STATE OF MICHIGAN

COURT OF APPEALS

PFS - PREMIUM FINANCE CORP,

Plaintiff-Appellant,

v

ENVIRONMENTAL RISK MANAGERS, INC, BETSY KERBER, ANGELA HUGHEY and EVANSTON INS CO,

Defendants-Appellees.

UNPUBLISHED
August 31, 2010

No. 287256
Kalamazoo Circuit Court
LC No. 06-000125-CK

Before: METER, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants summary disposition. We affirm.

I. BASIC FACTS AND PROCEEDINGS

General Environmental Services, Inc. (GES) operated a landfill site and hazardous waste incinerator site in the state of Kentucky. Under Kentucky state law, "[a]n owner or operator of [these facilities] shall establish financial assurance for closure of the facility."[1] 401 KY ADC 35:090, § 2. One acceptable financial assurance is "closure insurance." *Id.*, § 2. A certificate of closure insurance is submitted to the Environmental and Public Protection Cabinet of the State of Kentucky (the Cabinet) for review. *Id.*, at § 6(1). If the Cabinet accepts the closure insurance, "[t]he owner or operator shall maintain the policy in effect until the cabinet consents to termination of the policy by the owner or operator . . ." *Id.*, at § 6(6).

GES contacted an insurance agent, R.C. Riley, to obtain closure insurance for the two sites. Riley in turn contacted Chris Bunbury, president of defendant Environmental Risk

[1] Michigan law similarly requires, as a part of the application for a license to operate a disposal area, evidence of financial assurances, such as bonds. See MCL 324.11523.

Managers (ERM), to locate an insurer. Bunbury located defendant Evanston Insurance Company (Evanston), which agreed to insure the sites.

GES sought to finance the premiums over a period of time and ERM, on behalf of GES, contacted plaintiff to arrange for financing. Plaintiff and GES executed an insurance premium finance contract, dated April 29, 2003, in which plaintiff agreed to finance the premiums for both sites for $914,812.50 in exchange for repayment at 5.25% interest. The insurance premium finance contract indicates that GES would make a $182.960.50 down payment and repay the loan in 24 equal monthly payments of $32.190.07. The contract was signed by the president of GES, R.T. Kattula, as the "insured," and R.C. Reilly, as an "agent" verifying the signature of the insured.

In connection with the insurance premium finance contract, Clare Rothi, president of plaintiff, faxed to ERM's office a document entitled, "AGREEMENT OF AGENCY," which provided:

> In consideration Of PFS—Premium Finance Corporation premium financing to GES C/PC as the insured, the undersigned agent agrees to reimburse PFS—Premium Finance Corporation for any deficiency if there are any premiums contained in said Insurances Premium Finance Contract of even date that are: 1) subject to audit; 2) fully earned; 3) contain audits or old balances; 4) written with companies lower than the most current Best rating of B+ or are non-approved (non-admitted) in the State in which this insurance applies or 5) are noncancellable.

Angela Hughey, an employee of ERM, signed the above document on April 30, 2003.

Evanston issued insurance policies for each site on April 29, 2003. However, the policy on the landfill site was eventually cancelled and the premium returned since the State of Kentucky had not issued a permit for the site, and thus did not rely on the policy for financial assurance. In regard to the hazardous waste incinerator, Evanston issued a "claims made" policy insuring against (1) third party liability and (2) closure and post-closure liability.

Within a year after the policy was issued, GES was financially troubled and Bluegrass Incinerator Services, LLC (Bluegrass) purchased its assets. This transaction occurred around the time that the landfill policy was cancelled. Meanwhile, Bluegrass, Evanston, Bunbury and Riley had continuing discussions with the Environmental Cabinet of the state of Kentucky in regard to whether the language of the incinerator policy was consistent with Kentucky state law. As a result, there were several endorsements to the closure provisions of the incinerator policy that were added to mirror Kentucky state law. In particular, in many places where the policy referenced the "Regulatory Body," the following phrase was inserted afterward: "consistent with the laws, rules and procedures governing the approval of the "Regulatory Body," if any." Plaintiff maintains that these changes incorporated Kentucky state regulations that "expressly permitted Kentucky to delay or refuse cancellation of the Policy by Plaintiff."

On May 5, 2004, a revised insurance premium finance contract was executed. The revised contract did not include the terms of the landfill policy and reflected that Bluegrass was the named insured. The revised contract was again signed by R.T. Kattula as the "insured" and

oddly also as an "agent" to verify his signature as the "insured." According to Clare Rothi, he first received a fax with the revised contract signed and dated by R.T. Kattula only as an "insured," and then received another copy of the revised contract with both signatures.

Also attached to the revised contract was another "AGREEMENT OF AGENCY," which except for Bluegrass replacing GES, was identical to the above quoted agreement of agency.

Betsy Kerber, an employee of ERM, signed the above document. She testified that Rothi called the ERM office and told her she needed to sign the document that day. She testified that she was alone and that Rothi indicated that the "deal would not go through if I did not sign the documents." Kerber testified that she "knew I was told it had to be signed and sent back right away and that's what I did." She signed the document because ERM had "many, many other agreements" with plaintiff. Bunbury testified that ERM's policy is not to sign finance agreements and that neither Hughey nor Kerber had authority to sign the agreements of agency.

By the end of May 2005 Bluegrass had fallen behind on payments and plaintiff requested Evanston cancel the incinerator policy. Evanston attempted to cancel the policy and return the unearned premiums, but the state of Kentucky's Environmental and Public Protection Cabinet notified Evanston on June 10, 2005 that the hazardous waste site had been ordered closed and that the policy could not be cancelled under Kentucky state law.[2] Evanston did not return any premiums to plaintiff.

On March 6, 2006, plaintiff filed a complaint against ERM to recover unearned premiums. Plaintiff claimed to have made diligent though unsuccessful efforts to collect from Bluegrass. Plaintiff first alleged that ERM breached the agreements of agency. Plaintiff also

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[2] Section 6 of 401 KAR 35:090, provides, in relevant part that:

> (8) The policy shall provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the cabinet. Cancellation, termination, or failure to renew may not occur, however during the 120 days beginning with the date of receipt of the notice by both the cabinet and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy shall remain in effect in the event that on or before the date of expiration:
>
> * * *
>
> (b) Interim status is terminated or revoked; or
>
> (c) Closure is ordered by the cabinet or a circuit court or other court of competent jurisdiction: or . . .

asserted claims of negligence, breach of fiduciary duty and tortious interference. Each claim essentially averred that ERM improperly promoted changes to the incinerator policy that put at risk plaintiff's opportunity to recover unearned premiums. Plaintiff sought $234,904.32, plus late fees, costs and attorneys' fees.

On January 7, 2007 plaintiff sought to file a second amended complaint because plaintiff learned through deposition testimony that Bunbury had not authorized Hughey or Kerber to execute either agreement of agency. Plaintiff also sought to name Evanston as a defendant for promoting changes to the incinerator policy on or before the May 5, 2004 revised contract was executed that put at risk plaintiff's opportunity to recover unearned premiums. The trial court granted the motion and plaintiff filed a second verified amended complaint naming Evanston, Hughey and Kerber as defendants.

The parties eventually filed cross motions for summary disposition. The disputed issues were whether ERM, Hughey or Kerber were liable under the agreements of agency and whether ERM or Evanston owed plaintiff any duty. The trial court found that plaintiff had not established any condition to trigger the agreements of agency and that ERM and Evanston did not owe plaintiff any duty.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented and draw all reasonable inferences in favor of the nonmoving party to determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id*. A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). Summary disposition is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 120.

Contract interpretation also presents a question of law that is reviewed de novo. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008).

B. AGREEMENT OF AGENCY

Plaintiff first argues that ERM is liable under the agreements of agency. We disagree.

The rules of construction for contracts in general also govern guarantees. *In re Landwehr's Estate*, 286 Mich 698, 702; 282 NW2d 873 (1938). A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). If the contract's language is clear, its construction is a question of law for the court. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). An

insurance contract is clear if it fairly admits of but one interpretation. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999); *Hellebuyck v Farm Bureau Gen Ins Co*, 262 Mich App 250, 254; 685 NW2d 684 (2004). If a clear contract does not contravene public policy, the contract will be enforced as written, however inartfully worded or clumsily arranged the contract might be. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005); *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003); *VanHollenbeck v Ins Co of N America*, 157 Mich App 470, 477; 403 NW2d 166 (1987).

The relevant document states:

> In consideration of PFS -- Premium Finance Corporation premium financing to [GES or] BLUEGRASS INCINERATION SERVICES, LLC as the insured, the undersigned agent agrees to reimburse PFS -- Premium Finance Corporation for any deficiency if there are any premiums contained in said Insurances Premium Finance Contract of even date that are: 1) subject to audit; 2) fully earned; 3) contain audits or old balances; 4) written with companies lower than the most current Best rating of B+ or are non-approved (non-admitted) in the State in which this insurance applies or 5) are noncancellable.

Plaintiff first argues that the agreements of agency were executed to ensure that the incinerator policy would not become "noncancelable" at any time during the term of the incinerator policy. Plaintiff accordingly argues that even though the state of Kentucky ordered that the incinerator policy not be cancelled after the inception of the policy, ERM is still liable under the agreements of agency. We disagree.

Upon review of the language of the agreement of agency, we conclude that nothing compels the conclusion that ERM undertook a continuing obligation to ensure that the premiums would not become "noncancellable." The agreement of agency only ensures that the policy would be cancelable at its inception. We would expect, at the least, that there be additional language indicating a continuing obligation, such as "will not be" cancelable at some later time. Courts may not read into a contract a provision not contained therein, and thereby reform or modify the contract. *Cottrill v Michigan Hosp Service*, 359 Mich 472, 476; 102 NW2d 179 (1960). Further, an obligation to assume another's debts will not be found in the absence of a clearly expressed intention to do so. *Bandit Industries, Inc v Hobbs Int'l, Inc*, 463 Mich 504, 512; 620 NW2d 531 (2001). We conclude the language of the agreements of agency does not require that ERM undertake a continuing obligation to ensure that the premiums would not become "noncancellable." Here, there was no language in the incinerator policy indicating that it could not be cancelled. Rather, the incinerator policy expressly provides that it could be cancelled in the event of nonpayment. Accordingly, because the incinerator policy was not "noncancellable" at its inception, ERM is not liable under the agreement of agency.

In regard to the conditions of "old balances" and "fully earned," we conclude that plaintiff failed to establish that these conditions were satisfied. Initially, these issues were first raised in a motion for reconsideration. Issues first raised in a motion for reconsideration need not be addressed by the appellate court. *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Plaintiff did not establish an "old balance." Plaintiff claims that the "balance was not paid in full by GES until May 12, 2004." However, the document upon which

plaintiff relies does not contain an entry on May 12, 2004. Moreover, plaintiff has not shown any deficiency arising from old debt because there is no dispute that the debt was paid.

Further, the trial court properly held that the premiums were not "fully earned" at the time of the inception of the policy. The incinerator policy contains a "minimum premium and minimum retained premium endorsement," which provides that all but 25 percent of the pro rata premium is refundable to plaintiff upon cancellation. Thus, the incinerator policy was not "fully earned" at the inception of the policy. EMS is not liable under the agreements of agency.

C. FIDUCIARY DUTY

Plaintiff argues that the trial court erred in concluding that neither ERM nor Evanston owed plaintiff a fiduciary duty. We disagree.

A fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another. *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995), citing *Ulrich v Federal Land Bank of St. Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Id*., citing *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 274; 288 NW2d 613 (1979).

We conclude plaintiff has not presented any evidence of a fiduciary relationship with ERM or Evanston. Plaintiff was not a party to any contract with ERM or Evanston. Plaintiff paid money to GES and Bluegrass and they purchased insurance from Evanston. Further, the trial court correctly noted that Evanston and plaintiff had potentially adversarial interests. As plaintiff has mentioned, under the premium finance contract, GES/Bluegrass appointed plaintiff attorney in fact "with full authority to cancel the said policies; to collect all unearned premiums or any amount of the loss payable under the said polices." An attorney charged with collecting unearned premiums from Evanston is at least potentially adversarial to Evanston's interests, and thus plaintiff had no reasonable basis to rely on Evanston's statements.

Plaintiff maintains that "the long history of dealing between Plaintiff, who knew nothing about environmental insurance regulation, and ERM, which held itself out to be an expert in environmental insurance, created a special duty by ERM to inform Plaintiff." However, even assuming ERM was acting as an agent to plaintiff, our Supreme Court has rejected the notion that "reliance on the length of the relationship between the agent and the insured is the dispositive factor in transforming the relationship into one in which the traditional common-law 'no duty' principle is abrogated." *Harts v Farmers Ins. Exchange*, 461 Mich 1, 10; 597 NW2d 47 (1999). Further, plaintiff only relies on two cases, neither of which suggests that ERM or Evanston owe plaintiff a fiduciary duty. One of those cases, *Business to Business Markets, Inc v Zurich Specialties*, 135 Cal App 4d 165 (2005), is not binding precedent. Further, *Business to Business Markets, Inc* is markedly distinguishable, involving an insured's action against an insurance broker for failing to procure a policy that insured stated needs. Here, plaintiff is not an insured and Evanston issued appropriate insurance.

In addition, the other case cited, *Downs v Saperstein Associates Corp*, 265 Mich App 696; 697 NW2d 190 (2005), was a tort case in which this Court rejected a claim that a "special relationship" arose because "the injured parties entrusted themselves to the Detroit Fire

Department for their fire protection." *Id*., at 701. In fact, this Court noted that "special relationships only exist where a party entrusts himself to the protection and control of another and, in doing so, that party loses the ability to protect himself." *Id*. The above rule supports defendant's position because there is no indication that plaintiff lost the ability to protect itself. Argument must be supported by citation of appropriate authority or policy. MCR 7.212(C)(7); *Woods* 277 Mich App at 626. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Id., at* 626-627. The trial court did not err in concluding that neither ERS or Evanston had a fiduciary relationship with plaintiff.

D. UNJUST ENRICHMENT

"Whether a specific party has been unjustly enriched is generally a question of fact. However, whether a claim for unjust enrichment can be maintained is a question of law, which we review de novo." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006) (internal citations omitted).

This Court has defined unjust enrichment as the "(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 the defendant. When unjust enrichment exists, the law operates to imply a contract in order to prevent it." *Sweet Air Inv, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007) (citations omitted). However, a "contract cannot be implied when an express contract already addresses the pertinent subject matter." *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003).

Plaintiff argues the trial court erred in relying on Evanston's eventual $1.8 million payment under the closure policy. However, there is no dispute that the premium finance contract provides plaintiff a legal remedy against Bluegrass for the failure to recover unearned premiums. Indeed, the record reflects that plaintiff received a judgment against Bluegrass for the same amount plaintiff seeks from Evanston. It has long been understood that "equity will not imply a contract in law where an express contract exists." *Ramirez v Bureau of State Lottery*, 186 Mich App 275, 285; 463 NW2d 245 (1990) (holding that equity will not interfere where a legal remedy is available); see also *LaBour v Michigan Nat Bank*, 335 Mich 298, 302; 55 NW2d 838 (1952) ("It is fundamental that equity follow the law.").

In addition, as previously discussed, Evanston did not "receive" any benefit from plaintiff. Under the premium finance contract, plaintiff provided GES/Bluegrass with money and GES/Bluegrass agreed to repay it with interest. GES/Bluegrass and not plaintiff actually paid Evanston for the policy. Thus, Evanston received a benefit from GES/Bluegrass, not plaintiff. The trial court properly granted summary disposition to Evanston on plaintiff's claim for unjust enrichment.

E. TORTIOUS INTERFERENCE

The elements of a cause of action for tortious interference with a business relationship or expectancy are: 1) a valid business relationship existed; 2) the alleged interferer knew of the relationship; 3) the interference was intentional and caused a breach or termination of the relationship; and 4) the plaintiff was damaged as a result. *Dalley v Dykema Gossett, PLLC*, ___

MICH ___; ___ NW2d ___ (2010); *Mino v Cilo School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003).

> Plaintiff entire argument on this point is reprinted below:
>
> 1. Evanston and Plaintiff established a relationship requiring Evanston to refund premiums to Plaintiff; (Exhibits 1 and 18)
>
> 2. ERM knew of this relationship; (Exhibit 1)
>
> 3. ERM encouraged Plaintiff to reaffirm the debt on 208 by misinforming Plaintiff that 208 was refundable;
>
> 4. ERM and Evanston also helped amend 208 so that Plaintiff's security interest was jeopardized; (Exhibit 6)
>
> 5. Because of these amendments and misinformation, Evanston breached its duty to refund premiums to Plaintiff.

The appellant may not give issues cursory treatment with little or no citation of supporting authority. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Moreover, there is no evidence that Evanston breached its duty to refund premiums to plaintiff. Pursuant to Kentucky state law, "[c]ancellation, termination, or failure to renew may not occur and the policy shall remain in effect in the event that on or before the date of expiration" "[c]losure is ordered by the cabinet or a circuit court or other court of competent jurisdiction." 401 KAR 35:090, § 6 and 6(c). Thus, because the incinerator policy was never cancelled, Evanston did not breach its duty to refund premiums. The trial court properly granted defendants summary disposition.

Because of the above disposition, we need not address additional arguments raised by plaintiff. Affirmed.

/s/ Patrick M. Meter
/s/ Brian K. Zahra
/s/ Pat M. Donofrio