S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RUTH L. MILLER,

Plaintiff-Appellee,

v

KEYSTONE FINANCIAL, INC., d/b/a KEYSTONE FINANCIAL GROUP, INC., and ED WOOD,

Defendants-Appellants,

and

FIRST FINANCIAL ACCEPTANCE COMPANY, INC.,

Defendant.

UNPUBLISHED
March 3, 2000

No. 209870
Oakland Circuit Court
LC No. 97-538475 CK

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition in favor of plaintiff. We affirm in part, reverse in part, and remand for further proceedings.

I

Defendants assert that the trial court erred in granting summary disposition of the breach of contract claim where factual issues were in dispute. We disagree. "A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. This Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law." *Hughes v PMG Building, Inc,* 227 Mich App 1,4; 574 NW2d 691 (1997).

Plaintiff's complaint alleged that she entered into a loan transaction with First Financial Acceptance Company ("First Financial"). In order to obtain the loan, plaintiff pledged security consisting of 8,167 shares of Comerica stock. First Financial allegedly transferred the assets to Keystone Financial, Inc. ("Keystone"). Plaintiff moved for summary disposition of her breach of contract claim contending that defendants failed to return her stock. In support of summary disposition, plaintiff relied, in principal, on the deposition testimony of defendant Wood, who stated that he believed that Keystone, was obligated to return plaintiff's stock to her.

A

Defendants direct this Court's attention to several allegedly disputed facts. For purposes of continuity, we address the issue of whether Keystone was obligated to return the pledged Comerica stock once plaintiff tendered payment of the loan. It is undisputed that Keystone received in a settlement agreement[1] with First Financial the rights to the promissory note executed by plaintiff in exchange for $200,000 from First Financial. What is of concern to this Court is whether Keystone also acquired the duties under the same note, specifically the duty to maintain and return the pledged stock upon satisfaction of the underlying debt.

At first glance, the settlement agreement appears to convey the assets of First Financial to Keystone. Such a conveyance is commonly referred to as an assignment of one party's rights (or benefit) in a contract to another party. However, due to the complex nature of the contract in question, a promissory note coupled with a security agreement encumbering shares of stock, we find that further inquiry is necessary. We turn to E. Allan Farnsworth for commentary on this question:

> [I]t is vital to distinguish the *assignment of rights* from the *delegation of performance of duties*. An obligee's transfer of a contract right is known as an *assignment* of the right. By an assignment, the obligee as *assignor* (B) transfers to an *assignee* (C) a right that the assignor has against the *obligor* (A). An obligor's empowering of another to perform the obligor's duty is known as a *delegation* of the performance of that duty. By a delegation, the obligor as *delegating party* (B) empowers a *delegate* (C) to perform a duty that the delegating party owes to an *obligee* (A). A party to a contract that both assigns rights and delegates performance to another person will be referred to as a *transferor* (B); the other person will be referred to as a *transferee* (C); and the transaction will be called a *transfer* of the contract. [Farnsworth, Contracts 2d, § 11.1 (citations omitted, emphasis in original).]

Therefore, this Court must determine whether the rights of the contract (collection of the $200,000 loan) were assigned to Keystone, or whether the entire contract, rights and duties included, was transferred to Keystone. If the latter is true, Keystone, by the terms of the security and pledge agreement, would be obligated to pay to plaintiff any dividends received and return the pledged stock certificates to plaintiff upon the repayment of the debt.[2]

We turn to the Restatement 2d of Contracts for guidance:

§ 328 Interpretation of Words of Assignment; Effect of Acceptance of Assignment

> (1) Unless the language or the circumstances indicate the contrary, as in an assignment for security, an assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract.
>
> (2) Unless the language or the circumstances indicate the contrary, the acceptance by an assignee of such an assignment operates as a promise to the assignor to perform the assignor's unperformed duties, and the obligor of the assigned rights is an intended beneficiary of the promise. [Restatement Contracts, 2d § 328.]

Looking at the settlement agreement, the promissory note and security agreement, coupled with the unambiguous language of Restatement Contracts, 2d §328, we are left with a firm conviction that Keystone not only became the assignee of First Financial's rights under the note, but also became the delegate of the remaining duties of First Financial to be performed. Specifically, the payment of dividends to plaintiff and the return of the pledged Comerica stock upon satisfaction of the debt. Thus, as described by Professor Farnsworth above, First Financial in effect transferred the promissory note and security agreement to Keystone.

B

Defendants claim the trial court did not properly consider that it would be financially impossible for Keystone to obtain the pledged shares of Comerica stock on the open market. Such an attempt would result in an unreasonable hardship for Keystone to endure. In response, plaintiff asserts that impossibility cannot be established because defendants' inability to raise capital to re-purchase plaintiff's stock shares was the basis of the breach of contract.

In *Rogers, Plaza, Inc v SS Kresge Co*, 32 Mich App 724, 743; 189 NW2d 346 (1971), this Court stated:

> Impossibility of performance may be classified as original impossibility or supervening impossibility. The former is impossibility of performance existing when the contract was entered into, so that the contract was to do something which from the outset was impossible; whereas supervening impossibility is that which develops some time after the inception of the contract.

Under Michigan law, "[e]conomic unprofitableness is not the equivalent to impossibility of performance. Subsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve [a party of its contractual obligations.]" *Chase v Clinton County*, 241 Mich 478, 484; 217 NW 565 (1928). See also, *Milligan v Haggerty*, 296 Mich 62, 71; 295 NW 560 (1941) and *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 408; 29 NW2d 832 (1947). Further, the comments to §261 of the Restatement 2d of Contracts[3] lends support. Comment b to §261 states in part, "The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this section." Comment d states in part, "A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability . . ." Comment e offers, "This Section recognized that if the performance remains practicable and it is merely beyond the party's capacity to render it, he is ordinarily not discharged . . . Instead, the rationale is that a party generally assumes the risk of his own inability to perform his duty."

In the instant case, Keystone had a duty, through the transfer of the promissory note from First Financial, to hold the 8,167 shares of Comerica stock as collateral for plaintiff's $200,000 loan. Once plaintiff's debt was satisfied, Keystone was obligated to return the shares to plaintiff. It appears Keystone did not have possession of the Comerica shares.[4] This is evidenced by Keystone's attempt to purchase 2,950 shares of Comerica stock on margin. Keystone was not able to generate the needed funds for the purchase and the stock was never acquired by Keystone. No further attempt was made to acquire the 8,167 shares. We find that Keystone's action in attempting to replace the 8,167 shares was not impossible so as to render the contract unenforceable. These facts dictate a case of financial inadequacy which we decline to transform into a defense of contractual impossibility.

C

Next, defendants claim the trial court erred in granting plaintiff's motion for summary disposition as to her claim of fraud. We agree. In *Hord v Environmental Research Institute*, 228 Mich App 638, 642; 579 NW2d 133 (1998), this Court set forth the elements of a fraud claim:

> There are six essential elements of a fraud claim: (1) that the defendant made a material representation; (2) that it was false; (3) that when the defendant made it the defendant knew that it was false, or that the defendant made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that the defendant made it with the intention that it should be acted on by the plaintiff; (5) that the plaintiff acted in reliance on it; and (6) that the plaintiff thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [Citations omitted.]

Review of defendant Wood's deposition reveals that representations were made to him that First Financial would transfer plaintiff's Comerica stock to Keystone. When it appeared that First Financial would not transfer plaintiff's Comerica stock, he testified that he attempted to locate sufficient shares of stock to return to plaintiff. Accordingly, a question of fact exists regarding whether any representation was false at the time it was made. Additionally, plaintiff's knowledge is critical because defendant Wood testified that plaintiff contacted him when she learned that defendant Keystone Financial Group, Inc. was being placed in receivership. There can be no fraud where a person has the means to determine that a representation is not true. *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992).

D

Additionally, questions of fact precluded summary disposition of the conversion claim. "A conversion is any distinct act of dominion wrongfully exerted over another's personal property." *Attorney General v Hermes*, 127 Mich App 777, 786; 339 NW2d 545 (1983). "A person may be guilty of a conversion by actively aiding or abetting or conniving with another in such an act. Indeed, one may be liable for assisting another in a conversion through acting innocently." *Trail Clinic v Bloch*, 114 Mich App 700, 706; 319 NW2d 638 (1982).

In the present case, defendant Wood's testimony indicated that defendants never obtained possession of plaintiff's shares of stock in order to wrongfully exercise dominion over the stock. Additionally, there was no testimony to indicate that defendant Wood actively aided and abetted a conversion by First Financial. Plaintiff contends that defendants aided and abetted First Financial's conversion by paying dividends from their treasury shares. However, the security and pledge agreement provided that dividends had to be paid to plaintiff. Defendant Wood testified that First Financial represented that it held plaintiff's stock. Therefore, dividends should have been paid. If dividends were not paid, a breach of the security and pledge agreement occurred. Accordingly, the mere payment of dividends fails to demonstrate the intent required to prove aiding and abetting by defendants of a conversion on the part of First Financial. Since a finding by the trial court that defendants converted plaintiff's shares of stock was premature, an award of treble damages pursuant to MCL 600.2919A; MSA 27A.2919(1) was erroneous.

II

Finally, defendants assert the trial court erred in imposing personal liability on defendant Wood. Since defendants have failed to cite any authority in support of this claim on appeal, this Court deems the issue to be effectively abandoned and will refrain from entertaining a review of the claim. *Schellenberg v Rochester Michigan Lodge No 2225*, 228 Mich App 20, 49; 577 NW2d 163 (1998).

III

In conclusion, this Court finds the trial court did not err in determining that Keystone was liable for plaintiff's breach of contract claim. However, we find factual discrepancies to exist pertaining to plaintiff's claims of fraud and conversion. As such the trial court erred in granting plaintiff's motion for summary disposition for those claims. Further, since the trial court erred in granting summary disposition as to plaintiff's claim of conversion, the award for treble damages also falls. Finally, since defendants have failed to legally support their claim on appeal that the trial court erred in finding defendant Wood to be personally liable for the breach of contract claim, we decline to address the issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kathleen Jansen

[1] The Settlement agreement, dated March 15, 1999, included several "assets" that were to be "transferred and/or assigned" by First Financial to Keystone. Of particular interest is paragraph 3(g) which states:

> Gordon & Ruth Miller promissory note (approximately $200,000), security agreement, and security.

[2] The security and pledge agreement, dated July 29, 1994, states in relevant part:

> 2. Dividends. During the term of this Agreement, all dividends received by Lender will be released to the record owner.
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> * * *
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> 6. Payment of Loan. Upon payment at or after maturity of all principal and interest of the loan, and loan fees, less amounts theretofore received and applied by Lender in reduction thereof, Lender shall transfer to Pledgor all of the pledged shares and all rights received by Lender as a result of its record ownership thereof.
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> * * *
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> 9. Binder Effect/Applicable Law. This agreement shall be binding upon the parties hereto and their respective heirs, successors and assigns. The terms and provisions hereto shall be governed and construed in accordance with the laws of the State of Michigan.

[3] Restatement Contracts, 2d § 261 states:

> Discharge of Supervening Impracticability
>
> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

[4] This Court is somewhat puzzled by Keystone's business practices. According to the settlement agreement, Keystone acquired the promissory note, security agreement and pledged security. What puzzles this Court is Keystone's lacking due diligence in perfecting its security interest. Pursuant to

MCL 440.9305; MSA 19.9305, perfection of the security interest in the pledged Comerica stock can take place by possession only. Without control over the stock, Keystone did not have a perfected security interest, and thus was the unsecured creditor of the promissory note.