

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

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THE ANDERSON ASSOCIATES, INC., and  
LARRY GOTCHER,

UNPUBLISHED  
February 7, 1997

Plaintiffs-Appellants,

v

No. 191375  
Wayne Circuit Court  
LC No. 95-519938

HIKMAT KALLABAT, d/b/a BELLE POINTE  
DEVELOPMENT CORP and BELLE POINTE  
DEVELOPMENT LTD., and AMOS KNOLL and  
JAMES RUBIN, d/b/a BELLE POINTE  
DEVELOPMENT CORP., BELLE POINTE LTD  
ONE, BELLE POINTE ESTATES, and COAST TO  
COAST DEVELOPMENT,

Defendants-Appellees.

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Before: Reilly, P.J., and Cavanagh and C.D. Corwin,\* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7)<sup>1</sup> in this action seeking enforcement of an oral contract for the commission on the sale of real estate. We affirm in part, reverse in part, and remand.

This Court reviews a summary disposition determination de novo as a question of law. When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. *Florence v Dep't of Social Services*, 215 Mich App 211, 213-214; 544 NW2d 723 (1996).

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

Plaintiffs argue that the trial court erroneously dismissed their tort and noncontractual claims for fraud, bad-faith promise, tortious interference with contract, promissory estoppel, intentional infliction of emotional distress, and exemplary damages as barred by the statute of frauds, MCL 566.132(1)(e); MSA 26.922(1)(e). We address each of these arguments individually.

In order to show fraud or misrepresentation, plaintiff must prove (1) defendant made a material representation; (2) that the representation was false; (3) when defendant made the representation, defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity; (4) that defendant made it with the intent that plaintiff would act upon it; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff suffered injury. An action for fraudulent misrepresentation must be predicated on a statement relating to a past or an existing fact. Future promises are contractual and cannot constitute actionable fraud. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208-209; 544 NW2d 727 (1996).

Because plaintiffs in the instant case premised their various fraud claims upon a future event (Kallabat's signing a sales commission agreement with Gotcher the day after Gotcher introduced Kallabat to Rubin), plaintiffs' fraud claims were contractual and could not constitute actionable fraud. See *id.* Therefore, the trial court should have dismissed the claims pursuant to MCR 2.116(C)(8) because plaintiffs failed to state a claim under which relief could be granted. We will not reverse where the trial court reached the right result for the wrong reason. *Hawkins v Dep't of Corrections*, 219 Mich App 523, 528; \_\_\_ NW2d \_\_\_ (1996).

Plaintiffs also argue that the trial court should not have granted summary disposition on their claim under the bad-faith exception to fraudulent misrepresentation. Because this claim sounds in tort, the trial court did in fact err in dismissing plaintiffs' claim as barred by the statute of frauds. See *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 370; 320 NW2d 836 (1982). For the same reason, we conclude that the trial court erred in granting defendants' motion for summary disposition on plaintiffs' claim of tortious interference with contract.

Plaintiffs further claim that the trial court erred in finding that their claim for promissory estoppel was barred under the statute of frauds. We agree. The elements of promissory estoppel are (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). The doctrine of promissory estoppel is applied cautiously, where the hallmark of such a claim is a promise that is clear and definite. *Id.*

The Supreme Court has held that the statute of frauds does not bar a validly pleaded claim for promissory estoppel. See *Opdyke, supra* at 369-370. Likewise, this Court has found that claims for promissory estoppel could survive where the original agreement was barred under other subsections of MCL 533.132; MSA 26.922. See, e.g., *Conel Development, Inc v River Rouge Savings Bank*, 84

Mich App 415, 422-424; 269 NW2d 621 (1978) (original agreement barred under MCL 566.132(1)(b); MSA 26.922(1)(b)); *Lovely v Dierkes*, 132 Mich App 485, 488-491; 347 NW2d 752 (1984) (original agreement barred under MCL 566.132(1)(a); MSA 26.922(1)(a)). We therefore conclude that a claim for promissory estoppel should be allowed where the original agreement was barred by MCL 566.132(1)(e); MSA 26.922(1)(e), and we find that the trial court erred in granting defendants' motion for summary disposition of this claim.

Next, plaintiffs argue that the trial court erred in summarily dismissing their claim for intentional infliction of emotional distress under the statute of frauds because this defense is inapplicable to plaintiffs' tort action. While we agree with plaintiffs' contention, see *Opdyke, supra* at 370, we nevertheless find that summary disposition was properly granted because plaintiffs failed to state a valid claim. Damages for mental distress are not recoverable in a breach of contract action absent allegation and proof of tortious conduct existing independent of the breach of contract. Failure to pay a contractual obligation does not amount to outrageous conduct such as would support a claim of intentional infliction of emotional distress, even if it is wilful or in bad faith. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 657; 517 NW2d 864 (1994). As previously stated, we will not reverse where the trial court reaches the right result for the wrong reason. *Hawkins, supra*.

Next, plaintiffs argue that the trial court erred in dismissing their claim for exemplary damages because defendants' tortious conduct was independent of their breach of contract. As a general rule, exemplary damages are not available in an action for breach of a commercial contract. However an exception exists where there is proof of tortious conduct independent of the breach. *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 351; 480 NW2d 623 (1991). We conclude that the alleged tortious conduct in this case is not sufficiently independent of the breach of contract to permit a claim for exemplary damages.

In summary, we hold that the trial court erred in granting defendants' motion for summary disposition as to plaintiffs' claims of tortious interference with contract and promissory estoppel, as well as plaintiffs' claim under the bad-faith exception to fraudulent misrepresentation. However, we hold that the trial court did not err in dismissing plaintiffs' claims for fraud, intentional infliction of emotional distress, and exemplary damages.

## II

Plaintiffs contend that the trial court erred in summarily dismissing their contract-based claims (breach of contract, unjust enrichment, and specific performance) under the statute of frauds. Plaintiffs contend that the trial court should not have considered defendants' statute of frauds defense because of defendants' own fraudulent acts. We disagree.

As noted *supra*, plaintiffs' fraud claims were predicated upon a future event, that of Kallabat signing the sales commission agreement the day after Gotcher introduced him to Rubin. Therefore, plaintiffs' fraud claims are not actionable. See *Baker, supra*.

Next, plaintiffs argue that the trial court erred in dismissing their claim for quantum meruit under the statute of frauds. Plaintiffs acknowledge that in *Purification Systems, Inc v Mastan Co, Inc*, 40 Mich App 308, 315; 198 NW2d 807 (1972), this Court held that a party cannot recover under quantum meruit for an oral agreement to receive a sales commission for the sale of land. However, plaintiffs attempt to distinguish *Purification Systems* by arguing that they are seeking to enforce not the sales commission agreement, but rather Kallabat's promise to sign the agreement.

We do not find this argument persuasive. To accept plaintiffs' contention would effectively render MCL 566.132(1)(e); MSA 26.922(1)(e) a nullity. In addition, plaintiffs' assertion ignores the long-held rule that agreements for a commission on the sale of real estate must be in writing. See *Mead v Rehm*, 256 Mich 488, 490; 239 NW 858 (1932).

Finally, in light of our decision to reverse and remand on several of plaintiffs' contractual claims, plaintiffs' assertion that the trial court erred in dismissing their claim for specific performance is moot, as plaintiffs themselves admit.<sup>2</sup>

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Maureen Pulte Reilly  
/s/ Charles D. Corwin

<sup>1</sup> Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (C)(10). Although the trial court opinion states that summary disposition was granted pursuant to MCR 2.116(C)(8) and (C)(10), it is clear from the transcript of the hearing that the court granted defendants' motion for summary disposition because it found that plaintiffs' claims were barred by the statute of frauds. Thus, it is clear that summary disposition was granted pursuant to MCR 2.116(C)(7).

<sup>2</sup> Plaintiffs raise several additional arguments in the footnotes of their brief on appeal. Because these arguments were not presented to the trial court, we decline to review them. See *Garavagli v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995), lv den 452 Mich 867 (1996), cert den \_\_\_ US \_\_\_, 1997 US LEXIS 75 (1997).