STATE OF MICHIGAN

COURT OF APPEALS

FRANCOIS FOURNIER, also known as FRANCIS FOURNIER, Plaintiff-Appellee, v L'ATTITUDE HOLDINGS, LLC, and L'ATTITUDE, INC., Defendants-Appellants.	UNPUBLISHED October 20, 2015 No. 325459 Marquette Circuit Court LC No. 14-052213-CK

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendants, L'Attitude Holdings, LLC (L'Attitude Holdings) and L'Attitude, Inc. (L'Attitude), appeal as of right the trial court order granting summary disposition in favor of plaintiff, Francois Fournier (also known as Francis Fournier). We affirm.

I. FACTUAL BACKGROUND

Plaintiff and Steven Nagelkirk went into business together in 2007. They became the only members of L'Attitude Holdings and the sole shareholders of L'Attitude. Nagelkirk had a 90 percent interest in L'Attitude Holdings compared to plaintiff's 10 percent interest. As for L'Attitude, Nagelkirk had 850 shares compared to plaintiff's 150 shares. L'Attitude Holdings owns real property located in Marquette, Michigan, and leased the property to L'Attitude, which operates L'Attitude Café & Bistro.

At issue in this case are two separate promissory notes issued in 2007, whereby plaintiff loaned L'Attitude Holdings $194,000 and L'Attitude $52,150. Although defendants initially made payments on the loans, they ceased to make such payments in 2009.

Thus, plaintiff filed this instant action in 2014, alleging breach of contract, promissory estoppel, and unjust enrichment. Plaintiff moved for summary disposition under MCR 2.116(C)(10), alleging no genuine issue of material fact regarding defendants' breach. Defendants, however, asserted that at a shareholder meeting in 2009, the parties agreed that plaintiff would forego payment, Nagelkirk would make additional capital contributions, and plaintiff would be repaid when the businesses stabilized at some point in the future. Defendants also asserted that laches precluded plaintiff's suit. Plaintiff responded that there was an anti-

waiver clause in the promissory notes and that any modification had to be in writing and supported with consideration.

The trial court ultimately agreed with plaintiff, granting summary disposition in his favor and dismissing the case. Defendants now appeal.

II. STANDARDS OF REVIEW

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "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). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citations omitted).

Additionally, "[t]his Court also reviews de novo a trial court's decision to apply equitable doctrines such as laches." *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013). "We review for clear error the findings of fact supporting the trial court's equitable decision." *Twp of Yankee Springs v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

III. CONSIDERATION

The parties first contest whether *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003), precludes plaintiff's motion for summary disposition. In *Quality Products*, the Michigan Supreme Court held "that parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract." *Quality Products*, 469 Mich at 364. However, for such a modification to be effective, it must be supported by additional consideration or reduced to a writing that is signed by the party against whom the modification is charged. *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 90 n 7; 468 NW2d 845 (1991). Defendants contend that there was a genuine issue of material fact whether they orally waived enforcement of promissory notes, coupled with course of conduct in that plaintiff never brought suit. See *id.* Regardless of whether such grounds warrant summary disposition, the trial court properly granted summary disposition as the only alleged consideration for the modification of the parties' agreement fell within the preexisting duty rule and, thus, cannot be adequate consideration for such a modification.

Consideration underlying a contract is a "bargained-for exchange." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002). "There must be a benefit on one side, or a detriment suffered, or service done on the other." *Id.* at 238-239 (quotation marks and citation omitted). "[C]onsideration may constitute a return promise or a performance, including an act, a forbearance, or the creation, modification, or destruction of a legal relation." *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 244; 625 NW2d 101 (2001) (quotation marks and citation omitted). Generally, courts will not inquire into the sufficiency of consideration, as only "a cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Gen Motors Corp*, 466 Mich at 239 (quotation marks, citation, and alteration omitted). When a case involves a modification of a prior agreement, MCL 566.1 provides:

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

Thus, if the parties wished to modify their agreement, they had to memorialize that modification in a signed writing, or the modification had to be supported with consideration. MCL 566.1.[1]

As our Supreme Court confirmed, modifying the terms of a contract requires either "additional consideration" or a "writing" that is "signed by the party against whom it is charged." *Scholz*, 437 Mich at 90 n 7. See also *Scarlett v Allen*, 295 Mich 694, 703; 295 NW 365 (1940) (quotation marks and citation omitted) ("In order to modify the original contract, the new agreement must have all the requisites of a valid and enforceable agreement, or it will not be binding."); *August v Collins*, 240 Mich 23, 26; 214 NW 951 (1927) (quotation marks and citation omitted) ("But, while there are some expressions in the cases which seem to dispense with the necessity of a consideration for a modification of a contract, yet a modification can be nothing but a new contract, and must be supported by a consideration like every other contract.").[2]

Here, the parties agreed, via the promissory notes, to a repayment schedule for the loaned sums plaintiff made to defendants. Defendants failed to adhere to that schedule and defaulted on their obligation of repayment under the promissory notes. Nevertheless, defendants claimed that the parties met at a shareholder meeting and agreed to modify the original agreement, whereby

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[1] We have held that MCL 566.1 applies to several different legal documents, not merely agreements pertaining to mortgages or other security interests in personal or real property. *Adell Broad v Apex Media Sales*, 269 Mich App 6, 10; 708 NW2d 778 (2005).

[2] See also *Power-Tek Solutions Services, LLC v Techlink, Inc*, 403 F3d 353, 359 (CA 6, 2005) ("Michigan courts have universally interpreted section 566.1 as rendering invalid any alleged agreement changing, modifying or discharging a contract where that alleged agreement is neither reduced to writing nor supported by additional consideration.").

plaintiff then agreed to an indefinite repayment plan. Despite defendants' characterization of this issue as a simple waiver analysis, this is a contract modification case, falling squarely within the caselaw discussed *supra*. The parties agree that any modification to the original agreement was not in writing. Thus, defendants must produce some evidence establishing a genuine issue of material fact that consideration supported the modification. They have not done so.

Defendants allege that the consideration supporting the modification was the advantages plaintiff received and the opportunity for repayment. Defendants argue that had plaintiff not agreed to the modification, the businesses would have gone bankrupt, and plaintiff probably would have received nothing for the promissory notes.

However, " '[u]nder the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise.' " *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 158; 719 NW2d 553 (2006), quoting *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000). In fact, "[t]his rule bars the modification of an existing contractual relationship when the purported consideration for the modification consists of the performance or promise to perform that which one party was already required to do under the terms of the existing agreement." *Yerkovich*, 461 Mich at 741. See also *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 22 n 3; 444 NW2d 786 (1989) ("The preexisting-duty rule in the former case has historically been applied to bar a modification of an existing contractual relationship between two parties when the purported consideration for the modification consists of the performance or promise to perform that which one party was already required to do under the terms of the existing agreement."). The Court has long held that "since a promise to do nothing more than one is already legally bound to do is no consideration for a promise given in return, there is no consideration for an extension of the time of payment" of a legal obligation, "which involves promise to forbear, where the only consideration is the debtor's promise to pay the debt at the extended time of payment, without anything more, or his promise to pay in installments." *Andrews v Pfent*, 280 Mich 324, 326; 273 NW 585 (1937) (quotation marks and citation omitted).

In the instant case, defendants' only proffered consideration for the modification is paying plaintiff the agreed upon amount, and nothing more, that defendants were obliged to pay under the original promissory notes. Plaintiff already was in business with defendants, he did not receive more favorable loan terms, and he did not receive a greater share of the business, or an increased share of the profits. In essence, defendants' offered nothing more than to satisfy their preexisting duty. This does not constitute consideration for the modification. *46th Circuit Trial Court*, 476 Mich at 158; *Yerkovich*, 461 Mich at 741; *Borg-Warner*, 433 Mich at 22 n 3; *Andrews*, 280 Mich at 326.

Defendants, however, insist that had plaintiff not agreed to the modification, the businesses would have gone bankrupt and plaintiff would have received almost nothing for the promissory notes. However, "[i]nducements and motives" do not constitute a "bargained for exchange or legal detriment to [a party,] which is necessary to establish a legally valid contract." *Alibri v Detroit/Wayne Co Stadium Auth*, 254 Mich App 545, 560; 658 NW2d 167 (2002), rev'd on different grounds 470 Mich 895 (2004) (quotation marks and citation omitted). Furthermore, defendants fail to grasp that plaintiff was *already* owed the money under the promissory notes. Thus, defendants' vague promises to repay these preexisting loans after achieving better

financial stability do not constitute consideration for the modification. Nor is there any evidence that additional loans were used, or even promised to be used, to repay sums owed to plaintiff.

Lastly, defendants rely on *Turner v Williams*, 311 Mich 563, 566; 19 NW2d 100 (1945), for the proposition that "[i]f the parties considered it to their advantage to depart from strict performance of the agreement, that would constitute a sufficient consideration." However, defendants claim only to have promised, in nebulous terms, to resume payments when the businesses had achieved greater financial stability. As our Supreme Court has recognized, "[w]hile no particular form is required, mere indefinite expressions cannot constitute a modification, nor can mere negotiations for a variance in the terms of the contract." *Scarlett*, 295 Mich at 703.[3]

IV. LACHES

Defendants also assert that laches precludes plaintiff's suit. "As our Supreme Court has explained, a complainant in equity must come to the court with a clean conscience, in good faith, and after acting with reasonable diligence[.]" *Knight*, 300 Mich App at 114. If the plaintiff has failed to exercise reasonable diligence in vindicating his rights, a court sitting in equity may withhold relief on the basis of laches, and leave the plaintiff where it finds him. *Id.* "This is so because equity will not lend aid to those who are not diligent in protecting their own rights." *Id.*

However, laches is not triggered through the passage of time alone. *Id.* at 114-115. Rather, it is unreasonable delay "that results in circumstances that would render inequitable any grant of relief to the dilatory plaintiff." *Twp of Yankee Springs v Fox*, 264 Mich App 604, 611-612; 692 NW2d 728 (2004) (quotation marks and citation omitted). See also *Tenneco Inc v Amerisure Mutual Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008) (the delay must be "inexcusable.").

In other words, a court must discern whether prejudice resulted to the other party from the delay. *Knight*, 300 Mich App at 115. "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Twp of Yankee Springs*, 264 Mich App at 612. Thus, the court looks to the effect of the passage of time, not the mere fact that some time has passed. *Id.* "Generally, where the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot . . . be recognized." *Wayne Co v Wayne Co Retirement Commission*, 267 Mich App 230, 252; 704 NW2d 117 (2005)

[3] The statute of frauds is not applicable here, as the original contract was capable of being completed within one year. See MCL 566.132(1)(a); *Zurcher v Herveat*, 238 Mich App 267, 299-300; 605 NW2d 329 (1999) (stating that a modification must be in writing or supported by consideration in order to be enforceable if the original "agreement was required to be in writing under the statute of frauds"); *Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 509; 525 NW2d 905 (1994) (stating that the statute of frauds does not apply to any agreement that is capable of being performed within one year).

(quotation marks and citation omitted). Moreover, the defendant bears the burden of proving that lack of due diligence resulted in some form of prejudice. *Twp of Yankee Springs*, 264 Mich App at 612.

Here, the trial court properly concluded that the doctrine of laches did not bar plaintiff's claim. Defendant relies on the fact that it took plaintiff five years to bring suit. However, the passage of time alone does not trigger the equitable doctrine of laches. *Knight*, 300 Mich App at 114. Rather, it is "the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." *Kuhn v Secretary of State*, 228 Mich App 319, 334; 579 NW2d 101 (1998) (quotation marks and citation omitted). As the parties agree, defendants must prove prejudice in support of their claim. *Id*. They have not done so.

Defendants claim that Nagelkirk made additional capital contributions to the business based on plaintiff's failure to bring suit sooner. However, as the trial court found, that is a detriment to Nagelkirk, not defendants. In fact, these additional sums actually benefitted defendants because the additional capital contributions allowed them to stay in business longer. Further, although defendants claim that plaintiff allowed damages to accrue without excuse or reason, defendants claim that had plaintiff brought suit earlier, they most likely would have gone bankrupt in 2009. Allowing defendants the boon of survival hardly amounts to prejudice.

Thus, defendants have not demonstrated any prejudice resulting from the delay, and therefore cannot demonstrate error in the court's finding that laches did not bar plaintiff's claim

IV. CONCLUSION

Because defendants fail to allege any consideration outside of their preexisting duties that support the alleged modification to the agreement, summary disposition in favor of plaintiff is proper. Nor does laches preclude plaintiff's suit. We affirm.

/s/ Jane E. Markey
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan