STATE OF MICHIGAN

COURT OF APPEALS

VINCENT DILORENZO and ANGELA TINEVIA, Plaintiffs-Appellants,	UNPUBLISHED December 8, 2005
v STATE OF MICHIGAN, COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES, Defendant-Appellee.	No. 255432 Ingham Circuit Court LC No. 03-000174-MZ

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's order granting summary disposition to defendant. We affirm.

I. FACTS

Plaintiffs' complaint alleged breach of contract, promissory estoppel, misrepresentation, fraudulent inducement, and abuse of discretion on the part of defendant in its dealings with plaintiffs. Plaintiffs were principal stockholders in New Century Bancorp, which was ordered into receivership in a separate case.[1]

Defendant filed a motion for summary disposition under MCR 2.116(C)(7) and (8). The trial court granted the motion, holding that defendant was immune from any tort claims as the state and a governmental agency and that, if an agreement was reached between plaintiffs and defendant, it was void because defendant lacked any authority to enter into the agreement.

[1] *Comm'r of the Office of Financial & Ins Services v New Century Bank*, unpublished opinion per curiam of the Court of Appeals, decided November 4, 2004 (Docket No. 249109).

II. STANDARD OF REVIEW

This Court reviews an order granting summary disposition under MCR 2.116(C)(7) and (8) de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint and under the subrule "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The legal sufficiency of the complaint is based on the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). As pointed out in plaintiffs' brief, a motion under this subrule may only be granted where "no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

III. ANALYSIS

Plaintiffs argue on appeal that summary disposition was erroneously granted because there was an enforceable agreement between the parties, that discovery was incomplete and that it was error for the court not to allow an amendment of their complaint to correct any defects. Finally, they claim that the trial court did not make findings of fact and law on the record.

Even accepting all the well-pleaded facts as true and construing them in plaintiffs' favor, we hold that the trial court was correct in its decision to adopt the reasoning in defendant's brief and grant summary disposition to defendant. First, the contracts that were attached were outside the pleadings and should not be considered. *Beaudrie*, *supra* at 129. Secondly and more compelling, the contracts were not between plaintiffs and defendant, but between third parties.

Finally, even if the claim that plaintiffs and defendant had made a deal, it was unenforceable as a matter of law. Any authority to enter into agreements must be conferred by statute or by the constitution. *Roxborough v Michigan Unemployment Compensation Comm'n*, 309 Mich 505, 511; 15 NW2d 724 (1944); *Taxpayers of Michigan Against Casinos v Michigan*, ___ Mich App ___; ___NW2d ___ (2005), slip op at 9. Plaintiffs have not pointed to any authority, statutory or otherwise, that would permit defendant to enter into an agreement to avoid the procedures set up by the Banking Code of 1999, MCL 487.11101 *et seq.*

The trial court's reliance on *Roxborough*, *supra*, and *Sittler v Bd of Control of the Michigan College of Mining & Technology*, 333 Mich 681, 687; 53 NW2d 681 (1952), was well placed. In this case, plaintiffs do not have any proof that an agreement existed, or that defendant had the authority to make an agreement.

The trial court also correctly granted summary disposition under MCR 2.116(C)(7) for the torts of fraudulent inducement and misrepresentation alleged by plaintiffs.

The statute controlling governmental immunity, MCL 691.1407, makes it clear that unless the tort alleged falls within one of the delineated exceptions, the state agency is immune when engaged in the exercise or discharge of its governmental function. To avoid dismissal, plaintiffs' complaint must allege facts that justify application of one of the exceptions to immunity. *Wade*, *supra* at 164. There are only five statutory exceptions to governmental immunity, the "highway exception," MCL 691.1402, the "motor vehicle exception," MCL 691.1405, the "public building exception," MCL 691.1406, the "proprietary function," MCL

691.1413, and the "governmental hospital exception," MCL 691.1407(4). Because plaintiffs failed to allege facts to avoid these exceptions, the court properly granted summary disposition. *Wade, supra*.

Plaintiffs next argue that, had they been given an opportunity to complete discovery or allowed to amend their complaint, summary disposition would not have been proper.

Summary disposition is not appropriate where facts may be developed through discovery to support a claim. *Xu v Gray*, 257 Mich App 263, 267; 668 NW2d 166 (2003). However, if no factual development could possibly justify recovery, then summary disposition is appropriate. *Beaudrie*, *supra* at 130. In this case, plaintiffs had almost two years from the time the petition for receivership was filed and almost six months between the time they filed their complaint to the time defendant's motion was heard to discover any evidence to support their claim. Additional time was unlikely to have brought any new evidence to light.

Plaintiffs also complain that they were not given an opportunity to amend their complaint to cure any defects and avoid dismissal. MCR 2.116 (I)(5) provides: "If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.118 provides that leave of the court is required to do so. Plaintiffs did not seek leave of the court to amend their pleadings. While MCR 2.118(A)(2) states that "[l]eave shall be freely given when justice so requires," amendment is not justified when it would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

Since plaintiffs did not seek leave to amend their complaint and it appears that amendment would have been futile anyway, this argument must fail.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello