STATE OF MICHIGAN

COURT OF APPEALS

JACK E. QUARTELL and RUTH QUARTELL,

Plaintiffs-Appellants,

v

GREAT LAKES BANCORP,

Defendant-Appellee.

UNPUBLISHED
December 17, 1996

No. 183368
LC No. 94-2229-CK

Before: MacKenzie, P.J., and Markey and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). We affirm.

The facts were well articulated by the trial court:

> Plaintiff [Jack Quartell] is, and was at all times pertinent hereto, an investor in real estate. He buys, sells and holds properties: residential, commercial and industrial, here in Michigan and also in Florida. During 1989 and 1990, the years relevant to this litigation, plaintiff owned eight properties, was selling 23 others on land contract, and had a net worth of almost $3,000,000.
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> In December, 1989, plaintiff became interested in a small strip mall on 28th Street in Wyoming, Michigan. Wyoming is a suburb of Grand Rapids, and 28th Street is the area's equivalent of Telegraph Road. Later that month, while closing an unrelated loan at one of defendant bank's branches, plaintiff asked the loan officer with whom he was then dealing about financing for the strip mall. The discussion was "casual." Plaintiff was told that financing the mall "shouldn't be a problem," but no terms were discussed. Even the amount of any loan was unknown because the property had not recently been appraised. On December 28, 1989, plaintiff bought the mall on a one-year land

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* Circuit judge, sitting on the Court of Appeals by assignment.

contract. He had made no arrangements for financing. Plaintiff acted quickly in order "to get it [the mall] at the good price."

In mid-January, 1990, plaintiff submitted a loan application to defendant. Thereafter, defendant agreed to loan $920,000 to plaintiff to be secured by a first mortgage on the strip mall. A commitment letter was issued on February 22. However, shortly before closing on the loan, defendant balked. Its commitment letter required plaintiff to assign to it the leases with the two tenants in the strip mall. A third space was vacant. The commitment letter also required that any subordinated leases "be satisfactory to Lender." Shortly before the scheduled closing, one of the tenants closed its store in the mall. The tenant continued to pay rent, but the premises were empty. Claiming that that turn of events rendered the lease unsatisfactory, defendant insisted on a modification of the loan commitment. Plaintiff agreed. He agreed in writing to find a replacement tenant as a condition precedent to closing the loan*. When he failed to do so, defendant declined to close. When plaintiff was unsuccessful in finding other financing, he lost the strip mall in forfeiture proceedings. This case followed, but not until June, 1994.

* * *

[P]laintiff states five claims. Count I asserts breach of contract. In particular, plaintiff contends that defendant reneged on its loan commitment to him. Count II asserts promissory estoppel. Specifically, plaintiff contends that he bought the strip mall in reliance on defendant's promise of financing. Count III alleges that defendant's failure to close on the loan was a breach of its duty to deal with plaintiff fairly and in good faith. Innocent misrepresentation is alleged in Count IV. Supposed violations of the Michigan Consumer Protection Act are the subject of Count V. All of plaintiff's claims are premised on the contention that defendant wrongfully refused to loan $920,000 to him.

* Plaintiff and his wife both signed the modification to the commitment letter. Because Mr. Quartell does all of his investing as an individual, not as a corporation or through partnerships, the initial commitment letter was to him and his wife; accordingly, the modification had to be accepted by both of them.

On appeal, plaintiffs first claim that the trial court erred in dismissing their breach of contract claim. Specifically, they argue that the modified commitment letter was signed under economic duress and was therefore invalid. According to plaintiffs, this invalidity caused the original letter to remain binding, and because the original letter ambiguously required plaintiff to assign defendant "satisfactory" leases, summary disposition was improper. We disagree with plaintiffs' premise that the modified agreement was invalid, and thus reject this argument.

To claim economic duress, one must be illegally forced to act by fear of serious injury to person, reputation, or fortune. *Norton v State Highway Dep't*, 315 Mich 313, 319; 24 NW2d 132 (1946). Illegality is an element of economic duress. *Enzymes of America v Deloitte, Haskins & Sells*, 207

Mich App 28, 35; 523 NW2d 810 (1994), rev'd on other grounds 450 Mich 887; ___ NW2d ___ (1995). In this case, plaintiffs alleged no illegal act on the part of defendant when it insisted on modifying the original loan commitment. Proposing a modification to a preexisting obligation is not unlawful, and refusing to abide by a previous agreement falls short of duress. *Gill v SHB Corp*, 322 Mich 700, 706; 34 NW2d 526 (1948); *Goebel v Linn*, 47 Mich 489, 494; 11 NW 284 (1882). Therefore, plaintiffs could not, as a matter of law, establish a claim of economic duress. Summary disposition was proper. MCR 2.116(C)(8).

Next, plaintiffs claim that the trial court improperly dismissed their claim for breach of an implied covenant of good faith and fair dealing. According to plaintiffs, defendant breached this covenant when it invoked the provision in the original commitment letter requiring leases to be "satisfactory" to defendant. However, any claim based on the original commitment letter was waived when plaintiffs agreed in the modified letter to find a replacement tenant for the vacated premises. A subsequent agreement concerning the same subject matter rescinds a previous agreement and operates as a waiver of any claim for breach of the earlier agreement. *Joseph v Rottschafer*, 248 Mich 606, 610-611; 227 NW 784 (1929). Summary disposition was proper. MCR 2.116(C)(8).

Plaintiffs also contend that the trial court improperly dismissed the count in their complaint alleging misrepresentation. Plaintiffs argue that defendant represented to them that there would be no difficulty in obtaining financing for the mall before they entered into the land contract for its purchase, and that they purchased the mall in reliance on that representation.

An action for misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual in nature and do not sound in tort. *Hi-Way Motor v Int'l Harvester*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Marrero v McDonnell Douglas Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993). A promise to provide financing is a promise relating to future conduct, and therefore cannot form the basis of a claim of misrepresentation. *Marrero*, *supra*. An exception to this rule may exist where there is a relationship of trust and confidence. *Rutan v Straehly*, 289 Mich 341, 349; 286 NW 639 (1939). See also *State Bank of Standish v Curry*, 442 Mich 76; 500 NW2d 104 (1993). However, there are no unusual or extraordinary circumstances present in this case which could elevate the nature of the relationship to such a level of trust and confidence. *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 274; 288 NW2d 613 (1979). Because defendant's statements did not relate to past or existing facts, but were at best statements relating to future conduct, summary disposition was proper. MCR 2.116(C)(8).

Finally, plaintiffs argue that the trial court improperly dismissed their claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901; MSA 19.418. We find no error. The clear legislative intent in enacting the MCPA was to protect consumers in their purchases of goods and services which are primarily used for personal, family, or household purposes. *Noggles v Battle Creek Wrecking*, 153 Mich App 363, 367; 395 NW2d 322 (1986). In this case, plaintiffs sought commercial financing to purchase commercial property for investment purposes, not for any personal, family, or household purposes. Because the MCPA was not intended to apply to such a transaction, plaintiffs

have failed to state a claim upon which relief can be granted. Again, summary disposition was proper. MCR 2.116(C)(8).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer