

STATE OF MICHIGAN  
COURT OF APPEALS

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TIMOTHY E. WAUN and DEANNA WAUN,

Plaintiffs-Appellants,

v

UNIVERSAL COIN LAUNDRY MACHINE,  
LLC, STEPHEN M. BEAN, and FREDERIC M.  
BEAN,

Defendants-Appellees.

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UNPUBLISHED  
September 26, 2006

No. 267954  
Wayne Circuit Court  
LC No. 04-424221-CK

Before: Davis, P.J., and Murphy and Schuette, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur in part and dissent in part. I agree with the majority in granting summary disposition for the claim of breach of fiduciary duty, the claims of breach of contract and breach of fiduciary duty with regards to Mrs. Waun, and the claim of personal liability for the Beans regarding the breach of contract claim. I respectfully dissent from the majority on all other claims and would affirm the trial court's grant of summary disposition on all claims.

I. BREACH OF CONTRACT

I disagree with the majority's conclusion that Universal was contractually obligated to engage in a cost and income analysis. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). The contract mandated that defendant use its "best efforts to locate a demographically valid location . . . in accordance with [Universal] criteria for the establishment of a coin or debit card laundry . . . ." It also required its "best efforts to secure financing on [Waun's] behalf . . . ." In reading the terms of the contract using the plain and ordinary meaning of the words, I do not believe that a cost and income analysis was mandated. The majority believes that the contract is ambiguous and the only reason defendant would engage in a cost and income analysis is because it was obligated under the contract, but a reasonable belief could be that the cost and income analysis was developed to help plaintiffs secure financing – a contractual obligation of defendant. I believe that the contract is not ambiguous and must be enforced as written. Our Supreme Court has noted that " '[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' " *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23

(2005). In his deposition, Stephen Bean was asked if developing a site included an income analysis like the one he provided to plaintiffs and he answered in the affirmative. This extrinsic evidence is only permitted to interpret the intent of the parties where the language employed in the contract is ambiguous. *Edoff v Hecht*, 270 Mich 689, 260 NW 93 (1935). The language of this contract is not ambiguous and therefore this statement by Bean cannot be used to determine the intent of the parties. Defendant was not contractually obligated to perform a cost and income analysis and consequently could not have breached the contract; therefore, the trial court did not err in dismissing the breach of contract claim.

## II. FRAUDULENT MISREPRESENTATION

In order to claim fraudulent misrepresentation, a plaintiff must show that the representation was false. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000); *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Generally, a representation that something will occur (or will not) occur in the future cannot support a fraud claim because such a representation “from its nature cannot be true or false when it is made.” *Broaden v Doncea*, 340 Mich 564, 572; 66 NW2d 216 (1954). “An action for fraud may not be predicated upon the expression of an opinion or salesmen’s talk in promoting a sale, referred to as puffing.” *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987). Under these standards, the requirements for plaintiffs’ claim of fraudulent misrepresentation would not be satisfied. The majority relies on *Mesh v Citrin*, 299 Mich 527, 534; 300 NW 870 (1941), that states when projected incomes and profits are predicated on underlying deceit concerning past or existing facts, it could form the basis of a fraud claim. Although the projections for plaintiffs’ annual income may have been ambitious, they were within industry standards. The claims by defendant were not outrageous or outlandish, but rather projections attainable by some competitors in the industry. I believe that there was not underlying deceit in defendant’s projections to plaintiffs, but rather optimistic projections that eventually proved to be wrong. Therefore defendant did not make a representation that was false and the trial court did not err in dismissing the breach of contract claim.

## III. NEGLIGENT MISREPRESENTATION

In order to have a successful claim of negligent misrepresentation, a plaintiff must show that he justifiably relied on the statements made by the other party. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989). Plaintiffs understood that all the pro-formas developed by defendants were simply projections and that they did not guarantee the income that they projected. Plaintiffs could have checked these assertions made by defendant by doing their own research on the industry, i.e. finding out the average turns per day and the normal income for a similarly situated launderette. Also, defendant was selling merchandise to plaintiffs and plaintiffs realized that the seminars were a ‘slick’ sales pitch; both of these realizations should have put plaintiffs on guard. Finally, defendant was not contractually obligated to perform a cost and income analysis; therefore, plaintiffs would have less reason to rely on the projections relayed by defendant. Plaintiffs did not justifiably rely on the projections made by defendant; therefore, the trial court did not err in dismissing the claim of negligent misrepresentation.

## IV. NEGLIGENCE

In order to have a successful claim of negligence, a plaintiff must show that the defendant owes him or her a duty. *Henry v The Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). In this case, the plaintiffs allege defendant breached that duty by developing the site analysis with grossly exaggerated income projections. Defendant was not contractually obligated to prepare a cost and income analysis as part of the site analysis, so therefore defendant did not owe plaintiffs a duty. The threshold question in any negligence action is whether the defendant owed a duty to the plaintiff. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The trial court did not err in dismissing the negligence claim.

#### V. SILENT FRAUD

In order to have a successful claim of silent fraud, a plaintiff must show that there was a legal or equitable duty of disclosure. *M & D, Inc v McConkey*, 231 Mich App 22, 29; 585 NW2d 33 (1998). Defendant does not have a legal duty to disclose that average industry sales were significantly lower than the sales projections supplied to plaintiffs because defendant was not contractually obligated to perform a cost and income analysis as part of the site analysis. An equitable duty of disclosure could arise where the buyers express a particularized concern or directly inquire of the seller and the seller remains silent. *Id.* at 33. There is no evidence that plaintiffs requested the non-disclosed information, consequently defendant did not have an equitable duty to disclose the information to plaintiffs. Defendant did not owe plaintiffs a legal or equitable duty to disclose; therefore, the trial court did not err in dismissing the silent fraud claim.

#### VI. REMAINING CLAIMS

The majority correctly affirmed the trial court's decision to dismiss the breach of contract and breach of fiduciary duty claims brought by Mrs. Waun. The tort claims brought by Mrs. Waun, as shown above, should be dismissed against both plaintiffs. Therefore, I would find that the trial court did not err in dismissing the claims regarding Mrs. Waun of fraudulent and negligent misrepresentation, negligence and silent fraud.

The question of whether the Beans are personally liable for the tort claims brought by plaintiffs need not be answered as I do not believe that there are any surviving tort claims. I would find that the trial court did not err in dismissing the tort claims holding the Beans personally liable.

I would affirm the grant of summary disposition by the trial court on all claims.

/s/ Bill Schuette