

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GEORGE RAPTIS,

Plaintiff-Appellant,

v

BANK OF AMERICA, N.A.,

Defendant-Appellee.

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UNPUBLISHED

June 18, 2013

No. 310089

Macomb Circuit Court

LC No. 11-005487-CZ

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, George Raptis, appeals as of right the trial court order granting summary disposition to defendant, Bank of America, N.A., pursuant to MCR 2.116(C)(8). We affirm.

**I. FACTUAL BACKGROUND**

Defendant is the loan servicer for plaintiff's mortgage on real property in Macomb, Michigan. Plaintiff began experiencing financial difficulties in 2009, and it was increasingly difficult for him to meet his mortgage obligations. Pursuant to the Home Affordable Modification Program, plaintiff sent a letter of hardship to defendant, requesting a modification of his mortgage payments. Plaintiff claims that defendant offered him a "Trial Plan Agreement" whereby defendant agreed to modify the mortgage payments. After plaintiff signed the agreement, he sent a check to defendant for \$1,239.

According to plaintiff, defendant accepted the initial payment but then instituted foreclosure proceedings in violation of their agreement. Consequently, plaintiff filed a complaint against defendant alleging numerous counts, including breach of contract. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8), contending that plaintiff's breach of contract claim must fail because plaintiff did not establish that any agreement to modify the mortgage existed, as defendant never signed the modification agreement. The trial court determined that an enforceable loan modification agreement never arose and granted defendant's motion for summary disposition under MCR 2.116(C)(8). Plaintiff now appeals.

## II. SUMMARY DISPOSITION

### A. Standard of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). “When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint” and it “becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Maiden*, 461 Mich at 118.

### B. Breach of Contract

The trial court properly granted summary disposition on plaintiff’s breach of contract claim. The complaint alleged that a contract was formed on December 7, 2010, when plaintiff purportedly accepted defendant’s loan modification offer by signing the necessary documents. Yet, the offer expressly required a specific form of acceptance, i.e., a notarized signature and return of the documents by November 19, 2010. By plaintiff’s own admission in the complaint, he did not attempt to accept this offer until December 7, 2010, after the offer had expired. “An offer comes to an end at the expiration of the time given for its acceptance” and an “offeree cannot accept, either through words or deeds, an offer that has lapsed.” *Pakideh v Franklin Commercial Mortg Group, Inc*, 213 Mich App 636, 640, 641; 540 NW2d 777 (1995). Because plaintiff did not accept the offer before it expired on November 19, 2010, the trial court correctly granted summary disposition with respect to plaintiff’s allegations that a contract was formed on December 7, 2010.

Plaintiff, however, maintains that a modification was agreed to when defendant cashed the check that plaintiff subsequently sent on December 13, 2010. Plaintiff contends that the submission of the check was a counteroffer to modify the existing mortgage agreement and defendant’s negotiation of the check was an acceptance of that counteroffer. Plaintiff cites to *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997), in which this Court stated: “Where the parties do not explicitly manifest their intent to contract by words, their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction.”

However, to establish a modification of the contract, plaintiff had to show by clear and convincing evidence that there was a mutual agreement to modify the original contract. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003). While defendant expressed its willingness to modify the original agreement, that willingness was conditioned upon plaintiff acting before a specified deadline. Plaintiff failed to act before that deadline. Plaintiff, however, insists that his subsequent payment and defendant’s acceptance of that payment evidenced a mutual assent to the modification. Yet, because plaintiff was in default on his mortgage payments, the acceptance of this subsequent payment is not clear

and convincing evidence that defendant was agreeing to the modification as opposed to accepting payment as required under the original agreement. The trial court properly granted summary disposition to defendant pursuant to MCR 2.116(C)(8).<sup>1</sup>

### C. Equitable Estoppel

Plaintiff also argues that principles of equitable estoppel preclude defendant from denying that there was an enforceable contract. Plaintiff did not preserve this issue because he did not raise it in the trial court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

Even if we were to consider the issue, plaintiff has not established that he would be entitled to relief. As explained in *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006):

Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts. It is well established under Michigan law that equitable estoppel is not a cause of action unto itself; it is available only as a defense. [(Quotation marks, footnotes, and citations omitted).]

On appeal, plaintiff does not clearly explain how the doctrine of equitable estoppel precludes defendant from denying the existence of an enforceable contract. Plaintiff states that he had an “honest belief” that there was an “enforceable contract” because he sent defendant the documents and the check, and defendant accepted the payment. Yet, defendant’s loan modification offer expressly required a notarized signature and return by November 19, 2010. Therefore, plaintiff would not have been justified in believing that his signature and return of those documents in December 2010 created an enforceable contract. Further, plaintiff was not justified in relying on defendant’s acceptance of payment as evidence that defendant agreed to a loan modification. Not only was payment consistent with plaintiff’s obligations under the original loan agreement, plaintiff failed to produce any evidence of past conduct signaling that defendant would construe this as a late acceptance of the modification. Plaintiff has not provided a reason to grant relief with respect to this unpreserved issue.

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<sup>1</sup> Because summary disposition was properly granted based on plaintiff’s failure to establish any mutuality in the modification agreement, we decline to address whether summary disposition also was warranted in light of the statute of frauds, MCL 566.132(2).

### III. CONCLUSION

Because plaintiff failed to demonstrate there was an enforceable modification to the mortgage agreement, summary disposition under MCR 2.116(C)(8) on his breach of contract claim is proper. Plaintiff also has failed to demonstrate any relevancy of the doctrine of equitable estoppel. We affirm.

/s/ Michael J. Riordan  
/s/ Michael J. Talbot  
/s/ Karen M. Fort Hood