STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL FREEDLAND and FRANKLIN INDUSTRIES, Plaintiffs-Appellants, v ERVIN WAYNE BOLEN and BOLEN ENTERPRISES, L.L.C., Defendants-Appellees.	UNPUBLISHED January 25, 2011 No. 295103 Wayne Circuit Court LC No. 08-120406-CK

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's grant of summary disposition to defendant and awarding defendant Bolen Enterprises, L.L.C. a judgment for $12,500 on its counterclaim. We reverse in part and remand for further proceedings consistent with this opinion.

Plaintiff Michael Freedland asked Mario Franco to find a buyer for a cooler and other related equipment that a tenant left in one of his buildings. Franco found defendant Ervin Bolen and advised Freedland about "how to invoice" the transaction. It appears that Freedland drafted a bill of sale identifying Franklin Industries as the seller and Bolen Enterprises as the buyer. The agreement required Bolen Enterprises to remove the equipment at its expense, pay a refundable security deposit of $2,500, and pay five installments of $5,000 each tied to the removal process. Franco presented the bill of sale to Bolen. Thereafter, Franklin Industries was paid $7,500 by Bolen Enterprises, and $5,000 by Michigan Construction Systems. Franco delivered the checks to Freedland.[1] Franco sent workers to remove the cooler, but Bolen Enterprises alleged that it

[1] The record reflects that, on July 9, 2007, separate checks for $2,500 and $5,000 payable to Franklin Industries and Midwest Contractors were drawn on an Elevator Technology account at KeyBank. The memo for one reads "Partial Payment on Cooler [illegible]" and the memo for the other reads "Final Payment on Cooler – 0 – Balance." One check is endorsed by "Franklin, Michel [sic] Freed[illegible]" and "Midwest Const. [illegible]" with the addition "Pay Ron K. Excavator, Rent [illegible] Purchase" and was negotiated at a Comerica Bank on July 10, 2007.

never received it. Plaintiffs never received any additional payments and filed this action for conversion and fraudulent misrepresentation. Bolen Enterprises countersued for breach of contract, among other claims. On defendants' motion, the trial court dismissed Ervin Bolen as a party defendant, ordered plaintiffs to pay Bolen Enterprises $12,500 "so that way each of you would have lost $12,500," and dismissed the lawsuit in its entirety.

Plaintiffs do not challenge the dismissal of their claims for conversion and fraudulent misrepresentation, thereby abandoning any issue regarding those claims. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Accordingly, we consider only the trial court's ruling on Bolen Enterprise's ("defendant"), counterclaim for breach of contract. We review the trial court's ruling on a motion for summary disposition de novo. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Because the trial court relied on evidence beyond the pleadings, it appears that it granted the motion under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).[2]

A contract is a bargained exchange of obligations entered into by choice between parties who have mutually agreed to all essential terms and the relationship is governed by those terms. *Ford Motor Co v Bruce Twp*, 264 Mich App 1, 12; 689 NW2d 764 (2004), rev'd on other grounds 475 Mich 425 (2006). Michigan law requires that a party claiming a breach of contract prove the terms of the contract, that the opposing party breached the terms, and that the breach caused an injury. *In re Brown*, 342 F3d 620, 628 (CA 6, 2003).

Defendant contends that plaintiffs breached the contract by failing to deliver the cooler after plaintiffs received payment. However, the contract merely required Franklin Industries to allow defendant to remove the equipment at its own expense. Though someone other than defendant removed the cooler, it was removed at Franco's direction and circumstantial evidence showed that Franco was acting as defendant's agent because he presented the deal to defendant and delivered defendant's checks to Freedland. Thus, Franklin Industries would not have breached the contract because it did what it was required to do even though it had not been paid in full. Defendant offered no evidence to show that it did not actually receive the cooler, and it offered no evidence to show that Franco was not acting on defendant's behalf when he sent his

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The other check is endorsed by "Franklin [illegible], Michel [sic] Freed[illegible]" and "Midwest Const Co" with the addition "Pay in [illegible], FOL Xcavator" and was negotiated at a Comerica Bank on July 13, 2007. Freedland testified that he did not receive these checks.

[2] A motion under MCR 2.116(C)(10) considers whether there is a genuine issue of fact for trial and is decided on the basis of the evidence submitted by the parties. MCR 2.116(G)(4) and (5), and (I)(1). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

associates to remove the cooler, or that Freedland had reason to know that Franco was not acting or authorized to act on defendant's behalf. Further, even assuming that defendant had presented such evidence, it would not be entitled to $12,500 because $5,000 was paid by Michigan Construction and defendant offered no evidence to show that it was affiliated with that company. Therefore, the trial court erred in granting defendant's motion for summary disposition on its counterclaim.

The trial court's order is reversed with respect to defendant's counterclaim only and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering