STATE OF MICHIGAN

COURT OF APPEALS

ESTATE PROPERTIES, INC. and
RONALD K. OLZMANN,

Plaintiff-Appellants,

v

ANN ARBOR COMMERCE BANK, B. ROSS COMPANY, and RALPH SWEITZER,

Defendant-Appellees.

UNPUBLISHED
July 22, 2003

No. 237294
Washtenaw Circuit Court
LC No. 00-638-CK

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of defendants' motion for summary disposition pursuant to MCR 2.116 (C)(7), MCR 2.116(C)(8) and MCR 2.116(C)(10). We affirm.

I. FACTS

Plaintiff Olzmann[1] (d/b/a Estate Properties, Inc.) owned and operated a mini-storage facility in White Lake Township. Plaintiff is an attorney experienced in real estate transactions. Plaintiff learned that another mini-storage facility, Master-Key Mini-Storage, owned by Joe Grammatico, was for sale. In January 1999, plaintiff contacted defendant Ralph Sweitzer (d/b/a Ross Company) and arranged a meeting between plaintiff, defendant and Grammatico to discuss the potential purchase of the storage facility. Plaintiff knew that Sweitzer was familiar with Grammatico and Sweitzer agreed to attend the meeting as a favor to plaintiff.

At the meeting, Sweitzer informed plaintiff that he had a relationship with defendant Ann Arbor Commerce Bank (hereinafter "the bank") and could assist plaintiff in obtaining financing. As a favor to plaintiff, Sweitzer agreed to type a letter of intent and to transmit some documents to the bank. Plaintiff planned to refinance his existing storage facility and use the funds to make a down payment on Grammatico's storage facility.

---

[1] Although Olzmann and Estate Properties are both listed as "plaintiffs," Olzmann is the sole actor in this dispute and the singular "plaintiff" will be used throughout this opinion.

Sweitzer then contacted Brian Picknell, the individual in charge of processing commercial loans at the bank. Sweitzer did not believe himself to be an agent of the bank. Picknell stated in his deposition that Sweitzer was not an agent of the bank, but merely a customer who received no compensation for any referrals he made to the bank. Picknell alone had the authority to determine whether the bank would grant plaintiff a loan.

Sweitzer then collected financial information from plaintiff, which Sweitzer provided to Picknell. Picknell then told plaintiff to provide Sweitzer with additional information including tax returns, information on his existing storage facility, rent rolls and the property description. Picknell and plaintiff continued to exchange information through Sweitzer. Some time during the beginning of February 1999, plaintiff and Picknell spoke directly and discussed financing in the amount of $200,000.00. Plaintiff acknowledged that most of the interactions between himself and Picknell were verbal and that he had no written instruments. Plaintiff never made a formal written loan application.

Sweitzer further assisted plaintiff by preparing a memorandum and letter of intent. Sweitzer then obtained signatures on the letter from plaintiff and Grammatico. The letter indicated that the closing date on the purchase of the mini-storage facility was within 45 days. The parties agreed that the 45 days expired on April 4, 1999. The letter also stated that a formal purchase agreement or land contract purchase agreement including more details of the arrangement would be executed at a later date. For unknown reasons, Sweitzer did not provide this letter of intent to the bank, and instead "just threw it away."

Sweitzer and plaintiff discussed having an appraisal preformed on the property. In fact, the letter of intent signed by both parties included the contingency that "[t]he buyer must secure a favorable appraisal of a minimum of $1,000,000 (one Million Dollars) on the said Facility." Plaintiff then provided Sweitzer with the name of an appraiser whom he wished to use. On March 23, 1999, plaintiff sent a letter authorizing the bank to order an appraisal and agreeing to reimburse the bank. Despite the fact that the letter of intent was set to expire in less than two weeks, plaintiff did not indicate in his letter that he urgently needed the appraisal. Having never received the letter of intent from Sweizter, the bank had no way of knowing that plaintiff needed approval of his loan within less than two weeks. In his deposition, Picknell testified that the bank follows an informal commercial loan process that can take anywhere from one day to one year to complete. Customers are required to submit the necessary financial information so that the request may be processed. Picknell stated that in order to review plaintiff's loan request he needed a purchase agreement, an appraisal and an environmental report in order to proceed with the loan application. Plaintiff never provided the bank with any of those documents.

On April 5, 1999 (after the expiration of the letter of intent), plaintiff wrote a letter to Grammatico stating that the appraisal was underway and that he expected their agreement to be complete in a few weeks. Instead of agreeing to postpone their transaction, Grammatico decided to sell to a higher bidder. Plaintiff made no effort to notify the bank that the deal had fallen through and the bank went ahead with the appraisal on May 5, 1999.

Plaintiff then filed the present lawsuit. Count I alleged that defendants were negligent in failing to process plaintiff's loan application. Count II alleged a violation of the Michigan Consumers' Protection Act. Count III alleged that defendants committed tortious interference with an advantageous business relationship.

Defendants then each filed motions for summary disposition based on MCR 2.116 (C)(7) (barred by the statute of frauds), MCR 2.116 (C)(8) (failure to state a claim upon which relief may be granted), MCR 2.116(C)(10) (no genuine issue of material fact). The trial court granted defendants' motion for summary disposition.

In a ruling from the bench, the court applied the doctrine of the statute of frauds, and the case *Crown Technology Park v D & N Bank*, 242 Mich App 538; 619 NW2d 66 (2000) and concluded that because there was no writing signed by defendant bank the statue of frauds bars any action for breach of contract based on the oral agreement between defendant and plaintiff. The court went on to state that plaintiff's claims based on theories of negligence and intentional tort were based on the enforcement of the underlying alleged oral promise. The court determined that the ruling in *Crown Technology Park* barred such claims. It went on to note that even if the negligence or intentional tort claims were considered to be outside of the statute of frauds, Michigan case law does not recognize a common law duty on the part of the bank to exercise reasonable care in determining plaintiff's eligibility for a loan. Nor can plaintiff's claim of intentional interference succeed because the element of malice can only be met by intentional doing of a wrongful act, not misfeasance as alleged in the present case. Additionally, the court noted that the Michigan Consumers' Protection Act had no application to this case because it involved a commercial transaction.

II. STANDARDS OF REVIEW

Motions for summary disposition are reviewed de novo on appeal. *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996). When reviewing a motion for summary disposition under MCR 2.116(C)(7), the court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery. *Id.* MCR 2.116(C)(8) provides that summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

On motions for summary disposition brought under MCR 2.116(C)(7) and MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, and other documentary evidence to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek, supra; Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 735-736; 613 NW2d 383 (2000). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

III. ANALYSIS

A. Statute of Frauds and Defendant Ann Arbor Commerce Bank

Plaintiff argues that the trial court erred when it determined that the statute of frauds barred plaintiff's complaint with regard to the bank's negligence. We disagree.

Plaintiff stated repeatedly in his deposition that he did not have any written agreement with the bank to process his loan application. MCL 566.132 states:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.
>
> (3) As used in subsection (2), "financial institution" means a state or national chartered bank, a state or federal chartered savings bank or savings and loan association, a state or federal chartered credit union, a person licensed or registered under the mortgage brokers, lenders, and servicers licensing act, Act No. 173 of the Public Acts of 1987, being sections 445.1651 to 445.1683 of the Michigan Compiled Laws, or Act No. 125 of the Public Acts of 1981, being sections 493.51 to 493.81 of the Michigan Compiled Laws, or an affiliate or subsidiary thereof.

Plaintiff argues that the statute of frauds does not apply here because his complaint did not seek to enforce the promise of extending the loan; instead, he claims the bank was negligent in processing the loan application. This Court addressed a situation where a plaintiff asserted that a promissory estoppel claim fell outside the statute of frauds. In *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 549-550; 619 NW2d 66 (2000), it stated:

> We must determine and give effect to the Legislature's intent when answering the essential question presented here--whether MCL § 566.132(2) bars enforcement of the oral promise or commitment at issue in this case. To do so, we first review the language of the statute itself. *Kiesel Intercounty Drain Drainage Dist v Dep't of Natural Resources*, 227 Mich App 327, 334; 575 NW2d 791 (1998). If the statute is unambiguous on its face, we simply enforce the statute as written. *Id.*
>
> MCL 566.132(2) expressly states that "[a]n action *shall not be brought against a financial institution* to enforce [a promise or commitment to waive a provision of a loan] unless the promise or commitment is in writing and signed with an authorized signature by the financial institution" (emphasis supplied). This language is unambiguous. **It plainly states that a party is precluded from bringing a claim--no matter its label-- against a financial institution to**

> **enforce the terms of an oral promise** to waive a loan provision [emphasis added].
>
> Crown Technology's argument that MCL § 566.132(2) does not eliminate promissory estoppel as a cause of action for an unfulfilled oral promise to waive a loan term is unpersuasive. The statute of frauds specifically bars "an action." By not specifying what sort of "action" MCL § 566.132(2) prohibits, we read this as an unqualified and broad ban. We also note that the subsections of MCL § 566.132(2) use generic and encompassing terms to describe the types of promises or commitments that the statute of frauds now protects absolutely. This is consistent with interpreting MCL § 566.132(2) to preclude *all* actions for the enumerated promises and commitments, including actions for promissory estoppel.

Similarly, here, plaintiff attempted to bring "an action" against a "financial institution" to enforce an oral agreement that constituted a "financial accommodation." Just as the *Crown Technology* Court found that MCL § 566.132(2) prohibits a promissory estoppel cause of action, we find that it prohibits this negligence action.

Plaintiff argues that this is a case of "separate negligence", i.e. negligence unrelated to the enforcement of an oral promise. The *Crown Technology* Court discussed in dicta, that there may be occasions when separate negligent oral assertions may sustain an action where they are unrelated to any other financial accommodation. It stated:

> The parties also dispute whether MCL § 566.132(2) bars Crown Technology's negligence claim against D&N Bank. MCL § 566.132(2) does not automatically bar a negligence claim because it only addresses enforcing certain types of unwritten promises. If a borrower has a separate claim for negligence that does not rely on enforcing the terms of an alleged oral promise, then MCL § 566.132(2) is not a bar to adjudicating the claim on its merits.

The facts of this case present a situation where the claim of negligence on behalf of the bank relies on enforcing the terms of an alleged oral promise. The bank allegedly led plaintiff to believe that it would process his loan application. Plaintiff asserts that the bank was negligent in failing to do so. Thus, this is a situation where the claim of negligence is barred by the statute of frauds. We find that the trial court judge did not err in finding that the statute of frauds barred plaintiff's claims.

B. Statute of Frauds and Defendant Sweitzer and B. Ross Company

Plaintiff argues that the trial court erred when it determined that the statute of frauds barred plaintiff's complaint as applied to Sweitzer who was an agent of the bank and an agent of plaintiff's. We disagree.

Plaintiff and Sweitzer had no written agreement that required Sweitzer to perform any tasks in relation to the loan application. Plaintiff acknowledged in his deposition that he and Sweitzer did not agree that Sweitzer would obtain closing on the financing. Plaintiff argues that Sweitzer was an agent of the bank, and as such was acting with the authority to act on the bank's

behalf. Plaintiff acknowledges that Sweitzer has no personal liability for acting on behalf of a disclosed principal. However, plaintiff asserts that Sweitzer exceeded the scope of his agency authority when he assured plaintiff that the loan would be processed within 45 days and when he threw away the letter of intent. An agent acting outside the scope of authority conferred upon him by his disclosed principal renders himself personally liable. *Brusslen v Larsen*, 6 Mich App 680; 150 NW2d 525 (1967).

> In determining whether a common law agency relationship exists, a court must consider the relations of the parties as they exist under their agreements and acts. "Agency" includes every relationship in which one person acts for or represents another by his authority. An agent is a business representative, whose function is to obtain, modify, affect, accept or terminate contractual obligations between his principal and a third party. The principal retains the right to control the conduct of the agent regarding the matters entrusted to him. *St Clair Intermediate School District v Intermediate Education Association/Michigan Education Association*, 458 Mich 540; 581 NW2d 707 (1998)

Plaintiff's argument fails because there is no evidence that Sweitzer was an agent of the bank. In their depositions, both Sweitzer and Picknell stated that Sweitzer was not an agent of the bank, merely a customer. Agency cannot be presumed from conduct or declarations of an alleged agent, but must be established by tracing its source to some word or action of the supposed principal. 3 Michigan Pleading and Practice, 2d, § 36.79, pp 592. Plaintiff presents no evidence that the bank ever established that such a relationship existed between itself and Sweitzer.[2]

Plaintiff next asserts that a genuine issue of material fact exists as to whether Sweitzer was a gratuitous agent of plaintiff or his corporation. The record does not support this assertion. Plaintiff testified in his deposition that Sweitzer was not his agent. Further, there is nothing on the record to indicate that Sweitzer was an agent for plaintiff's corporation.

Plaintiff's claim of negligence against Sweitzer is not supported by the record. To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Here plaintiff has not shown that Sweitzer owed him a duty to obtain financing. In *Nelson v Northwestern Savings and Loan Association*, 146 Mich App 505; 381 NW2d 757, this Court stated:

> As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar, the utmost shown against the defendant is that there was

[2] We note that the trial court based its grant of summary disposition with regard to claims against Sweitzer on the premise that Sweitzer was an apparent agent of the bank. While we disagree with this conclusion, we nonetheless agree that summary disposition was proper. A trial court's ruling may be upheld on appeal where it reaches the right result, albeit for the wrong reason. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

> unreasonable delay on its part in performing an executory contract. As we have seen, it is not liable by reason of the relation of lessor and lessee, but its liability, if any, must rest solely upon a breach of this contract.' " quoting *Hart, supra*,
>
> The Supreme Court in *Hart* indicated the distinction that must exist between a claim for breach of contract and a claim for negligence as follows: "Or as Prosser puts it (Handbook of the Law of Torts [1st ed], § 33, p. 205) 'if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not.' *Valentine v General American Credit, Inc.*, 420 Mich 256, 259; 362 NW2d 628 (1984); Prosser & Keeton, Torts (5th ed), § 92, pp. 655-656.

C. Tortious Interference

Plaintiff argues that the trial court erred when it determined that defendants did not engage in tortuous interference with an advantageous business relationship. We disagree.

In order to sustain a claim for tortious interference with an advantageous business relationship, plaintiff must demonstrate that defendants intentionally did an act that was per se wrongful for the purpose of invading the business relationship between plaintiff and Grammatico. In *Feldman v Green* 138 Mich App 360, 369-370, 360 NW2d 881 (1984), this Court stated:

> We hold, consistently with prior rulings by the Supreme Court of this state, that one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship. Under the latter instance, plaintiff necessarily must demonstrate, with specificity, affirmative acts by the interferor which corroborate the unlawful purpose of the interference.

The *Feldman* Court defined “malice” as:

> Malice in the legal sense is the intentional doing of a wrongful act without justification or excuse. And a 'wrongful act' is any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right. This is the English definition which has long prevailed in this state. [citations omitted]

In *Feldman*, the plaintiff brought a claim of tortious interference with an advantageous business relationship between plaintiff and a seller of real property. This Court affirmed the trial court’s grant of summary disposition on the ground that plaintiff did not allege that defendant had intentionally performed a per se wrongful act. This Court stated:

> The paucity of plaintiff's allegations in the present case is readily apparent when set against the foregoing precedent. Plaintiff admits that the sole basis for bringing the complaint rested in the fact that defendants had outbid and outmaneuvered him in purchasing the nursing homes. The law in Michigan has

> not been expanded to adjudge liability on this basis. This fact was made clear in *Meyering v Russell*, 53 Mich App 695, 220 NW2d 121 (1974), *rev'd*, 393 Mich 770, 224 NW2d 280 (1974), *appeal after remand* 85 Mich App 547, 272 NW2d 131 (1978). In *Meyering*, the Supreme Court summarily reversed a ruling by this Court which affirmed a judgment against a defendant interferor who purchased real property which the plaintiff had previously contracted to buy. The evidence in support of the judgment revealed that defendant obtained the property because the seller chose to accept the defendant's better offer of price and terms. *Id*. at 377.

In the present case, plaintiff failed to present any evidence that either the bank or Sweitzer took any action to interfere with plaintiff's relationship with Grammatico. Plaintiff did not establish that any of the alleged omissions on the part of defendants were intentional and done with the intent to interfere with plaintiff's relationship with Grammatico. Plaintiff cannot establish that defendants committed a per se wrongful act in failing to process the loan application.

Grammatico severed his relationship with plaintiff because he accepted another offer for more money. There is no evidence that defendants somehow induced Grammatico to sell to a different buyer and plaintiff's claim is untenable. The trial court properly granted defendants' motion for summary disposition on tortuous interference with an advantageous business relationship.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Bill Schuette