STATE OF MICHIGAN

COURT OF APPEALS

MARY CLARE DUNKEL, Plaintiff-Appellant,	UNPUBLISHED June 19, 2018
v	No. 339357 St. Clair Circuit Court
SIGNAL MEDICAL CORPORATION, Defendant-Appellee.	LC No. 15-002584-CK

Before: SAWYER, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition to defendant in this breach of contract action. We reverse.

On appeal, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition, concluding that there was no genuine issue of material fact that the extensions plaintiff granted to defendant were unenforceable modifications under MCL 566.1, and were also unenforceable in equity.

I. BREACH OF CONTRACT

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition, and that plaintiff should be granted summary disposition. First, plaintiff argues that the extensions were not modifications of the promissory notes, and thus, are enforceable. If the extensions are modifications of the promissory notes, they are enforceable because they are supported by consideration. In either case, plaintiff contends that the cause of action did not accrue until July 28, 2015, when defendant sent plaintiff a letter stating it would not repay the loan. Plaintiff filed the present action well within the six-year statute of limitations. We conclude that the extensions are modifications, but agree that the modifications are supported by consideration and plaintiff brought the action within the statute of limitations.

A trial court's ruling on a summary disposition motion is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Defendant brought its motion for summary

disposition under MCR 2.116(C)(10).[1] "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5)." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "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." *Id*. A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

"We review de novo, as a question of law, the proper interpretation of a contract." *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016). "Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

We agree with the trial court that the language in the promissory notes stating that payments "may be extended from time to time without in any way affecting the liability of the makers and endorses hereof," merely anticipates future modifications by the parties. The trial court stated:

> First, this Court finds that the extension clause at the end of each of the promissory notes merely indicates that the parties anticipated the possibility of extending the notes or any payment on the notes. Because of this anticipation, the notes state that any such modification would not affect Defendant's liability or the liability of the endorsers. However, there is no indication in the express terms of the note that Defendant waived notice or consent to any material modifications, including those regarding extension of the note or payment under the note. Further, contrary to Plaintiff's assertion, the notes do not state that the parties may extend due dates without changing or modifying the notes. The express terms of the notes merely state that any extensions will not affect Defendant's liability. Thus, any extension of the notes or payment under the notes is still a material modification of the original terms of the contract.

As stated, the language does not state that extensions are anything other than modifications. Reading the extension clause as rendering all subsequent extensions as part of the original agreement would be to render the language in the first paragraph of the promissory notes, which

[1] Defendant brought its motion for summary disposition under MCR 2.116(C)(7), (8), and (10). The trial court did not specify under which subsection it granted defendant's motion. However, the trial court considered material outside the pleadings when it granted defendant's motion for summary disposition. Thus, we "construe the motion as having been granted pursuant to MCR 2.116(C)(10)." *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

states that "[i]nterest shall be due and payable on the first day of each month after the date hereof . . . principal shall be paid on or before 5 years after the date of this note," devoid of meaning.

Consequently, the extensions were modifications, and subject to MCL 566.1, which requires modifications either to be in writing or to be supported by consideration:

> 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.

See *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 11-12; 708 NW2d 778 (2005) (determining that the parties' modification was valid under MCL 566.1 because it was in writing, and, alternatively, it was supported by consideration). There is no dispute that the modifications were not in writing. Thus, the question is whether the modifications were supported by consideration. Plaintiff argues that they were, as defendant received additional time to repay the loan and a longer opportunity to use the loan money to develop its products, while plaintiff benefitted by accruing additional interest on the principal and maintaining the value of her stock. On the other hand, defendant argues that there was no consideration because the parties promised nothing more than to perform the duties they were already bound to do—namely, defendant promised only to repay the loan and plaintiff received only the ability to profit after the sale of defendant. Thus, under the preexisting duty rule, defendant claims that there was no consideration.

Generally, a modification must be supported by consideration. Consideration is defined as a "bargained-for exchange." *Gen Motors Corp v Dep't of Treasury, Revenue Div*, 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). Courts generally do not consider the sufficiency of the consideration. *Id*. at 239. "Inducements and motives . . . are not that bargained for exchange or legal detriment to defendants 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 other grounds 470 Mich 895 (2004) (quotation marks and citation omitted).

"Under 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; 610 NW2d 542 (2000). "This 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." *Id*. at 741.

The extensions were supported by consideration. It is true that plaintiff's ability to profit after defendant's sale does not qualify as consideration under the preexisting duty rule because it

was negotiated under the original agreement. However, as a result of the extensions, plaintiff received the benefit of collecting further interest on her loan and took on the burden of waiting additional time before she would be repaid. Defendant, on the other hand, received the benefit of using the loan for a longer amount of time, but assumed the duty of paying more interest. The additional interest for plaintiff and additional time to invest the loan money for defendant were not preexisting under the original notes, which promised plaintiff only 15% interest over the course of five years maximum, and promised defendant only the ability to use the loan money over the course of five years. Thus, the additional interest money for plaintiff and the additional time to use the loan for defendant qualify as consideration, rendering the extensions enforceable under MCL 566.1.

Because the modifications were valid under MCL 566.1, defendant's letter to plaintiff stating that defendant would not repay her is defendant's breach. The letter is dated July 28, 2015, and plaintiff instigated the present action on October 25, 2015. Thus, plaintiff's action was brought well within the six year statute of limitations set out in MCL 600.5807(8).

II. EQUITABLE REMEDIES

Plaintiff argues that if this Court were to find that the extensions are not enforceable, then the extensions should be enforceable in equity, either under a theory of promissory estoppel or under a theory of unjust enrichment. The extensions are valid modifications, and thus, are enforceable at law. Consequently, the claims should be enforced in law rather than in equity. *Genesee Co Drain Comm'r v Genesee Co*, 321 Mich App 74, 74; 908 NW2d 313 (2017), quoting *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993) ("[A] contract will be implied only if there is no express contract covering the same subject matter.").

Reversed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood