STATE OF MICHIGAN

COURT OF APPEALS

KATHERINE KELLY,

Plaintiff-Appellant,

v

WILLIAM J. KELLY,

Defendant-Appellee.

UNPUBLISHED
November 25, 1997

No. 199138
Jackson Circuit
LC No. 96-075145-CK

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from a grant of summary disposition pursuant to MCR 2.116(C)(10) and a grant of sanctions favoring defendant. We affirm, and remand for imposition of sanctions pursuant to MCR 7.216(C) (vexatious appeal).

After plaintiff's husband died, defendant, decedent's law partner, agreed to pay plaintiff $100,000 to compensate her for the value of decedent's partnership share. The parties agreed that defendant would pay this amount over time. Interest was never discussed. Defendant paid plaintiff $100,000 over nine years. Thereafter, she sued defendant for interest.

Plaintiff argues that the trial court erred in refusing her request for leave to amend her complaint to plead a count of unjust enrichment. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). When a trial court grants summary disposition pursuant to MCR 2.116(C)(10), it must give the nonmoving party the opportunity to amend its pleadings unless the amendment would be futile. MCR 2.116(I)(5).

Unjust enrichment is an implied contract theory. *Barber v SMH, Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). A contract may not be implied where the parties have an express contract covering the same subject matter. *Id*. There is no dispute in this case that the parties had an express contract whereby defendant agreed to pay plaintiff $100,000 over time and that the parties never agreed on interest. There is also no dispute that defendant actually did pay plaintiff $100,000. Because

the parties had an express contract for payment that did not include interest, plaintiff cannot use the theory of unjust enrichment to imply a contract for interest. Therefore, it would have been futile for plaintiff to amend her complaint to add a claim of unjust enrichment, and the trial court properly denied plaintiff leave to amend.

Plaintiff next argues that the trial court erred in holding that Michigan law does not permit implication of interest absent an actual agreement. We disagree.

In the absence of an express agreement to pay interest, until the principal becomes due, no promise to pay interest may be implied, or be awarded as damages. *Amluxen v E J Stephenson, Inc*, 340 Mich 273, 276; 65 NW2d 807 (1954). In *Amluxen*, the plaintiff had borrowed $2,000 from the defendant. The plaintiff later repaid $100 and assigned a stock certificate as security for the remaining debt of $1,900. Later when the plaintiff tendered the $1,900, the defendant refused to release the stock certificate unless the plaintiff signed a "compromise settlement release." *Id*., 274. On appeal, our Supreme Court affirmed the lower court's decision for the plaintiff that interest was not owed. The Court stressed the fact that the plaintiff was never in default:

> If appellee had failed to pay the money promised, then by law appellant would be allowed interest in the nature of damages for the improper detention of the sum so promised from the date of default. There was no default in this transaction. [*Id*., 275.]

Plaintiff also relies on *Allen v Atkinson*, 21 Mich 351; 2 Brown's NP Reports S5 (1870). In that case, our Supreme Court held that no interest was due where interest was not contemplated by the parties when they contracted, and interest was not due as damages because the debtor was not in default. *Id*., 362. Likewise here, the parties did not contemplate interest as part of their express contract, and interest was not due as damages because defendant was never in default regarding his payments on the principal. Therefore, the trial court properly found that no agreement to pay interest could be implied.

Plaintiff argues that the trial court erred in sanctioning plaintiff and her counsel for frivolous pleading. We disagree.

We review an award of frivolous pleading sanctions for clear error. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

A claim is frivolous when, among other reasons, it is devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a). Although the trial court failed to clearly state its reasoning for imposing sanctions, we find that sanctions were justified. Even rudimentary legal research reveals that there was no legal basis for recovery. Plaintiff admitted that she and defendant had not agreed that interest would be paid. Further, because the parties had an express contract, Michigan law is clear that the implied contract theory of unjust enrichment has no application.

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff