

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH KIND,

Plaintiff-Appellant,

v

SCOTT GIES and KUPELIAN ORMOND &
MAGY, PC,

Defendants-Appellees.

UNPUBLISHED
November 8, 2011

No. 299825
Oakland Circuit Court
LC No. 2009-105877-NM

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I fully agree with the majority opinion vacating the trial court's order of summary disposition. I write separately to express my belief that, even if the Gies letters are considered along with the pleading, I would find no inconsistency warranting dismissal. The April 11, 2007 letter is accurately quoted in the complaint as advising plaintiff Deborah Kind to reach a settlement with Mark LeChard outside of the bankruptcy proceeding. Four months later, after negotiations with LeChard had failed, defendant Scott Gies advised Kind in writing that LeChard had offered to purchase the real estate for \$6,000. Gies then described the steps necessary for Kind to submit a competing bid. Gies continued, "The property is not being sold free and clear of all liens and other interests. The successful purchaser will take ownership of the property subject to all liens and encumbrances that is an obligation owed by the Debtor" Kind could easily construe this language as meaning that LeChard, as the successful purchaser, would become liable for all remaining debts against the property and the bankruptcy estate would, therefore, avoid its payment duty and close solvent. Kind's confusion would be understandable given Gies's complete failure to advise her regarding LeChard's ability to file a \$250,000 claim against the bankruptcy estate.

Moreover, any perceived inconsistency should have been resolved in favor of the complaint. In *Hague v DeLong*, 282 Mich 330, 331-332; 276 NW 467 (1937), the parties made an oral contract for the defendant to compensate the plaintiff for securing the business of a particular customer. The plaintiff attached to the complaint a letter discussing the plaintiff's planned method to negotiate the deal and requesting a ten-percent commission. *Id.* at 332. The trial court granted summary disposition for failure to state a legally cognizable claim based on a review of the complaint and the attached letter. *Id.* The Supreme Court reinstated the plaintiff's claim, holding "The cause of action is not based upon the letter but upon the oral contract made

the previous day. When there is a variance between a pleading and an exhibit attached thereto, if such exhibit is not the basis of the action, the pleading is controlling.” *Id.* at 332-333.

/s/ Elizabeth L. Gleicher