STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF BARRY,

Plaintiff-Appellant,

v

SOUTHWEST BARRY COUNTY SEWER AND WATER AUTHORITY,

Defendant-Appellee.

UNPUBLISHED
February 18, 2016

No. 326204
Barry Circuit Court
LC No. 13-001028-CK

Before: HOEKSTRA, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant Southwest Barry County Sewer and Water Authority (the Authority). We affirm.

The Authority operates a sewage collection and treatment system. To fund an extension of the sewage system in plaintiff township, Barry County (the County) issued bonds in accordance with the Southwest Barry County Sewage Disposal System—Fair Lake Extension Contract, signed by plaintiff, the County, and the Authority in 1996. The contract specified that the cost of the project would be "funded by amounts paid by [plaintiff] prior to the issuance of the Bonds by the County and the proceeds of the Bonds." It further specified that "[t]he cost of the Project to be financed by the issuance of the Bonds . . . shall be charged to and paid by [plaintiff] in the manner and at the times hereafter set forth." It also stated that plaintiff "shall impose special assessments with respect to certain parcels of land benefited by the Extension . . . and will by ordinance require connection fees, user charges and debt service charges to be paid by customers of the Extension within" plaintiff township. The contract further stated that "[t]he Bonds shall . . . be secured primarily by the contractual obligations of [plaintiff] to pay its installments due, plus interest, as hereinafter provided in this Contract, and secondarily, if approved by a three-fifths (3/5) majority of the members of the Board of Commissioners, by the full faith and credit of the County."

According to the complaint, because fewer users connected to the system than had been anticipated and the special assessment amount was reduced, there was a shortfall of available monies for debt service. Plaintiff issued its own bonds in September 2011 in order to purchase the County bonds and essentially refinance its debt. In December 2011, plaintiff presented to the Authority a proposed agreement whereby the Authority would pay plaintiff $20,000 a year for

six years to make up for the amount of revenue needed "to enable [plaintiff] to fully pay the Township Contractual Payments . . . ." The Authority's minutes from a February 6, 2012, meeting reflect that the Authority discussed how much it might contribute to plaintiff. The Authority discussed "how much the Authority would be willing to possibly contribute so that [plaintiff] could have a contract written for the Sewer Board to approve at a later date." The Authority voted to "move forward in the amount of $15,000.00 a year for the next six (6) years for the shortfall using septage fees . . . ."

Minutes from a meeting of plaintiff's board on February 7, 2012, state that "[a] motion was made by C. Price to contact Attorney Ken Sparks about preparing a contract and direction as to whether where the funds will be taken needs to be included in the contract." Minutes from a meeting of the Authority on February 27, 2012, indicate that the Authority voted down the proposal to help plaintiff with the shortfall. Minutes from a meeting of plaintiff's board on March 6, 2012, reflect that the board took notice of the Authority's minutes from February 27, 2012, and proposed to "hold a Special meeting with Attorney Ken Sparks in the near future and discuss the options to handle the Fair Lake shortfall paid by the General fund." Plaintiff's board's minutes from May 1, 2012, state that "[d]iscussion followed on scheduling a meeting with our attorney to discuss the township's options for covering the Fair Lake shortfall." The board's minutes from May 1, 2012, indicate that the board resolved to request assistance from the Authority to help with the shortfall.

The request for assistance was unsuccessful, and on December 2, 2013, plaintiff sued the Authority, alleging that it had proposed to the Authority before February 6, 2012, that the Authority pay for the shortfall and that the minutes of the Authority's February 6, 2012, meeting reflected an acceptance of that offer. Plaintiff alleged a breach of this contract. Plaintiff also alleged that there had been a breach of an implied contract whereby the Authority "accepted the benefit of the issuance of the Township Bonds issued by the Township without paying the debt service supplement." Plaintiff alleged that "[t]he course of dealings and expectations of the parties gave rise to an implied contract . . . ." Plaintiff's third and final count was for quantum meruit; plaintiff alleged that the Authority "has failed to pay the agreed-upon fair value of the debt service supplement for the Township Bonds despite having received a substantial and direct benefit from the issuance of the same."

The Authority filed a motion for summary disposition, which the trial court granted under MCR 2.116(C)(7) (statute of frauds) and MCR 2.116(C)(10). The court stated:

> I don't find that there was an offer and acceptance because there was no meeting of the minds at this point.
>
> I -- as I read it, and I know [plaintiff's counsel] disagrees, but the February 7th minutes indicate that there was not an acceptance, even if there was a counteroffer, because there were still questions and that a contract was gonna have to be prepared.
>
> There was discussion on where the remaining funds would be taken. There were questions on -- it would appear on what exactly the offer was from the

> Authority board. And after that contract was drafted, the Authority rejected that Contract.
>
> Therefore, the Court finds that the . . . claims fail . . . .

The court indicated that it was applying the statute of frauds and also indicated that its ruling applied to all three counts.

We review de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 118. "The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial. The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (citations and quotation marks omitted).

Plaintiff first argues that the trial court incorrectly determined that an express contract did not exist between the parties. Plaintiff contends that the minutes from the February 6, 2012, meeting evidenced the creation of a contract. Plaintiff engages in an extended discussion of purported reasons for why a contract existed, but the resolution of this issue is straightforward. "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 453-454; 733 NW2d 766 (2006) (citation and quotation marks omitted). Unquestionably, plaintiff submitted an offer to the Authority when it presented to the Authority a proposed agreement whereby the Authority would pay plaintiff $20,000 a year for six years. Clearly, however, the Authority did not "manifest[] an intent to be bound by . . . [that] offer, and all legal consequences flowing from the offer . . . ." *Id*. The Authority did not "undertak[e] some unequivocal act sufficient for that purpose." *Id*. at 454. To the contrary, the minutes of the February 6 meeting indicate that the Authority would "move forward" toward contributing $15,000 a year toward the shortfall. The minutes further indicate that the Authority needed to discuss the options so that plaintiff could "have a contract written for the Sewer Board to approve at a later date." This was far from an unequivocal act showing that the Authority was manifesting an intent to be bound by plaintiff's offer. No contract was formed by virtue of the February 6 minutes. Plaintiff contends that we may not consider any of the minutes beyond the sentence indicating that the Authority voted to "move forward in the amount of $15,000.00 a year for the next six (6) years for the shortfall using septage fees . . . ." Plaintiff contends that doing so would be considering improper deliberative statements. However, the other statements in the minutes give proper context to the phrase "move forward." In addition, the case plaintiff itself cites, *Tavever v Elk Rapids Rural Agricultural Sch Dist*, 341 Mich 244, 251; 67 NW2d 136 (1954), states, "Defendant speaks only through its *minutes* and resolutions." (Emphasis added.)

Plaintiff contends that, alternatively, the Authority's action on February 6 could be construed as a counteroffer that plaintiff accepted. "An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Id*. at 453. The February 6 minutes cannot be construed as a counteroffer[1] because, as noted, the Authority only voted to "move forward" with regard to the possibility of contributing $15,000 a year for the shortfall and the Authority explicitly noted that any binding contract would be written at a later date. "A mere expression of intention does not make a binding contract." *Kalmanath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). We find no basis on which to reverse the trial court's dismissal of plaintiff's breach-of-contract claim.

Plaintiff claims that the trial court erred in dismissing the claim of implied contract. As the parties both state in their respective briefs, for an implied contract to exist, there must be mutual assent and consideration. *Lowrey v Dep't of Corrections*, 146 Mich App 342, 359; 380 NW2d 99 (1985). There was no mutual assent here; the February 6 minutes show only that the Authority would consider contributing $15,000 a year for the shortfall and that further factors would be discussed before a potential contract would be drafted. As much as plaintiff might wish it to be so, the simple fact is that the Authority's actions did not demonstrate an assent to pay $15,000 a year towards the shortfall but only demonstrated, in the end, that it would *contemplate* doing so. See *Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich App 386, 392; 239 NW2d 380 (1976) (discussing the fact that an implied contract arises from implication and proper deduction). The trial court did not err in dismissing the claim of implied contract and we disagree with plaintiff that the trial court lacked sufficient information to rule with regard to this claim. Moreover, we reject plaintiff's argument that further discovery would somehow lead to success on its claim. See *Village of Diamondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). "[S]ummary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Id*. (citation and quotation marks omitted).

Plaintiff next argues that the trial court erred in dismissing the claim for quantum meruit. "The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006). Plaintiff contends that if it does not obtain relief, the Authority will obtain benefits by way of the conveyance of sewer easements and by "the over-contribution of the Fair Lake taxpayers to the payment of the costs of the sewer system;" plaintiff contends that the Authority improperly allocated money from Fair Lake taxpayers to fund the overall system.

Plaintiff has failed to demonstrate that the easements were from *plaintiff* and has failed to demonstrate the value of the easements. In fact, plaintiff itself admits that the easements came

[1] Even if the trial court believed it to be a counteroffer, the trial court reached the right result overall. *Gleason v Michigan Dep't of Trans*, 256 Mich App 1, 2; 662 NW2d 822 (2003) (discussing instances in which a trial court reaches the correct result for an incorrect reason).

from the County.[2] With regard to the alleged improper allocation of the tax monies, this simply was not a theory raised in plaintiff's complaint. Plaintiff states that, as a party to the original contract, it "would have standing to challenge the illegal overallocation." However, plaintiff did not sue on this theory. In addition, the alleged benefit was obtained *from the taxpayers*. The trial court correctly granted summary disposition with regard to the claim for quantum meruit. In addition, the trial court, contrary to plaintiff's arguments, had sufficient information before it to grant the dismissal and did not grant the dismissal prematurely.

Plaintiff lastly argues that the trial court erred in failing to award plaintiff attorney fees when it granted plaintiff's request to disqualify the Authority's former counsel. The parties agree that we should review this issue for an abuse of discretion. See *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Aside from citing the Michigan Rule of Professional Conduct that counsel violated, plaintiff utterly failed to support its argument with any controlling authority. As such, plaintiff abandoned the issue, *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 530; 730 NW2d 481 (2007), remanded on other grounds 480 Mich 910 (2007), and we reject its attempt to "revive" it by way of a reply brief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Michael J. Kelly

[2] The Authority's attorney stated that the easements came from the County and that they had no value aside from simply allowing the Authority to go onto property for repairs and maintenance of the sewer.