STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN LIVESTOCK CREDIT CORP., a/k/a MICHIGAN LIVESTOCK EXCHANGE,

Plaintiff/Counterdefendant-Appellee,

v

ROBERT E. MCCREA, BEVERLY MCCREA and ROBERT A. MCCREA, d/b/a BOB-BE FARMS,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
January 6, 1998

No. 185596
Huron Circuit Court
LC No. 91-007832 CK

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

PER CURIAM.

Defendants/counterplaintiffs (Bob-Be Farms) brought a counter complaint against plaintiff/counterdefendant Michigan Livestock Credit Corporation, a/k/a Michigan Livestock Exchange (hereafter "MLE") alleging usury, breach of contract, breach of fiduciary duty and misrepresentation. The trial court granted MLE's motion for summary disposition with regard to the usury count, and later granted MLE's motion for directed verdict on the fiduciary duty and misrepresentation claims. At trial, the jury found for Bob-Be Farms in the amount of $117,424.90 on the breach of contract claim. After a hearing on MLE's motion for judgment notwithstanding the verdict, the trial court granted the motion in part, denied it in part and issued a judgment for Bob-Be Farms in the amount of $6,794.40. Bob-Be Farms now appeals as of right. We affirm.

The parties first entered into a feeding agreement on May 27, 1987, and entered into new agreements in subsequent years. Under those agreements, MLE placed cattle on Bob-Be Farms' property and Bob-Be Farms was responsible for feeding the cattle until they reached their finished weight, at which time they would be sold and Bob-Be Farms would receive any profit over the cost of the cattle plus the service fees chargeable under the agreement. On December 12, 1991, MLE filed a Claim and Delivery Complaint against Bob-Be Farms and Farm Credit Services claiming that Farm Credit Services had taken over Bob-Be Farms upon which MLE had 462 head of cattle nearing their finished weight. MLE further alleged that Farm Credit Services had indicated that, if MLE attempted to

remove the cattle, the action would be considered a breach of the peace. MLE claimed that Bob-Be Farms was not feeding the cattle a proper diet and that MLE needed to attain control over the cattle in order to feed them properly so as to bring them to their finished weight. MLE stated that Farm Credit Services, as assignee of the contract between Bob-Be Farms and MLE, would be entitled to any proceeds from the sale of the cattle in excess of MLE's costs and fees as set forth in the agreement.

On December 20, 1991, the parties entered into a "Stipulation and Order to Dissolve Restraining Order and Withdraw Motion for Possession" wherein they agreed that MLE could take possession of the cattle and that MLE would file a $350,000 bond to protect Bob-Be Farms and Farm Credit Services' interest in the cattle until they were sold. The bond was acquired on December 24, 1991. An order instituting the stipulation was entered on December 30, 1991. On January 29, 1992, Bob-Be Farms filed its counter complaint against MLE (which forms the basis of this appeal). In February 1992, MLE and Farm Credit Services stipulated to settlement of the claims between them and the claim and delivery action was dismissed.

I

Bob-Be Farms argues that the trial court erred in granting MLE's motion for judgment notwithstanding the verdict on Bob-Be Farms' breach of contract claim. We disagree. In reviewing such a motion, we look at the testimony and all legitimate inferences in a light most favorable to the nonmoving party. *McLemore v Detroit Rec Hosp & Univ Med Center*, 196 Mich App 391, 395; 493 NW2d 441 (1992). As the party asserting a breach of contract, Bob-Be Farms has the burden of proving the breach. See *Oakland Metal Stamping Co v Forest Industries, Inc*, 352 Mich 119, 125; 89 NW2d 503 (1958). Bob-Be Farms has not sustained its burden on any of its breach of contract theories.

Bob-Be Farms contends that the contract was breached when the first-in, first-out (FIFO) method of accounting was used by MLE. Bob Be Farms relies upon language in the Livestock Feeding Proposal that MLE would insure that its farmer patrons remain in a financially viable position. However, nothing in that language or in any of the testimony demonstrated that any particular accounting method had to be used in order to conform to the contract.

Bob-Be Farms next claims that MLE breached the contract when it did not charge "full and normal" commissions on the purchase and sale of livestock. Again, the record is devoid of testimony establishing what constitutes a "full and normal" commission. Therefore, there was nothing upon which a jury could find that the commissions charged by MLE were *not* "full and normal." In this argument, Bob-Be Farms points to *one* other farm as comparison, suggesting that, if that did not adequately demonstrate what a "full and normal" commission is, then MLE could have provided evidence on the other hundreds of farmers in the program. However, in this argument Bob-Be Farms fails to recognize that the burden was on it to prove breach and not on MLE to prove conformance.

Finally, Bob-Be Farms asserts that MLE breached the termination provisions of the contract when it removed the cattle from the farm in 1991. The termination provision reads:

> This agreement may be terminated by the Exchange upon ten (10) days written notice to the Feeder of the Exchange's intent to terminate. Both parties understand and agree that this period may be waived if such conditions exist that will endanger the Exchange's equity position in the cattle.

There is no dispute that MLE's equity in the cattle was endangered once Farm Credit Services seized Bob-Be Farms' assets. Therefore, the trial court did not err in finding that the termination portion of the contract had not been breached. Further, because Bob-Be Farms failed to present proof of any breach of the contract, the trial court properly granted MLE's motion for judgment notwithstanding the verdict.

II

Bob-Be Farms next argues that, because MLE voluntarily dismissed its claim and delivery action, the trial court should have ordered that the proceeds of the bond be paid to Bob-Be Farms. We disagree. Because the assets of the farm, including the cattle at issue, had been seized by Farm Credit Services, Bob-Be Farms cannot and did not argue that it had been deprived of its property by a prejudgment order when the case was dismissed. Under MCR 3.105(H)(4), a party must be deprived of its property when the case is dismissed in order to seek a default judgment. As a result, the trial court did not err in denying Bob-Be Farms' motion for default judgment with regard to the bond proceeds.

III

Bob-Be Farms asserts that the trial court erred in granting MLE's motion for summary disposition on Bob-Be Farm's usury count. However, usury is available only as a defense and not as a claim upon which relief can be granted. *Olsen v Porter*, 213 Mich App 25, 30; 539 NW2d 523 (1995); *Mich Mobile Home Ass'n v Bank of the Commonwealth*, 56 Mich App 206, 218; 223 NW2d 725 (1974). Therefore, the trial court correctly granted MLE's motion pursuant to MCR 2.116(C)(8) because the claim is unenforceable as a matter of law. *Peters v Dep't of Corrections*, 215 Mich App 485, 486-487; 546 NW2d 668 (1996).

IV

Bob-Be Farms also states that the trial court erred in denying its motion to amend its counter complaint to add four counts under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961 *et seq*. We agree, but find that the error was harmless. The trial court denied the motion to amend because of the impact such claims would have on MLE. That is not an acceptable reason for denying a motion to amend. See *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Although Bob-Be Farms does not present this Court with authority regarding what constitutes a legally sufficient claim under RICO, it is apparent upon reviewing the proposed amendment to the counter complaint that the proposed RICO counts were based on the allegations of misrepresentation and breach of fiduciary duty in the original counter complaint. The trial court's determination at trial that it was impossible to find for Bob-Be Farms on those elements of the claim renders the failure to grant the motion to amend harmless. See *Cassibo v Bodwin*, 149 Mich App 474, 477-478; 386 NW2d 559 (1986).

V

Finally, Bob-Be Farms argues that the trial court erred in granting MLE's motion for directed verdict regarding the claims of breach of fiduciary duty and misrepresentation. We disagree. When Bob-Be Farms entered into the agreement, it did so with both an attorney and an accountant present. All the evidence presented made it clear that this was an arms' length commercial, contractual relationship. There was no evidence presented that any of the principals of Bob-Be Farms reposed faith, confidence or trust in MLE or that any of those principals relied on the judgment or advice of MLE. See *Ulrich v Federal Land Bank*, 192 Mich App 194, 196; 480 NW2d 910 (1991). Bob-Be Farms argues that one of its principals relied on the advice given by Schrader of MLE. However, the principal's own testimony was that sometimes he took Schrader's advice and sometimes he did not. In addition, the evidence showed that the principal of Bob-Be Farms relied on his own instincts together with advice of his counsel and accountant.

With regard to the misrepresentation claim, Bob-Be Farms first claims that MLE represented that it was designed to assist loyal patrons but that, instead, it preyed upon Bob-Be Farms' financial difficulties. Although Bob-Be Farms did not survive its financial difficulties, there was absolutely no evidence presented that the design of MLE's program was anything other than represented. Bob-Be Farms also argues that the statement in the agreement that only "normal" commissions would be charged was false. However, as stated at the beginning of this opinion, Bob-Be Farms failed to prove that the commissions it was charged were more than a "normal" commission.

Affirmed.

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