

STATE OF MICHIGAN
COURT OF APPEALS

DR. HARESH MEHTA and RAKSHA MEHTA,

Plaintiffs-Appellants,

v

JONATHAN LIMBRIGHT,

Defendant-Appellee.

UNPUBLISHED

February 5, 2009

No. 282029

Oakland Circuit Court

LC No. 2006-077908-CZ

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant. We affirm.

For the purposes of this appeal, the facts are not meaningfully in dispute. Plaintiffs retained Matthew Strickfaden to coordinate the construction of a new home. Strickfaden was apparently not truly a general contractor, due to the level of control over the project retained and exercised by plaintiffs, but was rather the “builder” and “project manager.” Among other elements of the work, plaintiffs sought out defendant on the basis of a friend’s recommendation to perform some internal painting. Plaintiffs obtained from defendant a proposal and took it to Strickfaden, who hired defendant after a “mutual” decision between himself and plaintiffs to do so. Defendant’s job was to paint certain walls and trim. However, defendant apparently did so incompetently. Specifically, he (1) failed to protect the wood floors properly, resulting in “overspray” of paint on the floors; and (2) he painted the trim by painting directly over not only the trim, but also the window glass, pursuant to a scheme to scrape paint back off of the glass afterwards, which failed and left scratches on the glass. Plaintiffs commenced this negligence suit against him.¹

A trial court’s ruling on a motion for summary disposition is reviewed de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion decided on the basis of

¹ Plaintiffs also brought a claim for vicarious liability, alleging that defendant was liable for the poor work performed by remediators brought in by defendant’s insurer to try to rectify the problems he caused. Plaintiffs have not appealed the dismissal of that claim.

MCR 2.116(C)(10), which this presumably was because the trial court did not consider only the pleadings, entails consideration of all evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party; summary disposition is warranted where the evidence shows no genuine issue as to any material fact. *Id.*, 567-568. “If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made.” *Fultz v Union-Commerce Assoc*, 470 Mich 460, 469-470; 683 NW2d 587 (2004). Furthermore, “this rule applies to a plaintiff who is not a party to the contract but alleges that a contracting party failed to perform its obligation under that contract.” *Kisiel v Holz*, 272 Mich App 168, 172-173; 725 NW2d 67 (2006).

The trial court correctly held that plaintiffs’ negligence claim depends on a showing that defendant breached some duty “separate and distinct” from his contractual duties. However, we find plaintiffs’ allegations that defendant did so are effectively tautological arguments to the effect that defendant’s contractual duties did not include incompetence. Plaintiffs argue that defendant “was never hired to slop paint on hardwood floors” or “to scratch windows so badly with razor blades that they cannot be repaired.” Although literally true, both statements pertain directly to the execution – or rather, to the flawed execution – of defendant’s painting obligations. More precisely, defendant’s duty was to paint certain areas of plaintiffs’ house in a good workmanlike manner. Plaintiffs essentially allege that defendant had a separate and distinct duty to avoid painting other parts of the house, like the floor or the windows. But this is simply a necessary corollary of painting the specified areas properly: it is difficult to comprehend how “properly painting a specified surface in a residence” could not include by necessary implication “avoiding getting paint on adjacent surfaces.”

This does not mean, as plaintiffs suggest, that a tortfeasor can insulate himself from liability simply by wrapping his wrongful actions in a contract. Accidentally painting another house entirely, to which defendant had no contractual ties, would implicate a duty “separate and distinct” from the contractual obligation to paint the first house. Likewise, cutting a hole in a wall or painting the wrong area entirely would also implicate duties “separate and distinct” from the paint work defendant contracted to perform. But, as the facts exist in the record, the scratches on the windows were because defendant decided on an unworkable *way of painting the windowframes*, and the paint got on the floor due to a combination of incompetently applying protection *as part of the painting procedure* and out of simple sloppiness, again *as part of the painting procedure*. In other words, defendant’s alleged acts and omissions amount to nothing more than a failure to carry out his contractual duty to paint the walls and windowframes in a good workmanlike manner.

Plaintiffs raise several additional arguments asserting that they are in contractual privity with defendant, or they are intended third-party beneficiaries of the contract with defendant. We need not consider these arguments, because plaintiffs have not asserted any contractual claims, nor have they made any attempt to seek leave to amend the pleadings to include such claims. Furthermore, plaintiffs do not appear to have been without a remedy even if they could not have brought contract claims against defendant: if nothing else, defendant was insured; and plaintiff was unquestionably in contractual privity with Strickfaden, who equally-unquestionably was in contractual privity with defendant irrespective of whether plaintiffs were. We conclude that the

trial court properly granted summary disposition in defendant's favor on the basis of the legal theories actually asserted in this case.

Affirmed.

/s/ Henry William Saad

/s/ Alton T. Davis

/s/ Deborah A. Servitto