STATE OF MICHIGAN

COURT OF APPEALS

J & J PLUMBING & HEATING, LLC, W. PAUL WIEGMAN, and JOHN GROSS, Plaintiffs-Appellants, v CHARLES TATE and IDA VANBEELEN, Defendants-Appellees.	UNPUBLISHED November 13, 2008 No. 277824 Ingham Circuit Court LC No. 06-001268-CK
J & J PLUMBING & HEATING, LLC, W. PAUL WIEGMAN, and JOHN GROSS, Plaintiffs-Appellants, v CHARLES TATE and IDA VANBEELEN, Defendants-Appellees.	 No. 279838 Ingham Circuit Court LC No. 07-000087-CK

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In Docket No. 277824, plaintiffs appeal as of right the February 28, 2007, order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendants. In Docket No. 279838, plaintiffs appeal as of right the July 23, 2007, order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants. We affirm.

Plaintiff J & J Plumbing and Heating is a limited liability company and plaintiffs Wiegman and Gross are members of the company. Defendants Tate and VanBeelen[1] are former

[1] It does not appear that defendant VanBeelen participated in the trial court proceedings.

employees of the company. Plaintiff[2] filed a breach of contract action on October 5, 2006, based on an alleged 2003 oral agreement to purchase "the entire business of Plaintiff to include all of the inventory, equipment, and accounts receivable." The complaint alleged that the agreement required defendant to pay Wiegman $60,000 at the rate of $300.00 per week and to pay Wiegman's truck payment until the loan on the truck was paid in full. Defendants also would become responsible to pay the current trade credit owed by plaintiff in the approximate amount of $50,000. Defendants would be responsible to keep current all of the bills in the normal course of business, including federal, state, local, and employee withholding taxes.

Plaintiff alleged that from the time defendants took over the operation of the company until October 6, 2003, defendants failed to pay the trade credit, the business taxes, and the employee withholding taxes. It also alleged that defendants failed to make any of the $300 weekly payments and failed to make any payments on the truck loan. Plaintiff alleged that Wiegman returned to the business in October 2003, and at that time the federal tax liability was $186,000, and the trade credit liability was $25,000. Plaintiff alleged that defendants breached their contract with plaintiff and failed to reimburse plaintiff for the debts, taxes, and payments due under the contract. Plaintiff sought damages in the amount of $393,428.41, plus interest, costs and attorney fees.

Defendant Tate moved for summary disposition of plaintiff's complaint under MCR 2.116(C)(8). Tate argued that summary disposition was appropriate because MCL 566.132(1)(a) requires agreements that cannot be performed within one year to be in writing, and that MCL 566.132(1)(b) requires a promise to pay the debt of another to be in writing.[3] Following a hearing on the motion on December 13, 2006, the trial court granted Tate's motion for summary disposition, finding that the purported contract contained terms that could not be performed within one year and terms that constituted promises to pay the debts of another. Because plaintiff had argued that an amended complaint might eliminate the applicability of the statute of frauds, the trial court concluded that plaintiff could request leave to amend the complaint. An order to this effect was entered on February 28, 2007.

In the meantime, on January 23, 2007, plaintiff filed a second action (case number 07-000087-CK) against defendants alleging that, rather than agreeing to purchase the company, defendants agreed to manage the company and that they had failed to pay taxes, employee withholding, trade credit and current bills. Plaintiff's alleged damages were the same as alleged by plaintiff's first complaint, only the theory of liability had changed.[4]

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[2] The term "plaintiff" refers to all three plaintiffs collectively.

[3] In his brief in support of his motion for summary disposition, Tate asserted that he had no contact with plaintiffs for approximately three years before being served with the complaint on October 7, 2006.

[4] Plaintiff raised claims of fraud/false representation, conversion, and breach of fiduciary duty.

Plaintiff filed an amended complaint in the first action on January 29, 2007, and later moved for leave to file the proposed amended complaint.[5] The proposed amended complaint contained the same breach of contract claim as the first complaint and added counts for unjust enrichment and promissory estoppel.

On April 4, 2007, the trial court held a hearing on a motion to consolidate the two lower court cases and to allow the filing of plaintiff's first amended complaint in the first action. In an order entered on April 11, 2007, the trial court denied the motion for leave to amend the complaint on the ground of futility. Given the denial of the motion to amend, the court denied the motion to consolidate.

Defendants moved for summary disposition in the second action on June 4, 2007, asserting in part that the claims raised in plaintiff's complaint were barred by res judicata because they were raised or could have been raised in the prior action. Following a hearing on the motion on July 11, 2007, the trial court granted defendant's motion for summary disposition on the ground that res judicata barred the second action.

I

Plaintiff first argues that the trial court erred in concluding that the statute of frauds barred plaintiff's breach of contract claim. We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8) de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Whether the statute of frauds applies to bar an action is a question of law that is also reviewed de novo on appeal. *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005).

Plaintiff argues that the trial court erred by granting summary disposition on the ground that the contract, by its terms, was not to be performed within one year from the date of the making of the contract.[6] Plaintiff maintains that "case law is clear that a contract will only fall within the statute of frauds when by its terms it is impossible to complete within one year."

An agreement that, *by its terms*, is not capable of being performed within one year from the making of the agreement is deemed void under the statute of frauds unless the agreement was in writing and signed by the party to be charged with the agreement. MCL 566.132(1)(a); see *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993), mod on other grounds by *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994).

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[5] Plaintiff objected to the entry of the order granting summary disposition and, at the February 28, 2007, hearing for entry of an order, it was discovered that plaintiff had filed the amended complaint without leave. The trial court directed plaintiff to file a motion for leave to file an amended complaint.

[6] Plaintiff has not challenged on appeal the grant of summary disposition on the ground that the contract contained a promise to pay the debt of another. Consequently, we need not consider the grant of summary disposition on this ground.

The alleged oral contract required that defendants pay $60,000 in $300 weekly installments. Therefore, by its terms, it comes within the statute of frauds. *Ordon v Johnson*, 346 Mich 38, 47; 77 NW2d 377 (1956) (recognizing that an oral agreement for the payment of money that, by its terms, is to be paid more than one year after its making is within the statute of frauds).

It has been recognized that

> if there is any possibility that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period and even though it does so extend. *[Drummey v. Henry*, 115 Mich App 107, 111; 320 NW2d 309 (1982).]

Plaintiff contends that the oral agreement falls within this exception. We disagree. It is not enough that one can imagine some turn of events whereby the contract could be fulfilled within one year. Rather, the *terms of the contract* must show that it is capable of being performed within one year. See, generally, *Southwell v Parker Plow Co*, 234 Mich 292, 293; 207 NW 872 (1926), and *Epstean v Mintz*, 226 Mich 660, 667; 198 NW 225 (1924). By its terms, the parties' alleged agreement was to be performed over 200 weeks' time, or nearly four years, and there was nothing in the terms to indicate that it could be performed within one year (e.g., pay $60,000 in two years or less or pay $60,000 in two years or on demand). Because the agreement, by its terms, was not to be performed within one year of its making and there is no writing signed by either defendant, the trial court did not err in granting defendants' motion for summary disposition on the basis of the statute of frauds.

II

Plaintiff argues that the trial court erred when it denied its request for leave to amend the complaint to add claims of promissory estoppel and equitable estoppel/unjust enrichment. The trial court held that amendment would be futile. We review the trial court's decision whether to grant leave to amend the complaint for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend a complaint "shall be freely given when justice so requires." MCR 2.118(A)(2). Ordinarily, a motion to amend should be granted, but it may be denied if the amendment would be futile. *Weymers, supra* at 658. "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

First, plaintiff argues that it properly pled the elements of a cause of action for promissory estoppel. In support of this argument, plaintiff states the elements of a cause of action for promissory estoppel, and then states simply that "plaintiffs . . . pled the requisite elements or promissory estoppel with the requisite facts to support their claim." Plaintiff provides no analysis of the issue. "An appellant must properly argue issues identified in the statement of the questions in order to properly present an appeal." *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds by *Bechtold v Morris*, 443 Mich 105, 503 NW2d 654 (1993). The appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for those claims. *Yee v*

Shiawassee Co Bd of Comm'rs, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Second, plaintiff argues that it properly pled a cause of action for unjust enrichment. It appears that plaintiff is arguing that defendants were unjustly enriched because plaintiff is obligated to pay taxes to the IRS and the state of Michigan that allegedly should have been paid by defendants.

The essential elements of an unjust enrichment claim are: "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to [the] plaintiff because of the retention of the benefit by defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). "In such instances, the law operates to imply a contract in order to prevent unjust enrichment." *Id.* "However, a contract will be implied only if there is no express contract covering the same subject matter." *Id.* Here, plaintiff maintained that an express oral contract existed between the parties, which the trial court found to be in violation of the statute of frauds. The subject matter of plaintiff's unjust enrichment claim was within the scope of the alleged express agreement between the parties. The trial court did not abuse its discretion in concluding that plaintiff could not maintain a claim for unjust enrichment as a matter of law and in denying plaintiff's motion to amend the complaint on the ground that the amendment would be futile.

III

Plaintiff argues that the trial court erred by concluding that plaintiff's second action was barred by res judicata. We review a trial court's application of res judicata de novo. *Washington Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001). The second action is barred when "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The doctrine bars all matters that with due diligence should have been raised in the earlier action. *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

At issue in this case is the first requirement. Plaintiff contends that the first action was not decided on the merits. We disagree. Generally, the granting of a motion for summary disposition constitutes an adjudication on the merits. See, e.g., *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App. 485, 510; 686 NW2d 770 (2004) ("[A] summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata."). A decision on a motion for summary disposition premised on a substantive ground constitutes an adjudication on the merits. Here, the first suit was dismissed on the ground that the alleged oral contract was void because it violated the statute of frauds. The trial court's order constitutes an adjudication on the merits of plaintiff's claims, and res judicata bars any further action against defendants. *Washington, supra* at 412.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette