STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN G. PINTO,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
December 10, 1999

No. 208392
Oakland Circuit Court
LC No. 96-532412 CK

Before: Gage, P.J., and Smolenski and Zahra, JJ.

GAGE, P.J. (concurring in part and dissenting in part).

While I agree with the majority's disposition of plaintiff's negligent misrepresentation and fraud claims, I respectfully dissent from the majority's conclusion that summary disposition of plaintiff's promissory estoppel claim was appropriate pursuant to MCR 2.116(C)(10). The evidence presented by plaintiff created genuine issues of material fact with respect to the estoppel issue.

In determining the propriety of summary disposition of plaintiff's estoppel claim under MCR 2.116(C)(10), we examine whether the plaintiff has provided sufficient factual support for this claim. We consider the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In deciding motions for summary disposition, we may not make factual findings or weigh credibility. *Ardt v Titan Ins Co*, 233 Mich App 685, 693; 593 NW2d 215 (1999). Only where the proffered evidence fails to establish a genuine issue regarding any material fact is the moving party entitled to judgment as a matter of law. *Maiden, supra* at 120.

The doctrine of promissory estoppel provides that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person, and that does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise. *State Bank of Standish v Curry*, 442 Mich 76, 83; 500 NW2d 104 (1993), quoting 1 Restatement Contracts, 2d, § 90, p 242.

The majority correctly notes that a court must make a threshold inquiry into the circumstances surrounding both the making of the promise and the promisee's reliance as a question of law. *State*

Bank of Standish, *supra* at 84. With respect to the determination whether a promise has been made, the Michigan Supreme Court has stated as follows:

> Drawing heavily from the Restatement's definition of promise, it has been suggested that "[a] promise may be stated in words, either orally or in writing, or may be inferred wholly or partly from conduct. . . . Both language and conduct are to be understood in the light of the circumstances, including course of performance, course of dealing, or usage of trade." Farber & Matheson, [*Beyond promissory estoppel: Contract law and the "Invisible Handshake*," 52 U Chi L R 903,] 932 and n 104 [(1985)]. In addition, "[a] promise must [also] be distinguished from a statement of opinion or a mere prediction of future events." *Id*. at 933. Variables such as the nature of the relationship between the parties, the clarity of the representation, as well as the circumstances surrounding the making of the representation, are important to the determination of whether the manifestation rises to the level of a promise. Both traditional contract and promissory estoppel theories of obligation use an objective standard to ascertain whether a voluntary commitment has been made. To determine the existence and scope of a promise, we look to the words and actions of the transaction as well as the nature of the relationship between the parties and the circumstances surrounding their actions. [*State Bank of Standish*, *supra* at 86.]

Assuming that this initial inquiry reveals sufficient objective indications of a definite promise, the existence and scope of the promise represent questions of fact. *Id*. at 84.

The deposition and affidavit statements of plaintiff reveal the following relevant facts. Plaintiff averred that for a ten-year period he occupied the positions of chief executive officer and sole shareholder of Nexco, Incorporated, Technical Services (Nexco). During this period, Nexco provided defendant personnel who worked in defendant's bus and truck divisions. Plaintiff further alleged the following with respect to his business dealings with General Motors (GM):

> That due to the importance of [GM's CPC division] as a customer, I maintained a close working relationship with Mr. Mel Plaskey, the buyer of technical services for this division.
>
> That over the course of my ten year relationship with GM, I developed a good working relationship with Mel Plaskey.
>
> That I worked on a hand shake basis, trusting Mel's word to be as good as any writing.
>
> That accordingly, I would frequently send Nexco employees to work for CPC as contract workers prior to the issuance of any written order by this division.

Nexco obtained from GM valuable blanket purchase orders, which permitted it to provide GM with personnel in certain specific work categories.

In his deposition, plaintiff testified that Plaskey told him in July 1993 that GM intended to reduce its supplier base, and that "now would be a good time to get out of the business." Plaintiff subsequently began investigating the possibility of selling Nexco to another company. During an August 1993 telephone conversation, plaintiff informed Plaskey of Kelly Services' interest in purchasing or merging with Nexco. Plaskey then inquired of plaintiff whether "it would be helpful, as [plaintiff] moved toward marketing [his] business, if he transfer[ed] the blanket order to the successor firm," to which plaintiff replied that such a transfer would be essential. While Plaskey never affirmatively told plaintiff at this time that he would transfer the blanket order, plaintiff testified that Plaskey indicated his willingness to make the transfer.

In September 1993, Plaskey telephoned plaintiff to apprise him that someone from Kelly Services had telephoned Plaskey in an attempt to discover the terms of Nexco's blanket purchase order. According to plaintiff's deposition testimony, Plaskey told Kelly Services that he could and would transfer Nexco's blanket purchase order to Nexco's successor, but that when it expired, Kelly Services then would have to qualify for a subsequent order in the same manner as any other company. Kelly Services later disclaimed further interest in merging with Nexco.

Another September telephone conversation occurred between plaintiff and Plaskey, during which plaintiff advised Plaskey that Technical Aid Corporation (Tech/Aid) still appeared interested in purchasing Nexco. Plaskey indicated that he had little knowledge of Tech/Aid, asked plaintiff some questions concerning Tech/Aid's business operations. After plaintiff responded to these questions and inquired of Plaskey whether he harbored reservations about dealing with Tech/Aid, Plaskey replied, "No, not at all."

Nexco and Tech/Aid eventually reached an agreement that Tech/Aid would purchase Nexco. Plaintiff recalled that on December 13, 1993 he telephoned Plaskey with this information. Plaintiff averred that Plaskey congratulated him and "informed me that he would commence the process of issuing a new technical blanket purchase order to Tech/Aid because he had a lot of work to do." On December 15, 1993, plaintiff met with Plaskey and provided him a letter describing Nexco's purchase by Tech/Aid "and confirming our understanding of the issuance of a new blanket purchase order to Tech/Aid," which Plaskey read and replied, "Done." Plaintiff averred "[t]hat I entered into this agreement [to sell Nexco for $650,000] with the understanding that CPC would issue a new technical blanket purchase order to Tech/Aid," and "[t]hat if not for this promise by Mr. Plaskey, I would not have even begun the process of selling Nexco to Tech/Aid."

The sale closed on December 20, 1993, becoming effective on December 26, 1993. On December 22, 1993, however, Plaskey spoke with plaintiff and for the first time indicated a distaste for Tech/Aid, and further stated that Tech/Aid "would never receive a technical blanket purchase order." On learning of Plaskey's comments Tech/Aid refused to complete the sale according to its original terms, ultimately purchasing Nexco for $350,000.

Viewing this evidence in the light most favorable to plaintiff reveals that Plaskey specifically and affirmatively stated that to facilitate Nexco's sale he would provide Nexco's successor with a blanket purchase order, further explicitly reassuring plaintiff that he had no objection to dealing with potential

purchaser Tech/Aid. Some evidence showed that plaintiff and Plaskey had a long business relationship and that plaintiff had previously accepted and relied on Plaskey's word. Plaintiff subsequently relied on Plaskey's representations regarding a new blanket purchase order in negotiating the terms of Nexco's sale, and Plaskey had knowledge of plaintiff's reliance. Plaintiff's reliance cost him $300,000. I believe that from this evidence a jury was entitled to make findings with respect to the elements of promissory estoppel. *Curry*, *supra* at 90.

The majority, without expressly considering all the facts and circumstances surrounding the various statements allegedly made by Plaskey, concludes that "plaintiff's reliance upon any promise that defendant may have made was not reasonable as a matter of law, in light of the express written contract that exists between the litigants." The contract between plaintiff and defendant precluded assignment and modification of the purchase order except "by a purchased [sic] order amendment/alteration issued by the Buyer." These contractual provisions do not, however, contravene or otherwise implicate Plaskey's alleged promises to plaintiff that "GM would cooperate in the transfer of Nexco business to Tech/Aid by *canceling* the Nexco technical blanket order, as of the date indicated by Nexco, and *issuing a new technical blanket purchase order to the successor firm*." [Emphasis added.] Because no legal bar precluded the issuance of a new technical blanket purchase order to Nexco's successor, I cannot conclude that plaintiff's reliance on Plaskey's alleged representations qualifies as unreasonable as a matter of law.

The promises made by Plaskey, whether specifically articulated or inferred, were made on several occasions and attended by circumstances under which it was entirely reasonable for plaintiff to rely on the promises. In reviewing the conduct and statements of Plaskey and drawing all reasonable inferences therefrom, I am satisfied that plaintiff has raised genuine issues of fact. I would conclude therefore that the trial court erroneously granted defendant summary disposition of plaintiff's promissory estoppel claim pursuant to MCR 2.116(C)(10).

/s/ Hilda R. Gage