STATE OF MICHIGAN

COURT OF APPEALS

MARY FORTENBERRY, ANJENETTA PHIFFER, IRENE CARRINGTON-LEE, MATILDA SHANNON and DIANA HUDSON,

Plaintiffs-Appellants,

v

JENKINS-DICK CORPORATION,

Defendant-Appellee,

and

ANN ARBOR CEILING,

Defendant.

UNPUBLISHED
December 2, 2003

No. 242225
Wayne Circuit Court
LC No. 01-110717-CZ

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

In this gender and race discrimination case, plaintiffs appeal the trial court's grant of summary disposition to defendant. We affirm.

On March 29, 2001, plaintiffs filed their complaint against defendant, Jenkins-Dick, a joint venture and general contractor for part of the Greektown Casino project.[1] Plaintiffs alleged that defendant (1) violated plaintiffs' rights under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., and (2) negligently performed its obligations under its contract with the casino owner.[2] The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8) and (10), and plaintiffs appeal.

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[1] Plaintiffs also sued Ann Arbor Ceiling, a subcontractor that performed work on the project. The trial court dismissed the company from this action pursuant to a stipulation of the parties.

[2] Plaintiffs also asserted a claim of fraud and misrepresentation, but later abandoned it.

I.

We review de novo the trial court's summary disposition ruling. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). For their CRA claim, plaintiffs alleged that defendant (1) refused to hire plaintiffs, (2) treated differently those plaintiffs who worked on the project, and (3) sexually harassed Fortenberry and Phiffer. The court granted summary disposition on the claim pursuant to MCR 2.116(C)(10), which tests the factual support for a claim. *Spiek, supra* at 337. In analyzing a motion under this subrule, a court must consider the affidavits, pleadings, depositions, admissions and other relevant documentary evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Spiek, supra* at 337.

The record contains unrebutted evidence that defendant does not qualify as an "employer" for purposes of the CRA.[3] In support of its motion, defendant submitted the affidavit and deposition testimony of Wilbert Fisher, defendant's general superintendent during the Greektown project. The evidence established that (1) defendant existed solely to act as the general contractor of select portions of the Greektown project; (2) defendant engaged in no hiring of workers on the Greektown project, but left the hiring decisions solely to the subcontractors, and (3) defendant had absolutely no authority to affect the terms of employment of the subcontractors' employees. In the response brief and on appeal, plaintiffs effectively concede that defendant does not qualify as an employer for purposes of MCL 37.2201(a) and MCL 37.2202(1), and offer no argument or evidence to rebut defendant's showing that it did not hire or otherwise exert authority over any subcontractors' employees on the project.

In light of the evidence and plaintiffs' concessions, the trial court correctly ruled that no genuine issue of material fact exists with respect to any of the allegations that defendant, as an "employer" made discriminatory, employment-related decisions in violation of MCL 37.2202(1).

Plaintiffs also alleged that defendant retaliated against plaintiffs by laying off Phiffer in response to her complaints of sexual harassment and by refusing to hire plaintiffs because of discrimination complaints they directed to the Detroit City Council. While it is true that MCL 37.2701(a) contemplates that "a person," not strictly an "employer," may violate the CRA by retaliating against another person, here, the only alleged retaliation was defendant's refusal to hire plaintiffs and the layoff of Phiffer. Because undisputed evidence shows that defendant did not hire project workers and had no authority over the terms of employment of its subcontractors' employees, the trial court correctly ruled, as a matter of law, that the retaliation theory of liability, which was "premised on the existence of [an actual or] a potential employer-employee relationship" between defendant and plaintiffs, did not apply to defendant.

II.

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[3] Under MCL 37.2201(a), the term "employer" means "a person who has 1 or more employees, and includes an agent of that person."

In a related argument, plaintiffs challenge the trial court's ruling that they did not adequately set forth a claim that defendant aided or abetted the discriminatory conduct of its subcontractors in violation of MCL 37.2701(b). "Decisions concerning the meaning and scope of pleading . . . are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Pursuant to MCR 2.111(B)(1), a complaint must state the facts "on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." To determine the elements that comprise a claim of aiding another's violation of an individual's civil rights, the parties and the trial court referred to cases interpreting New Jersey law, which has a provision similar to MCL 37.2701(b), that prohibits a person from aiding, abetting, inciting, compelling or coercing "the doing of any of the acts forbidden under" the nondiscrimination act. *Hurley v Atlantic City Police Dep't*, 174 F3d 95, 126 (CA 3, 1999). In *Hurley*, the Third Circuit ruled that, to establish that a defendant aided or abetted discrimination, a plaintiff must demonstrate that (1) the party aided by the defendant performed a wrongful act that caused an injury, (2) the defendant had general awareness "of his role as part of an overall illegal or tortious activity at the time that he provide[d] the assistance," and (3) the defendant knowingly and substantially assisted the principal act of discrimination. *Id.* at 127.

A review of plaintiffs' complaint supports the trial court's determination "that the words aid or abet are simply absent from the [c]omplaint." Instead, plaintiffs describe defendant as a principal actor, and nowhere employ language to suggest that defendant acted to compel, coerce or incite another's discriminatory action. The trial court also correctly observed that plaintiffs never mentioned the separate, specific subsection that contains the prohibition of aiding or abetting a discriminatory act, MCL 37.2701(b). Moreover, the complaint lacks any allegation that defendant was aware of its "role as part of an overall illegal or tortious activity at the time that" it provided the assistance, or that defendant knowingly and substantially assisted any principal act of discrimination. *Hurley*, *supra* at 127. Accordingly, the court did not abuse its discretion in ruling that the allegations in the complaint did not adequately inform defendant that plaintiffs intended to hold it liable as an aider or abettor of another's discriminatory acts.

Thus, because there is no genuine issue of material fact concerning defendant's discrimination as an employer, and because the complaint does not sufficiently allege that defendant aided or abetted the discrimination of another, the trial court properly granted summary disposition to defendant.

III.

In a related argument, plaintiffs also say that the trial court erred by denying their request to amend their complaint to include specific allegations that defendant aided or abetted discrimination. We review for an abuse of discretion the trial court's decision to permit or deny permission to a party to amend its pleadings. *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 598; 669 NW2d 304 (2003).

MCR 2.118(A)(2) provides that a party may apply to a court for leave to amend a pleading, and that "[l]eave shall be freely given when justice so requires." A court ordinarily

should grant a party's motion to amend, and should deny such a motion only for one of the following particularized reasons: (1) the moving party's undue delay; (2) the moving party's bad faith or dilatory motive; (3) the moving party's repeated failure to cure deficiencies through previously allowed amendments; (4) the opposing party would suffer undue prejudice if the court allowed the amendment; and (5) futility. *Weymers, supra* at 658, quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). And, while mere delay alone does not warrant denial of a motion to amend, it is equally clear that:

> [a] party is not entitled to wait until the discovery cutoff date has passed and a motion for summary judgment has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories in an amended complaint. . . . In complex cases . . . it is particularly likely that drastic amendments on the eve of trial will prejudice the defendants. . . . Putting the defendants "through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial." [*Weymers, supra* at 661-662, quoting *Priddy v Edelman*, 883 F2d 438, 446-447 (CA 6, 1989) (citations omitted).]

The record reflects that the trial court correctly found that plaintiffs unduly delayed in requesting permission to amend their complaint and that defendant would have been prejudiced if the court permitted the amendment. Early in the proceedings, plaintiffs were aware of the alleged facts supporting their claim that defendant aided or abetted the subcontractors' discrimination. A review of plaintiffs' proposed amended complaint reveals that plaintiffs altered none of the common allegations within their original complaint, and that within Count I of the amended complaint plaintiffs utilized the same factual allegations they asserted within the original complaint, with some minor grammatical rearrangement. As the trial court observed, ¶ 6 of defendant's affirmative defenses, filed on June 15, 2001, averred that defendant "is not an employer under the [CRA]," and defendant's responses to plaintiffs' interrogatories, which defendant served upon plaintiff on September 21, 2001, repeatedly informed plaintiffs that defendant did not seek or hire any project-related workers, but left all hiring of workers to its subcontractors. Plaintiffs do not contest the extent of their knowledge regarding defendant's role in the project. Plaintiffs offer no explanation for why they waited approximately five more months to raise the potential amendment, until after the conclusion of discovery and defendant's filing of its motions for dismissal and summary disposition, other than their unavailing suggestion that they wanted documentary evidence or deposition testimony that would further describe defendant's precise role in the project and the extent of defendant's hiring activities.

We cannot conclude that the trial court abused its discretion in denying plaintiffs' request to amend the complaint because (1) the trial court recognized and applied the correct standard in denying plaintiffs' request to amend the complaint, (2) plaintiffs inexplicably, unduly delayed in requesting an amendment until many months after they knew the facts underlying their claim, after the close of discovery, and after defendant filed its motions for summary disposition, and (3) the grant of plaintiffs' proposed amendment would result in prejudice to defendant, which did not have notice of a proposed aiding or abetting discrimination claim, and which would require further discovery to examine the previously unexplored elements of a claim of aiding or abetting. *Weymers, supra* at 658-662; *Amerisure Ins Co, supra* at 598-599.

IV.

Plaintiffs also assert that the trial court erred when it summarily dismissed their claim that defendant negligently performed its contractual obligations. Whether defendant owed plaintiffs a legal duty constitutes a question of law that this Court reviews de novo. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999); *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001). If the pleadings fail to state a claim on which relief may be granted, and no factual development could justify the claim for relief, the trial court should, as here, dismiss the claim.[4]

A duty may arise out of a contractual relationship. *Freeman-Darling, Inc v Andries-Storen-Reynaert Multigroup, Inc*, 147 Mich App 282, 284; 382 NW2d 769 (1985). Whether a plaintiff states an actionable tort claim for negligence arising out of an alleged breach of contract depends on the nature of the plaintiff's allegations. Michigan courts distinguish between a claim that the defendant *performed* certain contractual obligations *with active negligence*, and a claim that the defendant *failed to perform* his contractual obligations. *Rinaldo's Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65, 83; 559 NW2d 647 (1997); *Hart v Ludwig*, 347 Mich 559, 561-562, 564-565; 79 NW2d 895 (1956); *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 708; 644 NW2d 779 (2002); *Antoon v Community Emergency Med Serv, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991). A party who affirmatively performs his contractual obligations owes a duty to those who may be foreseeably injured by his performance to proceed with reasonable care. *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967); *Hart, supra* at 563-564; *Joyce v Rubin*, 249 Mich App 231, 243-244; 642 NW2d 360 (2002) (observing that under this theory of negligence, a defendant's breach of a contractual duty causes injury to a third party, who is then allowed to bring a tort action). To the contrary, no independent tort claim arises solely from a defendant's failure to perform his contractual obligations. *Hart, supra* at 562-564; *Derbabian, supra* at 708; *Freeman-Darling, supra* at 284.

> "The cases are numerous and confusing as to the dividing line between actions of contract and of tort, and there are many cases where a man may have his election to bring either action. Where the cause of action arises merely from breach of promise, the action is in contract.
>
> "The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of promise . . . .
>
> "As a general rule there must be some active negligence or misfeasance to support tort. *There must be some breach of duty distinct from breach of contract*." [*Hart, supra* at 563, quoting *Tuttle v George H Gilbert Mfg Co*, 145 Mass 169, 174-175; 13 NE 465 (1887) (emphasis added).]

Count II of plaintiffs' complaint alleges that defendant had a contractual obligation to "implement an employment plan consistent with" the CRA and Detroit Executive Order 22, "to maintain a job site free of unlawful discrimination and to facilitate the employment of women,

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[4] We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8), which tests the legal sufficiency of a claim. *Spiek, supra* at 337.

minority, Detroit residents, trades people." The complaint in ¶ 40 alleges that defendant breached its common-law duty to perform its contractual obligations with reasonable care to avoid injuring plaintiffs.[5]

The trial court correctly ruled that the allegations in subparagraphs 40(a)-(d) failed to state a claim for negligence because they allege only nonfeasance by defendant. These subparagraphs in essence say that defendant failed to perform certain contractual obligations. Therefore, plaintiffs' allegations fail to state an actionable claim for negligence.[6] *Sherman v Sea*

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[5] Plaintiffs allege that:

> Defendant[] . . . breached [its] duty of due care by *failing to*, among other things:
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> a.) Notify the appropriate unions as to their employment needs;
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> b.) *Failure to* refer to the list of individuals who repeatedly sought employment with their corporation[];
>
> c.) *Failure to* hire Plaintiffs;
>
> d.) *Failure to* insist that their foreman notify the union hall of specific date and hiring requirements;
>
> e.) Misrepresenting to the City of Detroit that workers who conformed to the criteria set forth in Executive Order 22 were not available for employment when, in fact, Plaintiffs were ready, willing and able to work and repeatedly sought employment with Defendant[];
>
> f.) Retaining workers to fit the criteria of Executive Order 22 only so long as necessary to comply with the reporting requirements of the projects within the City of Detroit and then discharging them when work was still available for which they were qualified, in violation of the [CRA] and Executive Order 22;
>
> g.) By utilizing unskilled labor in lieu of skilled trades persons such as Plaintiffs in an attempt to satisfy the requirements of Executive Order 22 on the aforementioned job site in contravention of the directive of Executive Order 22 that was designed to enhance employment opportunity of skilled trades persons[;]
>
> h.) Posting "no job site" hiring signs to prohibit or discourage applicants from applying thereby permitting Defendant[] to assert the unavailability of female minority trades persons and maintain their race/gender bias in hiring. [Emphasis added.]

[6] Plaintiffs' complaint asserts only defendant's violation of its common-law duty to perform its contractual obligations with reasonable care. Logically, defendant cannot have violated this common-law duty to act with reasonable care if it took no action toward performing its contractual obligations. Although plaintiffs suggest in their appeal brief that defendant violated a common-law duty obligating persons to act in a nondiscriminatory manner, we decline to consider this unpreserved issue because plaintiffs at no time raised this alleged duty before the trial court. *ISB Sales Co v Dave's Cakes*, ___ Mich App ___; ___ NW2d ___ (Docket No. (continued…)

Ray Boats, Inc, 251 Mich App 41, 52; 649 NW2d 783 (2002); *Freeman-Darling*, *supra* at 285, quoting *Hart*, *supra* at 563, quoting *Tuttle*, *supra* at 174-175.

With respect to the remaining negligence allegations within subparagraphs 40(e)-(h), two of these, subparagraphs 40(f) and (g), aver that defendant breached a duty of care by retaining female employees only briefly before discharging them and replacing them with unskilled workers. Subparagraphs (f) and (g) appear to allege defendant's misfeasance in violating the terms of its contract, and thus arguably state a negligence claim. However, as noted above, the undisputed facts show that defendant did not hire any Greektown project workers or exercise authority over the terms of any worker's employment. Accordingly, summary disposition of these allegations of negligence is proper pursuant to MCR 2.116(C)(10), because no genuine issue of material fact exists with respect to subparagraphs 40(f) and (g). See *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147, 149-150; 624 NW2d 197 (2000) (an order granting summary disposition pursuant to an incorrect court rule may be reviewed under the correct rule, and that this Court ordinarily affirms a trial court's decision that reaches the correct result, even for the wrong reasons).[7]

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

(…continued)

238921, issued 9/23/03), slip op at 7 (an issue not raised in, addressed by, or decided by the circuit court is unpreserved for appellate review).

[7] The remaining affirmed subsections, 40(e) and 40(h) arguably cover conduct related to plaintiffs' claim of aiding and abetting which we have already said the trial court properly dismissed.