

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES F. BARRETT, Trustee of the
CHARLES F. BARRETT TRUST, and
PINE GROVE CORPORATION,

UNPUBLISHED
January 18, 2002

Plaintiffs/Counter-
Defendants-Appellees,

v

MIPROCOM LIMITED PARTNERSHIP and
CASA MIPROEAST LIMITED PARTNERSHIP,

No. 224877
St. Clair Circuit Court
LC No. 97-003604-CH

Defendants/Counter-
Plaintiffs-Appellants.

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendants appeal as of right a judgment for plaintiffs granting foreclosure of a land contract. Defendants specifically appeal summary disposition for plaintiffs on defendants' counterclaim of fraud, denial of defendants' request to amend their countercomplaint, and denial of defendants' motion to dismiss after defendants paid the past-due payments into an account with the court. We affirm.

Defendants first argue that the circuit court erred in granting plaintiffs summary disposition based on the doctrine of laches and the failure to plead a misrepresentation of a past or existing fact. We disagree. This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

"The doctrine of laches applies where the passage of time combined with a change in condition make it inequitable to enforce a claim." *Jackson v Thompson-McCully Co*, 239 Mich App 482, 494; 608 NW2d 531 (2000). When considering the applicability of laches, a court must pay particular attention to the prejudice caused by the delay. *Kuhn v Secretary of State*, 228 Mich App 319, 334; 579 NW2d 101 (1998).

Between 1996 and 1997, plaintiffs brought three separate actions against defendants for failure to make payments on the land contract. Throughout these proceedings, defendants were aware that A&P had vacated the property and yet never raised the issue of fraud. Therefore, defendants failed to exercise due diligence. This delay prejudiced plaintiffs because they were

compelled to bring additional legal proceedings against defendants to enforce the land contract. Thus, the circuit court's finding of laches was proper.

Because the doctrine of laches was clearly applicable, we need not address defendants' second argument concerning summary disposition. *Kozmyna v Botsford Community Hosp*, 238 Mich App 694, 702; 607 NW2d 134 (1999). However, we note that a mere promise regarding future events is insufficient to establish fraud. *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998); *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994). Plaintiffs' alleged misrepresentation that A&P would remain in defendant's shopping center was a promise of a future event and therefore did not constitute fraud. Moreover, defendants failed to allege any conduct by plaintiffs that indicated an intent not to perform the contract. See *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 337-339; 247 NW2d 813 (1976). Nevertheless, the "bad-faith" exception is inapplicable in the present case because the allegedly promised performance was not within plaintiffs' control.

Defendants next argue that the circuit court erred when it denied their request to amend their countercomplaint. We disagree. A trial court's decision to deny leave to file an amended countercomplaint is reviewed for an abuse of discretion. *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000).

Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2); *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). A motion to amend should be granted unless one of the following reasons exist: (1) undue delay; (2) bad faith or dilatory purpose; (3) repeated attempts to amend; (4) undue prejudice; and (5) futility. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). A trial court should make specific findings regarding its reason for denial. *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997). If a trial court fails to make such findings, this Court must reverse unless the amendment would have been futile. *Dampier v Wayne Co*, 233 Mich App 714, 733-734; 592 NW2d 809 (1999).

In this case, the circuit court cited delay as the reason for its denial. However, delay alone is insufficient unless the delay was in bad faith or prejudiced the other party. *Weymers, supra* at 659. Nonetheless, we conclude that remand is unnecessary because the amendment was futile. See *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 783; 421 NW2d 289 (1988). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Id.* In the case at bar, defendants' motion for leave to file an amended complaint alleged that another tenant, who was located in the same shopping center but on property not subject to the land contract, was induced by plaintiffs to "backdate" his lease. However, the amendment failed to assert that defendants relied on the terms of that particular lease when deciding to accept the instant land contract.

Finally, defendants claim that the circuit court should have dismissed plaintiffs' foreclosure action, pursuant to MCL 600.3110, after defendants tendered all past-due principal and interest to the court. We disagree. Plaintiffs elected to accelerate the land contract when they brought the present action. *Sindlinger v Paul*, 428 Mich 161, 163; 404 NW2d 212 (1987). MCL 600.3110 is inapplicable because defendants did not make the payments until after

plaintiffs' election. *Sindlinger, supra* at 165-166; *Kent v Pipia*, 185 Mich App 599, 603; 462 NW2d 800 (1990); *Dumas v Helm*, 15 Mich App 148, 152; 166 NW2d 306 (1968).

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad