

STATE OF MICHIGAN
COURT OF APPEALS

CHARTER TOWNSHIP OF SHELBY,

Plaintiff/Defendant-Appellee/Cross-
Appellant,

v

TECHNOLOGY INTEGRATION GROUP
SERVICES, INC.,

Defendant/Plaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED
March 5, 2013

No. 297190
Macomb Circuit Court
LC No. 2007-003964-CK
2007-004647-CK

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Technology Integration Group Services, Inc. (“TIGS”), and the Township of Shelby (the “township”) filed separate actions against each other, each alleging that the other party was the first to breach their contract under which the township hired TIGS to provide technological support services to the township for a three year period. The township also asserted that it had been induced to enter the contract by fraudulent assurances from TIGS that it intended to maintain the security of the township’s data and that in light of the fraudulent inducement, the township had a right to rescind the contract and so should prevail, even if it was the first to materially breach the contract.

The jury found for the township on both theories and awarded the township damages of \$1,700 and costs of \$372.50. The jury found no cause of action in TIGS’s action for breach of contract against the township for which TIGS sought damages under a liquidated damages provision in the contract. TIGS’s post-trial motions for judgment notwithstanding the verdict (JNOV) or a new trial were denied. The court also denied the township’s motion for case evaluation sanctions. TIGS now appeals as of right, and the township cross-appeals the trial court’s denial of case evaluation sanctions and attorney fees. We reverse the judgment for the township and remand for entry of judgment in favor of TIGS.

I. FACTS

For several years prior to the events of this case, TIGS provided some technological support services to the township. In 2006, the township issued a request for proposals for a three year contract to provide a broad array of technological services including hardware, software,

maintenance and daily service. Following an extended bidding process, the township selected TIGS and the two parties entered into a written contract on July 15, 2007.

Paragraph 10 of the contract, entitled Service Level Agreement, set forth a chart of Service Level Criteria to be used “as a benchmark for service goals.” Paragraph 10 further provided procedures for TIGS to “provide a written report to the Township of the service level criteria and the actual results against those criteria.” The township was authorized to request service level reviews each quarter or more frequently. Paragraph 15 designated Ron Austin as the TIGS project manager, subject to change upon 30 days’ notice.

Paragraph 31, entitled “Performance Satisfaction,” provided a procedure for addressing the township’s dissatisfaction with any hardware or service. If a township employee deemed TIGS’s service unsatisfactory, the employee was required to submit an incident report to TIGS within five days of the deficient service. TIGS was required to submit a response and take necessary corrective action. Paragraph 32, “Termination and Renewal,” provided that the township could terminate the contract without cause at any time, but would then be required to pay a percentage of the remaining monthly payments. Further:

G. The Township may terminate this Agreement and not be subject to the early termination penalty if TIGS is unable to meet the Service Level criteria as outlined in Paragraph 10 for two (2) successive periods. Before termination all parties will participate in the dispute resolution processes in Paragraph 48.

Paragraph 48 provided that no litigation may take place until 30 days after the parties attempt to resolve their differences via facilitative mediation.

On July 18, 2007, only three days after the contract was executed, Darrin Hanna, the sole shareholder and president of TIGS, and his sister, Dawn Hanna, TIGS’s sales manager and liaison with the township, were both indicted on multiple federal charges related to alleged involvement in trade with Iraq during the United States’ embargo against Iraq. The indictments were sealed and so unknown to the parties until Mr. Hanna was arrested a week later on July 25, 2007.

Township supervisor Ralph Maccarone testified that he learned of the indictments on the evening of July 25th and decided almost immediately that the township should cease doing business with TIGS. In a phone call with Dawn Hanna within a day or two of the indictments, he did not discuss any performance issues that had arisen in the less-than-two-weeks since the contract was signed. Instead, he demanded that she sign a voluntary termination of the contract. Ms. Hanna refused and suggested that the parties go to facilitation as the contract provides for in the event of a disagreement. On July 31, 2007, Maccarone faxed a proposed agreement for the parties to mutually rescind the contract, but TIGS did not respond.

Maccarone directed the township’s accounting supervisor to withhold payment to TIGS on the new contract as well as for services performed under an old contract. On August 7, 2007, the township board voted to discontinue its relationship with TIGS and to hire a different company. Following that vote, Maccarone publicly stated that the rescission of the contract had “nothing to do with performance.” In opening statement, the township’s attorney stated that after

hiring TIGS, “These indictments made [Maccarone] concerned and made him act and made him get somebody else.”

TIGS personnel responsible for serving the township continued to report for work at the township offices through September 10, 2007. The township presented evidence that their performance was inadequate, that on at least one occasion they were unable to promptly restore the township website after it crashed and that TIGS did not immediately begin work on the new services to be provided under the contract. However, the township never submitted a formal performance complaint prior to unilaterally terminating the contract. TIGS requested mediation as called for by the contract, but the township refused to participate, and advised TIGS that “no contract exists.”

On September 11, 2007, TIGS brought an action against the township for breach of contract. On that same day, the township filed a lawsuit against TIGS for fraud and breach of contract.

II. STANDARD OF REVIEW

TIGS argues that the trial court erred in denying its motions for directed verdict and JNOV. This Court reviews de novo a trial court’s ruling on a motion for a directed verdict. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). “When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party’s favor.” *Id.* (citation and internal quotation marks omitted). “A directed verdict is appropriate where reasonable minds could not differ on a factual question.” *Id.* This Court also reviews de novo a trial court’s decision on a motion for JNOV, viewing the evidence and reasonable inferences arising therefrom in a light most favorable to the nonmoving party to determine if the evidence supported the jury’s verdict. *Alfieri v Bertorelli*, 295 Mich App 189, 193; 813 NW2d 772 (2012).

III. FRAUD IN THE INDUCEMENT

The township’s fraud claim is significant not only because of the monetary damages the jury awarded to the township, but also because the township relied on fraud as a defense to TIGS’s claim of breach of contract.

“Fraud in the procurement of [a] contract may be grounds for monetary damages in an action at law . . . or, . . . grounds to retroactively avoid contractual obligations through traditional legal and equitable remedies such as cancellation, rescission, or reformation[.]” *Titan Ins Co v Hyten*, 491 Mich 547, 557-558; 817 NW2d 562 (2012). Rescission of a contract is an equitable remedy applied to avoid enforcement of a contract. *G P Enterprises, Inc v Jackson Nat’l Life Ins Co*, 202 Mich App 557, 566; 509 NW2d 780 (1993). Rescission annuls the contract and restores the parties to the positions they would have been in if the contract had never been formed. *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003). Although the trial court’s judgment does not expressly grant rescission, the judgment against TIGS on the fraud and breach of contract claims, and the judgment of no cause of action in TIGS’s action against the township, effectively relieved both parties of any further obligations under the contract.

The township acknowledges that it withdrew its claim of fraud based on an affirmative misrepresentation of material fact. The township also acknowledges that the trial court declined to instruct the jury on silent fraud. The township argues, however, that the question of constructive fraud was properly submitted to the jury. The township argues that it established constructive fraud as prescribed in M Civ JI 128.03 (fraud based on a bad-faith promise). M Civ JI 128.03 states that the plaintiff claiming fraud based on a bad-faith promise must prove the following elements:

- a. Defendant promised that [Describe promise alleged by plaintiff.]
- b. At the time defendant made the promise, [*he / she / it*] did not intend to keep it.
- c. Defendant made the promise with the intent that plaintiff rely on it.
- d. Plaintiff relied on the promise.
- e. Plaintiff was damaged as a result of [*his / her / its*] reliance.

Essentially, fraud by a bad-faith promise is the same as fraud in the inducement, “which occurs where a party materially misrepresents *future* conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.” *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995) (emphasis added).

The township argues that TIGS misrepresented its ability to keep township’s information confidential. According to the township, “TIGS promised that *it could keep Township’s information confidential*,” and TIGS did not intend to keep that promise. The township asserts that it relied on that promise and was damaged as a result. Specifically, the township argues that Darrin Hanna entered into the contract with the township on behalf of TIGS, knowing that TIGS could not comply with the confidentiality provision because TIGS’s computer records had previously been copied by federal agents and were likely to be compromised again as the federal investigation continued.

However, the evidence did not support this contention. Evidence that TIGS’s offices and computers had been searched three years before the contract negotiations, and that federal officers questioned Darrin and Dawn Hanna in 2006, does not support an inference that TIGS falsely represented its ability to comply with the confidentiality provision of the contract. Darrin Hanna and Ron Austin both testified that the township’s confidential data was stored on the township’s servers and mainframes, and not on TIGS’s computers. The township’s witnesses, Anne Kowal, Ralph Maccarone, and Carol Youngblood, all testified that they believed that access through TIGS’s servers was possible, and the township emphasizes that onsite technicians could use their passwords to access confidential information. However, the township officials’ beliefs that the data was accessible through TIGS’s computers does not establish that the search of TIGS’s computers at TIGS’s location included the information on the township’s servers, or that TIGS allowed access to persons without the passwords. Moreover, even if federal agents acquired or could have acquired township data during their search, access by federal law enforcement officers does not establish a general compromise of confidentiality.

There was no evidence at trial that TIGS misrepresented its ability to preserve the confidentiality of the township's sensitive information. The township authorities agreed they were unaware of any security breach of township data and all the witnesses testifying as to the 2004 FBI search were consistent in their testimony that the FBI had not accessed any township information. There was absolutely no evidence that any confidential information was ever compromised. Further, there was no evidence that the Hannas were aware that they were going to be indicted at the time the parties negotiated and executed the contract.

Indeed, the record clearly shows that the township's primary, if not only concern, was the fact that the Hannas had been indicted. When Maccarone first talked to Dawn Hanna after the indictments became public, he did not complain about poor service or seek assurances that TIGS would still be able to perform or inquire as to his security concerns. Instead, he immediately demanded that TIGS agree to cancel the contract. The township also did not utilize the conflict resolution procedures called for in the contract, but simply ceased paying TIGS.

Not surprisingly, therefore, the township's arguments at trial focused overwhelmingly on the Hannas' indictments rather than on the actual issues with TIGS's performance or township security. The township argued that other TIGS clients had also "pushed the panic button" after the indictments and that it was reasonable for the township to do the same, though in fact, there was no evidence that TIGS's other clients terminated their contracts. At trial, the township repeatedly sought to portray the Hannas as enemies of the United States. The township's attorney harshly questioned the patriotism and loyalty of the Hannas going so far as to suggest that they were supportive of the 9/11 hijackers and that they failed to respect the United States and its fallen soldiers. Though it denied TIGS's motion for a mistrial, the trial court did state:

I am very concerned about the issues and whether or not there is a studied injection of false issues in this case. I don't believe that the terrorist attack on 9-11 or the Township's monument to soldiers who have died in action, although laudatory as those things are, to me and I think to most people, citizens of this great country, I'm not sure how those had any role in this case other than to inflame the jury. To talk about planes flying into buildings on 9-11, to place on the board in front of this jury foreign-sounding names of people who had absolutely no relationship to this case in any material way, I'm very concerned about it and I'm going to watch what happens in this case.

The testimony also shows that the township was not concerned with TIGS's performance. Maccarone testified that he told the press that the termination of the TIGS contract had nothing to do with performance. He further stated, "On behalf of the taxpayers, [the township] can't act under a contract that we believe is inappropriate." The township also repeatedly argued that it would not have signed the contract if the indictments had been released first. However, the township conceded that its bid application did not request information about whether the applicant or its principals were suspected of a crime or had been investigated by a police agency.

There is no evidence of fraud, and the record shows that the township's real reason for terminating the contract was not an evidence-based concern for the security of its data, but instead the township's desire not to be associated with the Hannas. Accordingly, the trial court

erred in denying TIGS's motions for a directed verdict and JNOV with respect to the township's fraud claim.

IV. BREACH OF CONTRACT

With respect to the breach of contract claims, both parties asserted that the other party was the first to materially breach the contract. TIGS argues that the township breached the contract by unilaterally terminating it and replacing TIGS with another vendor. The township argued that TIGS committed the first material breach and, therefore, is precluded from recovering under the liquidated damages clause for early termination of the contract. "In order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract." *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). The township argues that TIGS failed to provide Ron Austin as lead technician, failed to provide two or more full-time, on site personnel, and did not implement the 24-hour help desk or provide the township with an inventory.

None of these allegations is sufficiently serious to justify the unilateral termination of the contract. First, Austin did not cease serving the township until after the township stopped paying TIGS and brought in another firm to replace TIGS. Similarly, the evidence was that another TIGS employee was also present every day, and that others also sometimes worked on the contract for the township. The failure to provide an inventory or implement the help desk could eventually have allowed the township to terminate the contract without penalty, but the contract did not allow that as a first resort. Instead, the township was supposed to complain of any inadequacies in TIGS's service, and only if TIGS failed to meet the criteria in the contract for two successive periods could the township terminate the contract without penalty.

The township made no attempt to address any performance issues, and effectively repudiated the contract, at the latest, on August 20, 2007, when it brought in a replacement for TIGS after ceasing all payments to TIGS. The doctrine of repudiation or anticipatory breach holds that if a party to a contract unequivocally declares its intent not to perform, the non-repudiating party may sue immediately for breach. *Stoddard v Mfr Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999). By replacing TIGS and stopping all payments under the contract, the township unequivocally indicated that it did not intend to perform its obligations to TIGS. The township also refused to enter mediation with TIGS, as called for by the contract.

On these facts, the township's repudiation of the contract would only be justified if the indictments against the Hannas constituted sufficient grounds to terminate the contract. While the indictments may have been cause for concern, there is no legal support for the proposition that an indictment alone constitutes sufficient grounds to assume that a party will fail to adhere to a contract.

In sum, the township's evidence failed to establish a jury-triable issue of fact that TIGS committed a first material breach of the contract that justified the township's cancellation of the contract without penalty. The evidence indicates that township officials decided to back out of the contract because they perceived the Hannas as unsavory individuals with connections to terrorism, and that TIGS's alleged performance deficiencies were not a basis for the decision to terminate the contract, but rather were only belatedly identified as justification for the

cancellation. The contract contained a procedure for addressing the types of problems with TIGS's performance on which the township relies to justify its cancellation of the contract, and the township could have and should have resolved those matters through the contract's procedures for performance dissatisfaction and facilitative mediation. The township, not TIGS, committed the first material breach by rejecting TIGS's services and contracting with another vendor to replace TIGS with that vendor. Consequently, the township breached the contract and is liable for early termination as prescribed in the contract.

For these reasons, we reverse the judgment for the township on its claims for fraud and breach of contract, and remand for entry of judgment in favor of TIGS in accordance with the early termination penalty of the contract.

In light of our decision, it is unnecessary to address the parties' remaining issues on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro