

STATE OF MICHIGAN
COURT OF APPEALS

PORTABLE SPAS PLUS, INC.,

Plaintiff-Appellant,

v

INTEGRATED SOFTWARE SYSTEMS, INC.,

Defendant-Appellee.

UNPUBLISHED

December 18, 2003

No. 242300

Oakland Circuit Court

LC No. 99-016963-CK

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right an order of dismissal. Plaintiff contends the trial court erred (1) in refusing to consider plaintiff's claim for breach of an implied warranty of fitness for a particular purpose, (2) by granting summary disposition in favor of defendant on plaintiff's breach of contract claim, and (3) by refusing plaintiff permission to amend its complaint to include a specific count of breach implied warranty of fitness for a particular purpose. We agree.

MCL 440.2315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

"Thus, to establish a valid warranty of fitness for a particular purpose, 'the seller must know, at the time of sale, the particular purpose for which the goods are required and also that the buyer is relying on the seller to select or furnish suitable goods.'" *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 293; 616 NW2d 175 (2000), quoting *Ambassador Steel Co v Ewald Steel Co*, 33 Mich App 495, 501; 190 NW2d 275 (1971).

In this case, plaintiff has consistently averred that it was not sophisticated about computer systems and relied upon defendant's expertise to select the appropriate software and equipment to meet its business needs. Plaintiff provided defendant with a written list that explained its business functions, needs and what it wanted to accomplish with new software. Plaintiff stated it

provided defendant with a “blank check” to select the appropriate hardware and software for its business and that it purchased all programs recommended by defendant.

In *Leavitt, supra*, the plaintiff sought to purchase a motor home sufficient to endure excursions in the mountains. The plaintiff specifically informed the motor coach dealer of his travel intentions, the problems he had encountered in the past with vehicles, and admitted his own lack of knowledge regarding diesel engines. The *Leavitt* Court determined that “plaintiff’s testimony about having communicated his problems with brakes in the past while seeking defendant’s advice in the matter, along with having described the mountainous areas in which he wished to drive the coach, was sufficient to support a finding that plaintiff articulated to defendant his particular braking needs.” *Leavitt, supra*, 241 Mich App 294. Further, “plaintiff’s insistence that he relied mainly on defendant for the choice of engine, and for deciding against upgrading the brakes, is sufficient to support a finding that plaintiff relied on defendant’s expertise in selecting a coach that suited his needs.” *Id.*

The facts here are analogous to those in *Leavitt*. Plaintiff communicated to defendant that it was relying on defendant’s expertise to select an appropriate computer system to integrate its various business functions. In fact, before plaintiff contracted with defendant, it provided defendant a list of its business software needs, and defendant itself testified that the parties did discuss integration of the various software programs. As in *Leavitt*, “the evidence created genuine issues of material fact concerning whether defendant knew of plaintiff’s particular needs and whether defendant knew that plaintiff was relying on defendant’s expertise in making his selection.” *Id.*, 294-295.

MCR 2.111(B) requires a complaint to contain:

- (1) A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.

The “primary function of pleadings is to put the opposing party on notice of what he is called on to defend.” *Reinhardt v Bennett*, 45 Mich App 18, 24; 205 NW2d 847 (1973). MCR 2.111(B)

is designed to avoid two opposite, but equivalent, evils. At one extreme lies the straightjacket of ancient forms of action. Courts would summarily dismiss suits when plaintiffs could not fit the facts into these abstract conceptual packages. At the other extreme lies ambiguous and uninformative pleading. Leaving a defendant to guess upon what ground plaintiff believes recovery is justified violates basic notions of fair play and substantial justice. Extreme formalism and extreme ambiguity interfere equivalently with the ability of the judicial system to resolve a dispute on the merits. The former leads to dismissal of potentially meritorious claims while the latter undermines a defendant’s opportunity to present a defense. [*Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992) (footnote omitted).]

In general, allegations contained in a complaint must state the facts, without repetition, on which the party relies, and state the specific allegations necessary to reasonably inform the adverse party of the claimant's cause of action. Only claims of fraud or mistake must be pleaded with particularity. A new theory of recovery which supports previously pleaded factual claims may be asserted as within the scope of the pleadings. *Iron Co v Sundberg, Carlson & Assoc, Inc*, 222 Mich App 120, 124-125; 564 NW2d 78 (1997).

Here, defendant argued, and the court agreed, that plaintiff could not maintain a breach of implied warranty claim because it had not been specifically pled. But given the general guidelines applicable to pleading and the facts set forth in plaintiff's complaint, clearly defendant had sufficient notice of this claim. Plaintiff alleges in its complaint that "plaintiff gave defendant a two page list of specific items and operations that it required to be performed by the system in July of 1997," and further references an exhibit detailing those functions. The complaint specifically alleges, in relevant part:

The Defendant's agent Brenda (trainer) discovered during this time period that the system as sold and installed would not perform certain functions as required by the Plaintiffs [sic] and as contracted for.

Specifically, the system would not link the Plaintiffs [sic] cash register software with the software provided by the Defendant as represented and required by the Plaintiff in Exhibit A.

As the training continued it became apparent that the system would not perform specifically to wit:

The data that was currently in use by the Plaintiffs [sic] prior to purchasing the system provided by the Defendants [sic] could not be transferred to the new system and thus required manual key entry.

The system would not link to any financial data in use by the Plaintiffs [sic].

The system would not link to any inventory system used by the Plaintiffs [sic].

The system would not accept customer data from the files of the Plaintiff.

The system would not be functional until all of the above data was entered by the Plaintiffs [sic] manually which took nearly 5 months.

After all data was entered the system would not generate any reports.

The system would not accept pricing data from the Plaintiffs [sic] vendors.

The above actions constitute a material breach of the agreement of the parties for which the Plaintiffs [sic] have suffered damage in that the system is unusable for the purpose for which it was bought.

The issue pertaining to the pleadings in this case is factually similar to that in *Smith v Stolberg*, 231 Mich App 256; 586 NW2d 103 (1998). In *Smith*, the plaintiff asserted a negligence claim, but it was evident the allegations essentially set forth a claim for battery. The *Smith* court dismissed the plaintiff's negligence claim, and the plaintiff appealed arguing "the trial court erred in denying his motion for reconsideration with respect to the court's interpretation of the meaning and scope of the pleadings on his assault and battery theory against defendant . . . pursuant to MCR 2.111(B)(1). *Smith, supra* 231 Mich App 259. This Court agreed with the plaintiff, indicating in relevant part:

Defendants argue that the facts did not reasonably inform them of the cause of action for assault and battery so that they could defend on those grounds because the facts were not specifically referenced under separate and distinct counts. The court rules indicate otherwise. The only requirements for stating a cause of action is a presentation of factual allegations that would reasonably inform defendants of the 'nature of the claims' against which defendants are called on to defend. MCR 2.111(B)(1). Plaintiff complied. Defendants' argument that the lack of a title heading alone provides a basis for denying a claim is an 'evil' that the Michigan Supreme Court sought to avoid: extreme formalism leading to the dismissal of a 'potentially meritorious claim.' [*Smith, supra*, 231 Mich App 260-261, citing and quoting *Dacon, supra*, 441 Mich 329.]

As we discussed above plaintiff's pleadings are sufficient to have put defendant on notice regarding its claim of breach of implied warranty of fitness for a particular purpose. Moreover, in response to the list plaintiff provided, defendant gave plaintiff a presentation that represented the "ability and capacity of the system" it recommended to perform the functions plaintiff required. Defendant advised plaintiff as to which "modules" it needed to purchase for the system. Finally, defendant revised the proposal to include other items to facilitate linkage between plaintiff's two store locations. Specifically, pursuant to the complaint, "this proposal was accepted by the Plaintiffs [sic] based on the representations of the Defendant." As such, defendant knew plaintiff was relying on defendant's expertise to select an appropriate computer system to meet its specified business needs. Plaintiff has consistently asserted the programs defendant provided were not suitable for its intended purpose. During discovery, the issue of integration of the software system was the predominant area of inquiry. Defendant addressed this issue, albeit in a different context, when it defended against plaintiff's breach of contract claim by arguing integration was not a goal or term of the parties' contracts. Further, defendant addressed this issue in the fraud claim that survived summary disposition. The allegations of fraud specifically concerned plaintiff's claim that defendant misrepresented the ability of the software sold to integrate plaintiff's current software programs in contradiction to plaintiff's

express reason for entering into the contracts. As such, the court should have considered plaintiff's claim of breach of implied warranty of fitness for a particular purpose.

Plaintiff also contends the court erred in granting defendant summary disposition, pursuant to MCR 2.116(C)(10), on plaintiff's breach of contract claim. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The essential elements of a contract are (a) parties competent to contract, (b) a proper subject matter, (c) legal consideration, (d) mutuality of agreement, and (e) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In addition, to form a valid contract, the parties must have a "meeting of the minds" regarding all essential terms of their agreement. *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). The parties do not dispute the existence of a contractual relationship or that plaintiff received the contracted for hardware and software. Rather, the dispute centers on different interpretations regarding defendant's obligation to plaintiff to install and provide a functioning computer system for plaintiff's business. Defendant contends the hardware and software provided is capable of performing all of the functions required by plaintiff. But, plaintiff asserts the intent of the contracts was to provide a system that would integrate the existing software without the necessity of manual input of historical data. It did not wish to simply replace its existing software and equipment with another system that would perform the same functions.

Plaintiff states that although before contracting with defendant, it had functional software to run and maintain its business, it had recently purchased some new computer equipment. So its goal and objective in hiring defendant was to improve and integrate sharing of data and management information within its business. Plaintiff wanted to enter data one time into its computer system and have that information available for all aspects of its business, including but not limited to inventory, sales, accounting, customer service, etc. Plaintiff relies upon language in the parties' contracts that defendant's "responsibility extends beyond supplying hardware and software." In the contract language itself, defendant promised to provide "system design and information processing solutions." Further, the contract indicated, "based on the Functional Areas discussed, the following Navision Financials modules and granules are recommended." Plaintiff's interpretation of these statements was that they memorialized the understanding reached before entering into the contracts, that plaintiff's predominant goal was to integrate the various business functions of plaintiff's existing computer system. Plaintiff points out that the software contract provides that "to ensure the smooth integration of Navision Accounting Software into your operations, a trained professional from Integrated Software Systems, Inc. will come to your office and assist your staff in the implementation of Navision." Plaintiff interprets this contract language as an acknowledgment of the intent to integrate the new software with the old system.

Defendant counters that it only contracted with plaintiff to provide new hardware and software that would allow it to perform its various business functions. Defendant asserts that although the parties discussed integration issues, defendant did not understand integration of the systems to be a priority of plaintiff, and those services were not contained in the contracts. Defendant further asserts the contracts are not ambiguous, as they do not contain specific provisions pertaining to defendant's obligation to integrate plaintiff's various business systems,

old and new. As such, defendant contends it has fully performed under the contracts by providing the hardware and software for which plaintiff contracted.

The primary rule in the interpretation of contracts is to determine the intention of the parties. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). “In the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are not ambiguous. A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. In an instance of contractual ambiguity, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate.” *Id.*, (citations omitted).

The situation presented in *D'Avanzo* is analogous. In *D'Avanzo*, the parties contracted for an employment severance package. The defendant agreed to pay the plaintiff his regular salary and benefits for a period of five months. The defendant paid the insurance premiums for the plaintiff. During the period of coverage, the plaintiff made a claim for disability benefits but was informed that although the premiums had been paid, he was not covered as of the date of his employment termination. The defendant contended it had complied with the contract terms because it paid the premiums on the plaintiff's behalf. The plaintiff claimed the contractual agreement included not just the payment of premiums but the assurance that the benefits would be available. The Court in *D'Avanzo* noted that while the trial court “adopted plaintiff's interpretation of the disputed language . . . both parties have set forth reasonable interpretations of the same language. As such, we conclude that the disputed interpretations presented render the contract terms at issue ambiguous. Because this ambiguity creates a question of fact . . . the meaning of the disputed language cannot be construed as a matter of law.” *Id.*, 319-320. While defendant in this case may have technically performed its contractual obligations by providing the hardware and software, a question of fact remains regarding whether the products performed in conformance with the intent of the parties. As both interpretations of the contracts are reasonable, further factual development is necessary to ascertain the intent of the parties.

Finally, plaintiff argues the trial court erred in refusing plaintiff permission to amend its complaint to include a specific count for implied warranty of fitness for a particular purpose. On appeal, a trial court's decision regarding leave to amend will not be reversed unless it constituted an abuse of discretion that resulted in injustice. *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 598; 669 NW2d 304 (2003). A party may amend its pleadings with leave of the court but leave should be freely given when justice so requires. *Id.*; MCR 2.118(A)(2); see also MCL 600.2301. A motion to amend should be denied only for particularized reasons such as “[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment [and 5] futility.” *Amerisure Ins Co, supra*, 257 Mich App 598, quoting *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). While under certain circumstances delay may cause prejudice justifying a denial of leave to amend, mere delay alone is generally an insufficient reason to deny leave. *Amerisure Ins Co, supra*, 257 Mich App 599.

In this instance, the court failed to state with particularity the reasons for its denial of plaintiff's request to amend its complaint. The court referenced the reasons defendant asserted in objecting to an amendment of the complaint, but it did not delineate the court's reasoning. It merely stated:

I previously had granted summary disposition as to the breach of contract, and I denied summary disposition as to fraud regarding representations about the new software integrating with the old software. And Defendant has responded to your motion by asserting that this should be denied, because further discovery would be required, as this claim was not pled before, and the allegations cannot be supported by the record of the facts in this case. These are two motions that are on a 1999 case. I'm going to have to deny both of your requests."

It appears that the court's decision was based primarily on the age of the case as the court provided no explanation for denying plaintiff's motion. Defendant objected to amendment of the complaint suggesting it would prejudice defendant because adding the claim would require additional discovery. But defendant did not specify what discovery would be required. It is difficult to understand how defendant would be prejudiced as plaintiff's claim is based on the same facts as those pursued throughout the litigation within plaintiff's fraud and misrepresentation claim.

Prejudice arises when an amendment would prevent a defendant from securing a fair trial. The prejudice must come from the fact that the new allegations are raised so late in the proceedings that it would be unfair to allow them. Prejudice does not stem from the possibility that a new claim could result in defendant's losing on the merits. *Weymers, supra*, 454 Mich 659. Arguably, plaintiff is not asserting a new claim. Throughout the proceedings the parties have disputed whether integration of the software was a contractual obligation. A "trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Id.*, 659-660. Based on plaintiff's original pleadings and the discovery conducted, it is apparent defendant had notice of this claim or theory throughout litigation. Defendant has consistently asserted as a defense that (a) any breach of implied warranty of fitness was disclaimed by the contractual language pertaining to plaintiff's acceptance of the goods as suitable and (b) that the software provided by defendant was suitable for the purpose intended as it would perform all functions plaintiff's business required and is capable of integration. Hence, plaintiff's elaboration of this claim is not a surprise to defendant and it would not be prejudiced by an amendment to the complaint.

Finally, defendant asserts plaintiff's amendment of the complaint would be futile. An amendment is futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Given the court's denial of defendant's motion for summary disposition on plaintiff's fraud claim, which is based on the same factual allegations as plaintiff's breach of implied warranty theory, amendment of the complaint is not futile. So, plaintiff should have been permitted the opportunity to amend its complaint.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter