

STATE OF MICHIGAN
COURT OF APPEALS

BUSCH DRIVE, LLC,
Plaintiff-Appellee,

UNPUBLISHED
February 6, 2007

v

BLOUW CONSTRUCTION COMPANY, INC.,
Defendant-Appellant.

No. 272049
Kent Circuit Court
LC No. 05-011266-CH

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

In this breach of contract and specific performance on an option contract case, defendant appeals as of right the trial court's denial of its motion to amend its pleadings to include a counterclaim for recoupment of special assessment taxes it paid on the subject property before plaintiff exercised its option to purchase. Following the denial, the trial court granted plaintiff's motion for summary disposition and ordered defendant to perform under the option agreement. Defendant now appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On May 17, 1995, defendant entered in to a real estate contract with plaintiff's assignor. As a part of this larger contract, the parties executed an option agreement that allowed plaintiff's assignor or any of its assignees the option of purchasing real estate belonging to defendant for \$100,000. The agreement specifically stated that when and if the option were executed, defendant would be responsible for paying "[a]ny special assessments which have been levied against the premises on the date of closing."

In 1996, the City of Grandville improved the roadway adjacent to the property and levied special assessment taxes against the property. On May 31, 2005, plaintiff and its assignor executed an assignment of real estate option contract. Plaintiff attempted to exercise its option to purchase the property from defendant. Defendant refused to perform.

Plaintiff filed the instant suit for breach of contract and specific performance of the option agreement. Defendant answered the complaint and set forth its affirmative defenses. Later, defendant filed a motion for leave to amend its pleadings to add a counterclaim against plaintiff for unjust enrichment based upon the special assessment taxes. The trial court gave two reasons for refusing to grant defendant's motion to add a counterclaim: first, because defendant

did not seek leave to amend in time to comply with the court's scheduling order; and second, because the counterclaim would not be "viable."

On appeal, defendant argues that the trial court clearly abused its discretion in denying its motion for leave to amend its pleadings to add the counterclaim against plaintiff.

This Court reviews a denial of a motion for leave to amend a pleading for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Motions to amend should be denied only for specific 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...." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); see also MCR 2.118(A)(2).

Here, defendant failed in showing good cause for the delayed amendment as required by the scheduling order. Further, defendant's counterclaim for unjust enrichment was futile because the option agreement governed the terms of the sale. "Unjust enrichment" is defined as "[t]he retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected." *Barber v SMH (US) Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). "A contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties." *HJ Tucker and Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999). When the elements of unjust enrichment have been shown, "the law operates to imply a contract in order to prevent unjust enrichment." *Barber, supra* at 375. Additionally, under Michigan law, "a contract will be implied only if there is no express contract covering the same subject matter." *Id.*

The option agreement expressly requires a payment of \$100,000. The price was not dependent on an increase or decrease in the property's value or on an increase or decrease in municipal tax assessments. In fact, the contract specifically stated that when and if the option were executed, defendant would be responsible for paying "[a]ny special assessments which have been levied against the premises on the date of closing." Thus, this case involves an express contract that includes terms specifically covering special assessment taxes. Therefore, the unjust enrichment claim would have been futile, and the trial court did not abuse its discretion in denying defendant's motion to amend.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio