehow led to believe that, notwithstanding the merger clause, the previous representations were part of the signed agreement. In fact, the record shows that defendant's agents throughout the contracting process were experienced attorneys.

together, the rulings misrepresented the law to the jury and improperly prohibited defendant from adducing evidence and argument that the Group had breached the parties' agreement. In effect, defendant's argument is that it was denied a fair trial as the result of the summary disposition rulings and that the jury instructions were incorrect. Claims of instructional error are reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The instructions must be viewed as a whole to determine whether the trial court committed error requiring reversal. *Id*. Even if imperfect, instructions do not warrant reversal if, on balance, the theories of the parties and the applicable law were adequately presented to the jury. *Id*. Reversal based on instructional error should be granted only if the failure to reverse would be inconsistent with substantial justice. *Id*.; MCR 2.613(A). While we agree with defendant that the contested orders on summary disposition and resulting discussions of appropriate jury instructions were somewhat confusing, our review of the record does not lead us to conclude that, as a result, defendant suffered any harm.

Defendant's argument can be summarized as follows. In one of the summary disposition orders, the trial court ruled that defendant "failed to present a viable defense" to the Group's claim for breach of contract and the jury was so informed. Thus, defendant argues, the trial court ruled that it had breached the contract. As a matter of Michigan case law, a party who breaches a contract cannot itself maintain an action for breach by the other party. See *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). Yet, in another order denying summary disposition to the Group, the trial court determined that defendant could argue that the Group breached the agreement. Based on this syllogism, defendant argues that the "incorrect and inconsistent" summary disposition rulings "forced Detrex to enter the battle with both hands tied behind its back" during trial and resulted in instructions that "unfairly prejudiced the jury against Detrex."

The problem with this argument is that, notwithstanding defendant's argument about the impact of Michigan case law, the ruling that defendant "failed to present a viable defense" was not used against it, at trial or in the jury instructions, to prohibit presentation of its argument that the Group had also violated the contract. Defendant was allowed to present ample evidence and argument to that effect, including oral statements made outside of the written agreement at the meeting between Kohl and Currie. Consistent with this theory of the case, presentation of evidence, and argument, the jury was instructed as follows:

> If you find that The Group breached the agreement, The Group cannot recover damages on the same agreement.
>
> Now both Detrex and The Group have asserted claims against each other, each asserting that the other party breached the contract.
>
> Before trial I determined that Detrex failed to present a viable defense to The Group's claim against it for a breach of contract. However, you must still determine whether The Group breached it's [sic] obligation to Detrex. The decision on that issue may have a baring [sic] on whether you award The Group any damages on its claim of breach of contract against Detrex. If you find that The Group did not breach it's [sic] obligations to Detrex and that The Group suffered damages as a result of this breach then you may award The Group such

> damages as you find it entitled to. If, on the other hand, you find that The Group breached it's [sic] obligations to Detrex then you should state this determination on the jury verdict form and award to Detrex such damages you find it's entitled to.

Notwithstanding defendant's arguments about inconsistencies in the prior rulings, we do not conclude that it was handicapped in presenting its case or that the jury was misled in the instructions provided.[4] Further, it is apparent from the jury verdict form that, notwithstanding defendant's evidence and arguments and the latitude afforded by the instructions, the fact finder determined that the Group had not breached the contract.

We affirm. We need not consider plaintiffs' arguments on cross-appeal.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff

[4] On appeal, defendant argues that "if Detrex was able to show at trial that the Group indeed had breached the agreement, then this would have been a defense to the Group's claim against Detrex." Similarly, in discussions with the trial court regarding appropriate jury instructions, counsel for defendant stated, "the jury has to find . . . whether the Group breached. If the Group didn't breach, end of story on our counterclaim. If the jury finds the Group did breach, then they are precluded from recovering damages under Michigan law." Defendant received what it had asked for; it was allowed to produce evidence of the Group's breach and the jury was instructed that, if such a breach was found, the Group could not recover damages.