STATE OF MICHIGAN

COURT OF APPEALS

KERRY MORGAN,

Plaintiff-Appellant,

v

AMERITECH CORPORATION and AMERITECH MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
January 7, 2003

No. 233804
Wayne Circuit Court
LC No. 00-039940-CP

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Plaintiff Kerry Morgan commenced this putative class action against defendants Ameritech Corporation, Inc., and Ameritech Michigan, alleging violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., breach of contract, breach of fiduciary duty, and misappropriation of confidential information. Plaintiff appeals by right from the trial court's order granting summary disposition to defendants under MCR 2.116(C)(8). We affirm.

In his complaint, plaintiff alleged that defendants used his unpublished telephone number for improper purposes—namely, to attempt to sell plaintiff (and others similarly situated) additional products and services. For the six years preceding the filing of his complaint, plaintiff had paid a $4.95 monthly fee to defendants for non-published telephone service.

On appeal, plaintiff contends that the trial court erred in dismissing each of his four counts under MCR 2.116(C)(8). We review de novo a lower court's grant or denial of summary disposition for failure to state a claim under MCR 2.116(C)(8). *Trost v Buckstop Lure Co*, 249 Mich App 580, 583-584; 644 NW2d 52 (2002). Such a motion tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 1202 (2001). Summary disposition under MCR 2.116(C)(8) is appropriate when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a judgment in favor of the nonmoving party. *Trost*, *supra* at 584.

Plaintiff's first count alleged violation of the MCPA, MCL 445.901 *et seq*. The MCPA defines and enumerates "[u]nfair, unconscionable, and deceptive methods, acts, or practices" that are unlawful in the conduct of trade or commerce. MCL 445.903. Plaintiff alleged that

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

defendants violated the MCPA by representing that the non-published telephone service had benefits and standards that it did not have, representing that customer privacy would be maintained, causing confusion regarding plaintiff's rights, obligations, and remedies, and failing to reveal that defendants may call the telephone number for commercial purposes. However, beyond presenting evidence of his monthly telephone bill, which included a fee for "non-published service," plaintiff's allegations were conclusory and did not assert that defendants made any specific representations with respect to the benefits, standards, legal rights, or material facts of the non-published telephone number service. Accordingly, summary disposition was properly granted to defendants on plaintiff's MCPA claim pursuant to MCR 2.116(C)(8).

Plaintiff's second count alleged breach of contract. It is generally undisputed that the parties' contract arose from plaintiff's oral request for non-published telephone service and his subsequent payment of the monthly fee for that service.[1] Plaintiff alleged that this contract was breached when defendants' marketing department called his telephone number in an attempt to sell him products or services. In granting summary disposition to defendants, the trial court found the contract term, "non-published telephone service," to be unambiguous and to mean that defendants were prohibited from publishing or disseminating the number to the public. On appeal, plaintiff contends that the trial court was required to evaluate the definition of the term in the light most favorable to plaintiff, who argued that the term should be reasonably construed to include prohibition of publication of the number to defendants' own marketing departments.

In construing contractual language, a court should strive to effectuate the intent of the parties. Contract language is construed according to its ordinary and plain meaning; technical and strained constructions are to be avoided. *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). A trial court may grant summary disposition against a breach of contract claim as a matter of law where the terms of the contract are plain and unambiguous, and subject to only one reasonable interpretation.[2] *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999); *BPS Clinical Laboratories v Blue Cross and Blue Shield of Mich (On Remand)*, 217 Mich App 687, 700; 552 NW2d 919 (1997).

Here, the trial court did not err in consulting a dictionary to determine the plain and ordinary meaning of the subject term "non-published." *Twitchel v MIC General Ins Corp*, 251 Mich App 476, 489; 650 NW2d 428 (2002). "Publish," the opposite of "non-publish" is defined as "[t]o distribute copies . . . to the public." Black's Law Dictionary (7th ed). Accordingly,

[1] Approved tariffs filed with the Michigan Public Service Commission generally "govern the contractual relationship between a telephone company and its business and residential customers." *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 67 n 1; 559 NW2d 647 (1997). However, there is no claim that a particular tariff applicable here defines "non-published service." We note that MBTC tariff No. 20R, which explains facility ownership and maintenance, provides that customers have "no proprietary right in the [telephone] number."

[2] We reject plaintiff's argument that he should have been permitted to conduct discovery to determine the entire contract. Plaintiff sought to discover whether internal documents of defendant provided a definition of "non-published service" that was consistent with plaintiff's interpretation of that term. However, defendant's internal documents would not alter the plain meaning of the term if the contents of the documents were never communicated to consumers.

because plaintiff failed to allege that defendants published his telephone number to anyone other than its own employees, we find that plaintiff's breach of contract claim was properly dismissed pursuant to MCR 2.116(C)(8).

Plaintiff's complaint also included counts for breach of fiduciary duty and misappropriation of confidential information. However, plaintiff failed to address these counts in his brief on appeal. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Morris v Allstate Ins. Co*, 230 Mich App 361, 370; 584 NW2d 340 (1998). Accordingly, we decline to address these counts.

Lastly, plaintiff asserts that he must be given an opportunity to amend his complaint. We disagree. Plaintiff failed to ask the circuit court for leave to amend. MCR 2.118(A)(4). Thus, the issue is not properly before this Court on appeal. *Lown v JJ Eaton Place*, 235 Mich App 721, 725; 598 NW2d 633 (1999).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie