

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF PONTIAC,

Plaintiff,

v

PONTIAC DOWNTOWN DEVELOPMENT
AUTHORITY,

Defendant/Cross-Defendant/
Cross-Plaintiff-Appellee,

and

ATTIC THEATRE, INC. and STRAND
THEATRE, INC.,

Defendants/Cross-Plaintiffs/
Cross-Defendants-Appellants.

UNPUBLISHED

March 13, 1998

No. 198081

Oakland Circuit Court

LC No. 94-482086 CZ

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendants Attic Theatre, Inc., and Strand Theatre, Inc., (Attic/Strand) appeal as of right from a final consent judgment entered pursuant to the agreement of Attic/Strand and defendant Pontiac Downtown Development Authority (PDDA). We affirm.

Our statement of facts is limited to placing in context the issues raised on appeal. Recognizing that the renovation and operation of the Strand Theater complex was necessary to the revitalization of the City of Pontiac's downtown area, various city agencies sought to find a professional theater company to engage in such renovation and operation by offering to any such company the theater complex "as-is" and certain funding pledges. Desiring to be such company, Attic/Strand entered into possession of the theater complex. PDDA ultimately obtained title to the complex and in a resolution authorized the sale of the complex to Attic/Strand on a land contract.

After it was discovered that the theater complex contained various code violations, the City of Pontiac filed suit against PDDA and Attic/Strand. Attic/Strand cross-claimed against PDDA for specific performance of the land contract. PDDA “cross-counter-claim[ed]” against Attic/Strand for money lent (\$70,000) by PDDA to Attic/Strand.

PDDA moved for summary disposition of Attic/Strand’s specific performance claim and PDDA’s money lent claim pursuant to MCR 2.116(C)(10). The trial court granted summary disposition of Attic/Strand’s specific performance claim in favor of PDDA on the ground that there was no enforceable land contract between PDDA and Attic/Strand. The trial court also granted summary disposition of PDDA’s money lent claim in favor of PDDA.

Subsequently, Attic/Strand moved for leave to file a “Second Amended Cross Claim And Third Party Complaint.” This pleading sought to assert additional claims and join additional parties. Specifically, against PDDA and a second city agency, Attic/Strand sought to bring claims alleging that Attic/Strand was entitled to enforce alleged agreements between PDDA and the other city agency under a third-party beneficiary theory. Against the executive director of PDDA and the other city agency and the executive director’s assistant, Attic/Strand sought to assert a civil rights claim under 42 USC 1983 (unconstitutional deprivation of property interest) and a tortious interference with contractual relationship claim. The trial court denied this motion on the grounds that the motion was not timely, the amendments would prejudice PDDA, and the amendments were futile.

On appeal, Attic/Strand first argues that the trial court erred in granting summary disposition of its specific performance claim in favor of PDDA because the documentary evidence submitted in this case created questions of fact concerning the existence of an enforceable land contract.

This Court reviews de novo a trial court’s grant or denial of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1996). A motion under MCR 2.116(C)(10) permits summary disposition when “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the non-moving party, to determine whether a record might be developed that may leave open an issue upon which reasonable minds could differ. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996); *Pinckney, supra*. However, this Court is not permitted to assess credibility or to determine factual issues. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Where specific performance is sought, the burden is on the plaintiff to establish that, first, a “contract was made as claimed by them.” *Reed v Vander Zalm*, 336 Mich 1, 7; 57 NW2d 304 (1953). A valid contract requires a meeting of the minds or mutual assent on all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364; ___ NW2d ___ (1997); *Stark v Kent Products, Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975). Mutual assent is judged by an objective standard that looks to the parties’ express words and their visible acts. *Stark, supra*. Mere discussions, negotiations or expressions of intention cannot be a substitute for the formal requirements of a contract. *Paris v Scott*, 267 Mich 400, 404; 255 NW2d 216 (1934); *Eerdmans, supra*. As explained in *Central Bitulithic Paving Co v Village of Highland Park*, 164 Mich 223, 228; 129 NW 46 (1910):

[A] contract is not made so long as, in the contemplation of both parties thereto, something remains to be done to establish contract relations. The law does not make a contract when the parties intend none, nor does it regard an arrangement as completed which the parties thereto regard as incomplete.

Moreover, a contract for the sale of land must satisfy the statute of frauds, which requires that there must be a writing signed by either the party making the sale or a person lawfully authorized in writing to act on behalf of the person making the sale. *Eerdmans, supra*.

In this case, even giving the benefit of any reasonable doubt to Attic/Strand, no question of fact was created concerning the existence of a contract. The land contract was never signed by PDDA or a person lawfully authorized in writing to act on behalf of PDDA. The notes, minutes and other documentary evidence relied on by Attic/Strand, including the resolution by PDDA that authorized the sale of the theater on a land contract, evidence only negotiations, expressions of intention, incomplete arrangements and, at most, formal approval for a future contract of sale. Attic/Strand's own agent admitted that the land contract had "continued to be tabled" Because no question of fact was created concerning the existence of a contract, we conclude that the trial court did not err in granting summary disposition in favor PDDA on Attic/Strand's specific performance claim.

Next, Attic/Strand argues that the trial court erred in granting summary disposition of PDDA's money lent claim. However, the final consent judgment entered in this case provides as follows:

By agreement of the parties the following is hereby ORDERED:

1. This judgment shall bind the Attic Theater, Inc. (a/k/a Attic Theatre, Inc.) (Attic) and the Strand Theater of Pontiac, Inc. (a/k/a Strand Theatre of Pontiac, Inc.) (Strand) (which shall collectively be referred to as the "Attic/Strand"), and the Pontiac Downtown Development Authority (DDA).

* * *

4. The Attic/Strand shall have the right to only seek appellate review of this court's February 8, 1996, dismissal of its civil rights (i.e., the claim brought under 42 USC 1983) claim, the June 13, 1996, dismissal of its specific performance claim, both of which were brought against the DDA, and the Opinion and Order of the court entered on August 9, 1996 [that denied Attic/Strand's motion for leave to bring additional claims and join additional parties]. The Attic/Strand agrees to perfect any appeal, including its obligation to seek court approval of an appeal bond (which they agree to file timely after approval is given by this court as to both the form of the bond and its amount), within 21 days from the date that this judgment is entered. The Attic/Strand also agrees to diligently prosecute any appeal as an obligation of this judgment.

Judgments entered pursuant to the agreement of parties are of the nature of a contract. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). Absent a showing of facts such as fraud or duress, courts act properly when they enforce such agreements. *Id.*

In this case, Attic/Strand agreed that it would seek appellate review of only certain specified claims, not including PDDA's money lent claim. Attic/Strand has not alleged fraud or duress. Accordingly, we will enforce the parties' agreement and not review this issue.

Finally, Attic/Strand contends that the trial court abused its discretion in denying Attic/Strand's motion for leave to file its "Second Amended Cross Claim And Third Party Complaint."

A court should liberally grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2); *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). A motion to amend should be denied only for particularized reasons, such as futility. *Weymers, supra*. In addition, a trial court is generally required to permit amendment of pleadings to avoid summary disposition, again unless such amendment would be futile. MCR 2.116(I)(5); *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 299; 517 NW2d 319 (1994). An amendment is deemed futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 783; 421 NW2d 289 (1988). Moreover, to add allegations that merely restate allegations already made is futile. *Dukesherer Farms, Inc v Director of the Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988). The decision to grant or deny leave to amend a complaint is within the trial court's discretion. *Weymers, supra*. This Court will not reverse a trial court's decision regarding leave to amend unless it was a clear abuse of discretion resulting in injustice. *Id.*; *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

At the time Attic/Strand sought leave to file its "Second Amended Cross Claim And Third Party Complaint," trial on the remaining claims involved in this litigation was fast approaching and discovery was complete. The trial court denied Attic/Strand's motion to add third-party beneficiary claims on the ground that discovery had yielded no evidence of a contract between PDDA and the other city agency. After reviewing the record, we agree. *Central Bitulithic, supra*; *Eerdmans, supra*. The trial court denied Attic/Strand's motion to join additional parties on the ground that discovery had yielded no evidence of the elements of tortious interference with contractual relations and that Attic/Strand had "neither pled, nor could it prove that it was deprived of a property right without due process." Again, after reviewing the record, we agree. *St Louis v Mich Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 74-75; 544 NW2d 705 (1996); *Prysak v RL Polk Co*, 193 Mich App 1, 12; 483 NW2d 629 (1992). Accordingly, we cannot conclude that the trial court abused its discretion in denying Attic/Strand's motion to file its "Second Amended Cross Claim And Third Party Complaint" on

the ground of futility. *Weymers, supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski