

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GREENVILLE MANUFACTURING, L.L.C.,

Plaintiff-Appellant,

v

NEXTENERGY CENTER,

Defendant-Appellee.

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UNPUBLISHED

July 31, 2012

No. 304229

Wayne Circuit Court

LC No. 09-020090-CK

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Greenville Manufacturing, L.L.C., appeals as of right an order granting summary disposition to defendant, NextEnergy Center, in this breach of contract action. We affirm.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

Plaintiff is a startup company engaged in the field of alternative energy. Defendant is a nonprofit organization that helps private companies develop alternative energy technology. Defendant obtains funding from grants and contracts with various sources. On September 4, 2007, plaintiff, through its founder and owner Samuel Sesi, entered into a two year lease agreement with defendant to lease space from defendant's facility located at 461 Burroughs, Detroit, Michigan.

According to Sesi, from April of 2007 to September of 2007, Sesi engaged in a series of discussions with representatives of defendant, including: vice president of defendant's industry services, Dan Radomski (Radomski); defendant's vice president of business development and government relations, James Saber; and, defendant's former CEO James Croce, at which time they persuaded Sesi to move plaintiff to defendant's lab facility in Detroit. To induce plaintiff to move into defendant's lab facility, Sesi alleged that defendant's representatives promised that they would: 1) obtain grant funding for plaintiff; 2) introduce plaintiff to Senators Stabenow and Levin and assist plaintiff in obtaining contracts with the United States Government; 3) introduce plaintiff to influential officials at the Department of Defense and Department of Energy and assist plaintiff in obtaining contracts from these departments; 4) provide technical and intellectual support to plaintiff; and 5) obtain a startup grant for plaintiff in the amount of \$100,000.

Sesi alleged that he relied on these representations when he signed the lease agreement, but that from about September 2007 to December 2007, plaintiff did not receive the benefits represented in the parties' prelease discussions. Sesi claimed that when he threatened legal action, defendant renewed its promises to help plaintiff develop and indicated that there were plans for the Clinton Foundation to back an eco-village in Detroit with defendant at the center of the project. Plaintiff argued that he was again induced to remain at defendant's facility by the promises and representations that defendant would diligently seek grant funding for plaintiff and seek venture capital assistance for plaintiff.

In January 2009, Sesi again explained to defendant his distress at defendant's failure to perform. Defendant then allegedly reasserted that it would fulfill its promises and also asserted that the state of Michigan was issuing a \$35,000,000 grant, plaintiff was the perfect candidate to get five or six million dollars of this funding, and defendant would obtain this funding for plaintiff. According to Sesi, the funding in question was guaranteed by representatives for defendant, including Saber, who told Sesi that defendant was going to get plaintiff \$5,000,000 from the Kellogg Foundation.

On August 14, 2009, plaintiff filed its first complaint against defendant in which it alleged fraud and misrepresentation on the part of defendant. On July 9, 2010, the trial court held a hearing regarding defendant's first motion for summary disposition. At that time, plaintiff requested leave to amend its complaint to substitute a claim for breach of contract in place of its claims for fraud and misrepresentation. On July 23, 2010, plaintiff filed an amended complaint alleging a breach of contract action.

On October 22, 2010, defendant filed a second motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff could not provide any evidence that there was legal consideration, mutuality of agreement between the parties, and mutuality of obligation between the parties, and therefore, plaintiff could not establish that the alleged oral promises defendant made to plaintiff constituted a contract.

On March 11, 2011, the trial court entered an order granting defendant's motion for summary disposition and later denied plaintiff's motion for reconsideration.

Plaintiff now appeals as of right.

## II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Cedroni Assoc v Tomblinson, Harburn Assoc*, 290 Mich App 577, 584; 802 NW2d 682 (2010). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) applies to the factual support for a party's cause of action. *Id.* The party moving for summary disposition must specifically identify the matters that have no issues of disputed fact. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Then the party opposing the motion has the burden of showing, through documentary evidence, that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings,

affidavits, and other evidence in the light most favorable to the nonmovant. *Cedroni*, 290 Mich App at 584.

A motion for summary disposition should be granted “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when “reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

### III. PLAINTIFF’S BREACH OF CONTRACT CLAIM

Plaintiff originally sued defendants for innocent and fraudulent misrepresentation. However, an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact; future promises are contractual and do not constitute fraud unless the promises were made in bad faith without the present intention to perform. *Hi-Way Motor Co v Int’l Harvester Co*, 398 Mich 330, 336-338; 247 NW2d 813 (1976). “Evidence of a broken promise is not evidence of fraud.” *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 379; 689 NW2d 145 (2004). As with fraudulent misrepresentation, a claim for innocent misrepresentation “must relate to a past or existing fact and not promissory in nature.” *Id.* at 381. Because innocent misrepresentation can only occur when there is no intent to deceive, there is no “bad faith” exception to the rule. *Id.*

At the hearing on defendant’s first motion for summary disposition, defendant argued that plaintiff’s complaint “is not in fact an action for fraud, it’s more in line an action for, it’s a breach of contract action.” The trial court noted, “And whether you call it fraud [in] the inducement [sic], I don’t even know if this is really fraud as much as it might be, you know, misrepresentation. And, you know, it doesn’t have to necessarily even be intentional, it could be negligent misrepresentation.” Plaintiff’s attorney requested an opportunity to amend the complaint to allege breach of contract. Given the lack of integration clause, the trial court rejected defendant’s argument that an amendment would have been futile.

Plaintiff amended its complaint and defendant filed a second motion for summary disposition. In granting the motion, the trial court noted:

Well, the essence of the plaintiff’s claim is that there’s either fraud or I don’t know, intentional or negligent misrepresentation in inducing the plaintiff into entering into a contract. However, the contract is, in fact, the only document before this court. It is written. It spells out the offer, the acceptance and the consideration, and getting funding is not part of this agreement and it has been reduced to writing. He signed it. He had four or five months to go over it, review it and it’s obvious that he has reviewed it very carefully because he made changes to it and he initialed those changes.

There is no claim for breach of an oral promise to obtain funding, if that’s one of the theories, because he simply didn’t offer them any consideration for doing so.

The signing of the lease is not the consideration. The consideration in the lease is paying rent. I don't see it. Quite frankly, I think as a matter of law the contract prevails. The contract is what is at issue, and there is nothing in the contract that says that there's a requirement that they produce funding and they would have to have some consideration in order to be obligated to produce funding for him, and there was no consideration other than the payment of rent to produce funding. So there's no separate contract to get funding and the contract was signed is strictly for rent.

Plaintiff argues that the trial court erred in characterizing this as a fraud or misrepresentation case. We disagree. Although pleaded as a breach of contract claim, we are not bound by plaintiff's choice of labels for an action because to do so "would exalt form over substance." *Johnston v Livonia*, 177 Mich App 200, 208, 441 NW2d 41 (1989).

Fraud in the inducement is a special kind of fraud extraneous to the contract. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373, 532 NW2d 541 (1995). It arises where "the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior." *Id.* While a claim of fraudulent inducement may redress misrepresentations that induced a party to enter into a contract, it does not form the basis for breach of contract. *Id.* at 546.

Plaintiff alleges that "[l]ooking past the lease, the evidence minimally establishes that the promises were in fact made and that Plaintiff relied on those promises first in entering into the lease, then in remaining after announcing the intent to leave."<sup>1</sup> During oral arguments in this Court, plaintiff's counsel conceded that:

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<sup>1</sup> In a letter dated December 13, 2007, Sesi gave notice to defendant of his intention to vacate the premises:

I am providing this letter a notice that NextEnergy, as Landlord, has failed to comply with the terms of its Lease with Greenville Manufacturing LLC, as Tenant.

Specifically, Landlord has failed to complete all improvements in accordance with agreed upon plans and specifications and customary construction industry standards and practices and applicable laws. Moreover, the improvements have not been completed as of September 7, 2007 and Landlord has failed to furnish a Certificate of Occupancy issued by the City of Detroit, all as required by the Lease. Further, Landlord has failed to assign applicable manufacturing warranties. The state of the Premises is not consistent with the requirements of the Lease.

We amended because it was originally drafted as a fraud claim. And we couldn't prove that they lacked the intent to perform at the time they made the promises. That's what's required for proof of fraud. What we were able to prove and what we undertook to prove was they made promises they didn't keep . . . The bottom line is that there were promises made to *induce us* to enter into a business relationship with them.

Thus, regardless of how plaintiff chooses to label its claim, the action was one for fraudulent inducement. By plaintiff's own admission, it was unable to prove fraud. A simple re-labeling of the claim to breach of contract changes nothing.

Even if we were to accept plaintiff's claim as one for breach of contract, we are persuaded by the trial court's well-reasoned analysis on the issue. "In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. Mere discussions and negotiations cannot be a substitute for the formal requirements of a contract." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991) (citations omitted).

The goal of contract interpretation is to ascertain and enforce the intent of the parties. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). "A contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Clear and unambiguous contractual language must be enforced as written. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010). If the language of a contract is ambiguous, a court may consider extrinsic evidence to determine the parties' intent. However, "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990).

Plaintiff claims that defendant's alleged promises were terms of the parties' contractual agreement. However, the only evidence presented to the trial court was the lease agreement, the four corners of which clearly provided that defendant would lease space to plaintiff in exchange for plaintiff paying rent. There was no reason to consider parol evidence when the terms of the lease were clear and unambiguous. Additionally, we do not construe the absence of a merger clause to be determinative. It is true that "when the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated," *UAW-GM*, 228 Mich App at 502; however, we do not believe that the absence of a merger clause allows for the introduction for parol evidence to change the terms of a clear

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Landlord's failure to satisfy the requirements of the Lease within thirty (30) days of this letter will leave Tenant with no choice but to exercise its legal and equitable remedies.

The letter does not mention an alleged failure to receive the benefits allegedly represented in pre-lease discussions.

and unambiguous document. The lease agreement was the entirety of the agreement between the parties. Thus, even if treated as a breach of contract claim, plaintiff's action fails.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer