S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

FOREST BEACH JOINT VENTURE, Plaintiff-Appellant,	UNPUBLISHED September 13, 2002
v	No. 228279 Allegan Circuit Court
LAKETOWN TOWNSHIP, SCENIC SHORES COMMUNITY ASSOCIATION, and PREIN & NEWHOF, Defendants-Appellees.	LC No. 98-021817-CZ

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment, following a bench trial, finding no cause of action against defendants Laketown Township (the "township") on plaintiff's promissory estoppel claim and Scenic Shores Community Association ("Scenic Shores") on plaintiff's breach of contract and fraud claims. Plaintiff also challenges the trial court's pretrial ruling granting summary disposition in favor of defendant Prein & Newhof. Plaintiff further appeals the trial court's ruling granting summary disposition in favor of the township regarding plaintiff's breach of contract claim and the court's ruling granting summary disposition in favor of Scenic Shores regarding plaintiff's request for declaratory relief. We affirm.

I

Plaintiff first argues that the trial court erred by granting the township's motion for summary disposition of its breach of contract claim, which was based on a May 16, 1994, letter from the township manager to plaintiff.

We review a trial court's decision on a motion for summary disposition de novo. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). Although the trial court did not identify the particular subrule under which it granted summary disposition, it is apparent that the motion was decided under MCR 2.116(C)(8) because there is no indication that the court looked beyond the pleadings when granting the motion. In this regard, the May 16, 1994, letter properly is considered part of the pleadings. MCR 2.113(F)(1) and (2). A motion for summary disposition under MCR 2.116(C)(8), tests the legal basis of the claim. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997). The motion is examined on the pleadings alone, and all factual allegations in the pleadings must be accepted as

true. *Id*. at 380-381. The motion may be granted if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery. *Id.* at 380.

Plaintiff argues that the trial court erroneously granted the township's motion on the basis of lack of mutuality of obligation because the township did not raise this theory. We disagree. A review of the record reveals that this theory was raised and addressed on the record at the hearing on the motion, which was sufficient to present the issue to the trial court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). In any event, a court is empowered to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). Thus, the court did not err by considering a mutuality of obligation theory. Furthermore, we find no error in the trial court's determination that the May 16, 1994, letter failed to establish mutuality of obligation.

The essential elements of a contract are: (1) parties competent to a contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Mutuality of obligation simply means that both parties are bound to an agreement or neither is bound. *Reed v Citizens Insurance Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993).

Here, a review of the May 16, 1994, letter clearly establishes that mutuality of obligation is lacking. The purpose of the letter was "to provide written confirmation" that plaintiff could connect to the water and sewer mains, subject to township approval and "all written conditions and agreements," and to "outline the costs and procedures required for connection." While the letter refers to certain commitments by the township, it does not establish any obligation on plaintiff's part, i.e., there is no requirement that plaintiff actually connect to the township's water or sewer services and no requirement that plaintiff proceed with its plans for construction of additional phases. Because mutuality of obligation is lacking, the trial court did not err in granting the township's motion for summary disposition of plaintiff's breach of contract claim.

II

Plaintiff argues that the trial court erred by granting defendant Prein & Newhof's motion for summary disposition pursuant to MCR 2.116(C)(8). We disagree.

Plaintiff alleged that Prein & Newhof, a consulting engineering firm for the township, had a duty to discover alleged misrepresentations made by the township and disclose them to plaintiff and other third parties. We disagree.

In *Ross v Glaser*, 220 Mich App 183, 186; 559 NW2d 331 (1996), the Court held:

> As part of a prima facie case of negligence, a plaintiff must prove that the defendant owed him a duty. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Duty is a legally recognized obligation to conform to a particular standard of conduct toward another. *Chivas v Koehler*, 182 Mich App 467, 475; 453 NW2d 264 (1990). Duty comprehends whether the defendant is under any obligation to the plaintiff to avoid negligent conduct; it does not include the nature of the obligation. *Moning v Alfono*, 400 Mich 425, 437; 254

NW2d 759 (1977). If the court determines as a matter of law that a defendant owed no duty to a plaintiff summary disposition is properly granted under MCR 2.116(C)(8). *Dykema v Gus Macker Enterprises, Inc,* 196 Mich App 6, 9; 492 NW2d 472 (1992).

Plaintiff's reliance on *Bacco Construction Co v American Colloid Co*, 148 Mich App 397; 384 NW2d 427 (1986), to establish a duty of disclosure is misplaced. In *Bacco*, the project engineer made affirmative representations with the intent of inducing the plaintiff to rely on those representations. *Id.* at 402-403. Here, plaintiff did not allege that Prein & Newhof made any affirmative representations that were false. Similarly, *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 507-508; 538 NW2d 20 (1995), does not support plaintiff's position, inasmuch as there was a direct relationship between the plaintiff and the defendant in that case, which is lacking here. Plaintiff failed to allege any facts supporting the existence of a duty owed to it by Prein & Newhof. Plaintiff's complaint also failed to allege a claim for "silent fraud" because plaintiff does not allege that Prein & Newhof intended to induce plaintiff to rely on any alleged nondisclosure, which it had an affirmative duty to disclose. *Id*. at 508. Accordingly, the trial court properly granted defendant Prein & Newhof's motion for summary disposition.

III

Plaintiff argues that the trial court erred in rejecting its promissory estoppel claim against the township on the basis that the phrase "adequate capacity" in the May 16, 1994, letter was ambiguous, and by failing to consider alleged "promises and representations" made by the township in its March 27, 1992, report. We disagree.

We review the trial court's findings of fact at a bench trial under the clearly erroneous standard. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98; 535 NW2d 529 (1995).

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).

Promissory estoppel requires an actual, clear, and definite promise. *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993). Reliance is reasonable only where it is induced by an actual promise. *Id.* "'A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *State Bank of Standis v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993)(quoting 1 Restatement Contracts, 2d, § 2, p 8).

Here, the May 16, 1994, letter does not reveal a definite, clear promise concerning phase II of plaintiff's development. It states that plaintiff may connect its PUD, "as approved" by the township board on March 27, 1992, and the planning committee on April 15, 1992. Any promises contained in the letter clearly referred to the project as approved in 1992, not future projects. Also, the report of March 27, 1992, references approval of a site plan that was revised on March 11, 1993. The Forest Beach phase II site plan was not approved until the planning

commission meeting on August 7, 1996, and, therefore, could not have been included in the March 27, 1992, report, or contemplated in the May 16, 1994, letter.

Thus, the trial court did not clearly err in finding that the phrase "adequate capacity" was, at best, ambiguous with respect to future developments. Furthermore, even if the meaning of this phrase was clearly understood by both parties, the letter did not contain a promise that the "capacity" would be "adequate" in 1996 or 1997. Plaintiff could not have reasonably relied on the May 16, 1994, letter as reflecting a promise that future phases of its project could hook up to the same system for the same charges. Additionally, the May 16, 1994, letter does not make any promises concerning fire flows. Even if the engineering firm or members of the township were discussing fire flows before May 16, 1994, there is no evidence that an upgrade to fire flow capacity was being considered with respect to plaintiff's project or that any information was deliberately withheld from plaintiff. Accordingly, we conclude that the trial court did not clearly err in finding that the elements of a claim for promissory estoppel were not established.

IV

Plaintiff challenges the trial court's dismissal of its claims against Scenic Shores, arguing that the court's factual findings were clearly erroneous and that the court failed to consider pertinent evidence. Plaintiff further argues that the court's determination that it failed to present sufficient evidence to support its claim of fraud is against the great weight of the evidence. We disagree.

We find no support for plaintiff's claim that the court failed to consider pertinent evidence. In addressing this claim in response to plaintiff's motion for a new trial, the court specifically commented that it had spent at least a week reviewing all the evidence. In rendering its decision, the court was not required to make findings regarding every piece of evidence offered at trial. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. MCR 2.517(A)(2). That standard was satisfied here.

After reviewing the record, we find no clear error with the trial court's determination that plaintiff failed to prove the elements of actionable fraud. *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 51; 631 NW2d 59 (2001). The court's finding that fire flows were not a "concern" to the township until 1995 is not clearly erroneous. The fact that fire flow requirements were being discussed before then does not establish that material information was withheld from plaintiff. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 120-121; 313 NW2d 77 (1981); *M & D, Inc v McConkey*, 231 Mich App 22, 31; 585 NW2d 33 (1998). The record shows that Scenic Shores never gave plaintiff a guarantee of connection. It consistently informed plaintiff that those assurances would have to come from the township. Thus, the trial court's finding that plaintiff failed to supply evidence of a misrepresentation is not clearly erroneous.

We also reject plaintiff's great weight argument. The trial court's determination that plaintiff failed to demonstrate that Scenic Shores committed fraud is not manifestly against the clear weight of the evidence. *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544; 493 NW2d 492 (1992); MCR 2.611(A)(1)(e).

Contrary to what plaintiff argues, the trial court did not reject plaintiff's claims against Scenic Shores on the basis of a determination that defendant had established a legal defense of negligence on the part of plaintiff's principal, Timothy McAuliffe. The statement on which this claim is based was made by the trial court at a hearing on plaintiff's motion for a new trial, and was made in the context of addressing the question of McAuliffe's credibility. Considered in context, it does not reflect that the court applied a legal defense of negligence as a basis for rejecting plaintiff's claims.

Although plaintiff takes exception to the trial court's finding that McAuliffe was not truthful during portions of his testimony, the credibility of his testimony was for the trial court, sitting as the trier of fact, to resolve. *Kelly v Builders Square, Inc*, 465 Mich 29, 40; 632 NW2d 912 (2001). This Court will not second-guess the trial court's determination of credibility. MCR 2.613(C); *Kalkaska Co Bd of Co Rd Comm'rs v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2002).

Plaintiff also argues that the trial court erroneously found that the May 16, 1994, letter agreement superceded the January 18, 1992, contract. The record does not support plaintiff's claim. Rather, the trial court found that Scenic Shores had complied with all of its contractual obligations and then requested that plaintiff convey the property. When plaintiff refused, litigation resulted, which led to the May 16, letter agreement. The court found that Scenic Shores had complied with all of the requirements of the May 16 letter agreement. The trial court's determination accurately reflects the evidence of record. Clear error has not been shown.

V

Plaintiff argues that the trial court erred when it granted Scenic Shores' motion for summary disposition of plaintiff's original complaint for declaratory relief pursuant to MCR 2.116(C)(8). In light of our ruling that the trial court did not err in finding that Scenic Shores complied with all of its contractual obligations, it is unnecessary to address this issue because any error would be harmless. MCR 2.613(A).

VI

The trial court's decision to award Scenic Shores costs and attorney fees of $500 in connection with the dismissal of plaintiff's original complaint for declaratory relief against Scenic Shores is not clearly erroneous. MCR 2.114(D); MCL 600.2591(3)(a)(iii); *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). We similarly find no error in the trial court's decision to award Scenic Shores costs and attorney fees of $38,276 following trial. The trial court's finding that there was no sound legal or factual basis to include Scenic Shores in this lawsuit is not clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002); *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). We are not left with a definite and firm conviction that a mistake has been made.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray