STATE OF MICHIGAN

COURT OF APPEALS

JOHN P. BYRNE III and NISREEN BYRNE, a/k/a NISREEN KALLABAT,

Plaintiffs-Appellants/Cross-Appellees,

v

REPUBLIC BANK, GREGORY A. CUMMINGS, and ESTATE HOMES, L.L.C.,

Defendants,

and

REAL ESTATE ONE, INC., and RONALD R. CUMMINGS,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
September 6, 2007

No. 268762
Oakland Circuit Court
LC No. 2003-053169-CK

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from the trial court's order dismissing their claims against defendants Real Estate One, Inc., and Ronald Cummings (hereinafter defendants). We affirm.[1]

On October 3, 2003, plaintiffs filed this action arising from the purchase and construction of a residential home. Plaintiffs sued defendants, the real estate agent and agency, for breach of contract, breach of implied contract, promissory estoppel/detrimental reliance, conspiracy to defraud, fraudulent misrepresentation, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Generally, it was asserted that defendants induced plaintiffs to

[1] Defendants Real Estate One, Inc. and Ronald Cummings filed a cross appeal from the trial court's order denying their motion for summary disposition. Because we affirm the trial court's order dismissing plaintiffs' claims, we need not address the cross appeal.

engage Gregory Cummings, the builder and the son of defendant real estate agent, to construct a home in Clarkston, Michigan with a purchase price of $1,600,000. Plaintiffs alleged that the home was to be completed by July 2002 to allow the plaintiffs to have their wedding at the home. It was also asserted that defendants breached various other promises, including the payment of the golf membership and interior design services. The purported abandonment of the construction and the alleged improper disbursements by the financing institution for unfinished work precipitated the filing.

On October 21, 2005, the parties entered into a stipulated order to dismiss certain claims with prejudice. Therefore, plaintiffs were no longer pursuing claims for breach of contract, breach of implied contract, and violation of the MCPA against defendants. On November 14, 2005, plaintiffs filed a first amended complaint containing the same general allegations of fraudulent inducement and improper performance by defendants, the builder, and the lender. With regard to defendants involved in this appeal, plaintiffs raised claims of promissory estoppel/detrimental reliance, conspiracy to defraud, and fraudulent misrepresentation. The claims against defendants were reviewed during case evaluation, and the reviewing panel unanimously concluded that the causes of action raised by plaintiffs against defendants were frivolous. When plaintiffs did not file a motion asking the trial court to review the evaluation or post a bond to continue the action in accordance with the procedure set forth in MCR 2.403, defendants filed a motion to dismiss the case with regard to the claims raised against them. The trial court agreed to dismiss plaintiffs' claim against defendants, ruling:

> Case evaluators determined it frivolous, you had a duty to respond according to the rule. They separated you out and made you singularly responsible. I'm going to grant [their] motion.

Plaintiffs appeal by leave granted, asserting that the court rule at issue, MCR 2.403, is inapplicable because the claims raised involved both contract and tort actions, thereby preventing dismissal and obviating the requirement that a bond be posted.

Interpretation of a court rule presents a question of law that is subject to review de novo. *Dessart v Burak*, 470 Mich 37, 39; 678 NW2d 615 (2004). Court rules are construed in the same manner as statutes. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001). The plain language of the court rule is examined, and if unambiguous, we enforce the meaning plainly expressed, without further construction or interpretation. *Id*. Common words are given their everyday, plain meaning. *Id*. According to the plain meaning rule, "courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

MCR 2.403 governs the procedure for case evaluation and provides in relevant part:

> (K) Decision.
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> (1) Within 14 days after the hearing, the panel will make an evaluation and notify the attorney for each party of its evaluation in writing. If an award is not unanimous, the evaluation must so indicate.

(2) The evaluation must include a separate award as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3) The evaluation must include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of the award.

(4) In a tort case to which MCL 600.4915(2) or MCL 600.4963(2) applies, if the panel unanimously finds that a party's action or defense as to any other party is frivolous, the panel shall so indicate on the evaluation. For the purpose of this rule, an action or defense is "frivolous" if, as to all of a plaintiff's claims or all of a defendant's defenses to liability, at least 1 of the following conditions is met:

(a) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.

(b) The party had no reasonable basis to believe that the facts underlying that part's legal position were in fact true.

(c) The party's legal position was devoid of arguable legal merit.

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(N) Proceedings After Rejection.

(1) If all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion.

(2) If a party's claim or defense was found to be frivolous under subrule (K)(4), that party may request that the court review the panel's finding by filing a motion within 14 days after the ADR clerk sends notice of the rejection of the case evaluation award.

(a) The motion shall be submitted to the court on the case evaluation summaries and documents that were considered by the case evaluation panel. No other exhibits or testimony may be submitted. However, oral argument on the motion shall be permitted.

(b) After reviewing the materials submitted, the court shall determine whether the action or defense is frivolous.

(c) If the court agrees with the panel's determination, the provisions of subrule (N)(3) apply, except that the bond must be filed within 28 days after the entry of the court's order determining the action or defense to be frivolous.

(d) The judge who hears a motion under this subrule may not preside at a nonjury trial of the action.

(3) Except as provided in subrule (2), if a party's claim or defense was found to be frivolous under subrule (K)(4), that party shall post a cash or surety bond, pursuant to MCR 3.604, in the amount of $5,000 for each party against whom the action or defense was determined to be frivolous.

(a) The bond must be posted within 56 days after the case evaluation hearing or at least 14 days before trial, whichever is earlier.

(b) If a surety bond is filed, an insurance company that insures the defendant against a claim made in the action may not act as the surety.

(c) If the bond is not posted as required by this rule, the court shall dismiss a claim found to have been frivolous, and enter the default of a defendant whose defense was found to be frivolous. The action shall proceed to trial as to the remaining claims and parties, and as to the amount of damages against a defendant in default.

(d) If judgment is entered against the party who posted the bond, the bond shall be used to pay any costs awarded against that party by the court under any applicable law or court rule. MCR 3.604 applies to proceedings to enforce the bond.

The issue of the interpretation of MCR 2.403(N) was examined in *Wilcoxon v Wayne Co Legal Services*, 252 Mich App 549, 550; 652 NW2d 851 (2002). In that case, the plaintiff filed an eight-count complaint arising from her allegation that she was constructively discharged from her employment to allow defendant to avoid payment of commissions that arose from the performance of her work. The trial court dismissed three of the eight-counts in the complaint, leaving the plaintiff with five remaining claims: fraudulent and innocent misrepresentation, breach or oral or implied-in-fact contract, promissory estoppel, and unjust enrichment. A mediation hearing was held, and the panel unanimously found that the plaintiff's complaint was frivolous. After the plaintiff did not request a review by the circuit court or post a bond, the defendant moved to dismiss the complaint. The circuit court denied the motion, concluding that the court rule, MCR 2.403(N), did not require dismissal because the plaintiff's action was grounded in contract principles, not tort principles. This Court agreed by concluding:

> An examination of plaintiff's complaint shows that three of her remaining claims clearly sounded in contract, not tort. Plaintiff sought recovery under theories of breach of an express or implied-in-fact contract, quasi-contract (plaintiff's unjust enrichment claim), and promissory estoppel. Plaintiff's two remaining claims, however, sounded in tort.
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> There is nothing in the language used in the court rule that indicates that its authors intended the specific subcategory "tort case" to encompass civil actions that include both tort and any other civil claims. As used in the court rule, a tort

> case is one where all the underlying claims sound in tort. If a case includes both tort and contract claims, or tort and any other type of civil claim, that case falls within the category civil case or action, but not within the subcategory "tort case." Because three of plaintiff's remaining claims in this civil case sounded in contract, her case does not fall within the subcategory "tort case." Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss. [*Id*. at 552-553, 555 (footnote omitted).]

Plaintiffs allege that this case falls within the parameters set forth in *Wilcoxon, supra*, because the claims raised by plaintiffs consisted of both contract and tort claims. Although the original complaint listed both contract and tort claims against these defendants, plaintiffs subsequently dismissed the contract claims raised against these defendants. We note that plaintiffs' amended complaint continues to assert claims for breach of contract against other defendants. However, the plain language of the court rule at issue provides that case evaluation awards address a plaintiff's claim against each defendant. MCR 2.403(K)(2). Therefore, plaintiffs cannot rely on the allegations of breach of contract against other parties to maintain the claims raised against these defendants.

Plaintiffs further allege that the claims against these defendants involve breach of contract claims as evidenced by count IV of the amended complaint asserting "promissory estoppel/detrimental reliance against all defendants" and that promissory estoppel is properly characterized as a contract claim.[2] However, a party's label for the cause of action is not dispositive. We are not bound by the plaintiff's choice of labels for her claims because to do so would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). A party cannot avoid the dismissal of a cause of action based on artful pleading. See *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). Rather, the gravamen of a plaintiff's action is determined by examining the entire claim. *Id*. The courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim. *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987).

Review of the amended complaint reveals the following allegations accompanying the claim labeled "promissory estoppel/detrimental reliance":

> 54. Plaintiffs repeat and reallege the above paragraphs as if stated verbatim.

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[2] Plaintiffs correctly cite authority to indicate that a promissory estoppel claim has been construed as "akin to a contract claim." *Long v Chelsea Comm Hosp*, 219 Mich App 578, 588; 557 NW2d 157 (1996). However, case law has also concluded that promissory estoppel constitutes a tort claim. See *Ramsey v City of Pontiac*, 164 Mich App 527, 538; 417 NW2d 489 (1989). Furthermore, it cannot be ignored that plaintiffs' claim was entitled "promissory estoppel/detrimental reliance," and detrimental reliance has been classified as a tort. See *Evans v Detroit Bd of Education*, 144 Mich App 60, 64; 373 NW2d 246 (1985). Because the title of a claim given by a party is not dispositive, we need not address whether the labels given are appropriately characterized as contract or tort claims.

> 55. Defendants knew, or should have known, that Plaintiffs would rely on their representation, promises, and warranties.
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> 56. As a direct and proximate result of Plaintiffs[’] justifiable reliance on these representations, promises and warranties by these Defendants, Plaintiffs have sustained damages.

The allegations underlying plaintiffs’ label of “promissory estoppel/detrimental reliance” do not sound in contract. Rather, the terminology utilized, specifically the reference to “direct and proximate result,” is typically associated with tort or negligence actions. Moreover, in reviewing the common factual allegations in the amended complaint, plaintiffs recognized that defendant Ron Cummings of defendant Real Estate One, Inc., was the only agent involved in the transaction. The claims against these defendants are premised on alleged factual representations made. Based on the common allegations, these defendants did not enter into a contractual agreement with plaintiffs, and there is no indication that plaintiffs retained their own agent to act on their behalf. Thus, irrespective of plaintiffs’ label of the cause of action, plaintiffs were pursuing a tort theory of liability against these defendants. After the case evaluation panel concluded that the claims against these defendants were frivolous, plaintiffs could have asked the trial court to review the evaluation. MCR 2.403(N)(2). If a party’s claim is found to be frivolous, the party “shall” post a bond. MCR 2.403(N)(3). The use of the term “shall” denotes mandatory, not permissive or discretionary action. *Browder, supra*. Therefore, plaintiffs were required to ask the trial court to review the case evaluation award of frivolous or post a bond to maintain the claims against these defendants. MCR 2.403(N). In light of our holding that the trial court properly dismissed plaintiffs’ complaint with regard to these defendants based on MCR 2.403(N)(3), we need not address defendants’ cross appeal.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood