

STATE OF MICHIGAN
COURT OF APPEALS

JOHNNY’S-LIVONIA, INC.,

Plaintiff-Appellant,

v

LAUREL PARK RETAIL PROPERTIES, LLC.,

Defendant-Appellee.

UNPUBLISHED
May 19, 2015

No. 320430
Wayne Circuit Court
LC No. 12-012704-CZ

Before: TALBOT, C.J., and CAVANAGH and METER, JJ.

PER CURIAM.

In this fraud case, plaintiff appeals as of right an order granting summary disposition in defendant’s favor pursuant to MCR 2.116(C)(8). We affirm in part, reverse in part, and remand for further proceedings.

In October 2010, plaintiff entered into an agreement with defendant to lease retail space located in Laurel Park Place. In September 2012, plaintiff filed this three-count complaint asserting claims of fraud, fraudulent inducement, and unjust enrichment. Plaintiff alleged that, before it entered into the lease, defendant made four material representations, including that: (1) the original location plaintiff requested was not, and would not be, available for lease; (2) the retail space plaintiff leased was the only location available; (3) a location then-occupied by Subway would not be leased to a food vendor therefore plaintiff could not lease that space; and (4) eight million people entered the mall annually—and every year that census had grown. However, plaintiff alleged, these representations were false. In fact, for example, defendant did lease the former Subway space to a food vendor and that food vendor was Bubble Berry, a direct competitor. Both plaintiff and Bubble Berry sold yogurt. Plaintiff further alleged that, as a consequence of defendant’s misrepresentations, it entered into the lease with defendant and expended substantial sums of money on improvements to the retail space to its detriment.

In October 2012, defendant removed this matter to United States District Court of the Eastern District of Michigan. While pending in that court, defendant filed a motion to dismiss

and plaintiff filed an amended complaint.¹ Subsequently, this matter was remanded to the Wayne Circuit Court, and the parties requested the trial court to rule on defendant's motion to dismiss.² Defendant argued that it was entitled to summary dismissal because (1) fraud cannot be based upon promises of future performance and speculative future events; (2) there was no contractual basis to prevent a competitor from operating in the shopping center, i.e., the lease had no exclusive use provision; (3) the lease contained an integration clause at paragraph 12.18 which stated that no agreements were made that were not contained in the lease so plaintiff could not establish the necessary element of reliance; (4) plaintiff could not establish fraudulent inducement; and (5) there could be no unjust enrichment because a written contract existed.

Plaintiff responded that an exclusive use provision was not at issue and neither was the integration clause. The complaint alleged fraudulent misrepresentations of past or existing facts, not broken promises. Further, plaintiff could present parol evidence to establish fraud despite the integration clause which did not act as a "get out of fraud free card." Fraud, plaintiff argued, invalidated the entire contract, including the integration clause and, thus, defendant received an unjust enrichment in the form of plaintiff's rent.

Following oral arguments, the trial court entered an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). The trial court held that plaintiff failed to state fraud claims because it could not demonstrate reliance on the alleged misrepresentations. That is, the parties' contract contained a valid integration clause which extinguished any past promises. That clause stated in part: "Tenant acknowledges that neither Landlord nor any broker has made any representations to, or agreements with, Tenant which are not contained in this Lease." Thus, any reliance by plaintiff on representations not included in the contract was rendered unreasonable by the clause. Further, because a written contract existed and there were no questions of fact concerning its terms, plaintiff did not state a claim for unjust enrichment. Accordingly, the trial court concluded, defendant was entitled to dismissal of plaintiff's complaint. This appeal followed.

Plaintiff argues that the trial court erred when it dismissed plaintiff's fraud claims on the ground that the integration clause prevented plaintiff from demonstrating reasonable reliance on any of defendant's four fraudulent statements. We agree.

This Court reviews de novo the trial court's decision to grant a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.118(C)(8), the legal sufficiency of the complaint is tested by the pleadings alone. *Id.* at 119-120. All well-pleaded factual allegations in support of the claim are accepted as true and are construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). The motion should be granted only when the claim is clearly

¹ The amended complaint is not in the lower court file, but it appears that only the name of the defendant was changed.

² Neither the motion to dismiss nor plaintiff's response are in the lower court file.

unenforceable as a matter of law and no factual development could justify recovery. *Id.* (citation omitted).

Generally, actionable common-law fraud must be based on a statement relating to a past or an existing fact; promises relating to future actions are contractual and cannot constitute fraud. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). An exception exists, however, for fraud in the inducement. *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 242; 733 NW2d 102 (2006), quoting *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Fraudulent inducement occurs when “a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.” *Id.* To establish a claim of fraudulent misrepresentation or fraud in the inducement, the plaintiff must prove that: (1) the defendant made a material representation; (2) it was false; (3) defendant either knew it was false or made it recklessly without knowledge of its truth; (4) the representation was made with the intent that plaintiff would act upon it; and (5) plaintiff did act, which caused plaintiff to suffer damages. *Hi-Way Motor Co*, 398 Mich at 336 (citation omitted); *Custom Data Solutions*, 274 Mich App at 243 (citation omitted). The plaintiff must have reasonably relied on the false representation. *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

Parol, or extrinsic, evidence is generally admissible to prove fraud. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 503; 579 NW2d 411 (1998). That is, extrinsic evidence is admissible to attack the validity of the contract as a whole on the ground that it was procured by fraud. *Hamade v Sunoco, Inc*, 271 Mich App 145, 167; 721 NW2d 233 (2006). But when the contract has an integration clause, the aggrieved party cannot introduce extrinsic evidence to prove the existence of an agreement different than the agreement set forth in the written contract. *Id.* at 169. In other words, parol evidence of prior or contemporaneous collateral agreements is not admissible to contradict or vary the terms of the parties’ written agreement. *UAW-GM Human Resource Ctr*, 228 Mich App at 507 n 14.

Here, the trial court dismissed plaintiff’s fraud claims, holding that plaintiff could not demonstrate reasonable reliance on any of defendant’s four alleged misrepresentations because of the integration clause in the contract. That is, any reliance on the alleged representations was patently unreasonable. But, as discussed above, the integration clause only prohibited plaintiff from introducing parol evidence to prove that a collateral agreement existed between the parties which varied the terms of the written lease. Plaintiff never argued that any of defendant’s alleged misrepresentations constituted an agreement that contradicted the terms of the lease. Rather, plaintiff argued that these pre-contractual representations of fact were material to its decision to enter into the lease with defendant. As our Supreme Court explained in *Robinson v Great Lakes College, Inc*, 294 Mich 192; 292 NW 701 (1940): “[W]here the inducements for the execution of a contract are fraudulent representations as to existing facts, testimony as to such representations is not within the parol evidence rule. They do not vary, change, or alter the terms of the written contract and are admissible in evidence, as bearing upon the question of whether the contract, fair on its face, was procured by fraud.” *Id.* at 196.

In this case, the statements defendant allegedly made regarding the availability of specific retail space and the number of people entering the mall annually are not related to future conduct or performance under the lease and did not constitute agreements that plaintiff was attempting to

enforce contrary to the terms of their written lease. Thus, the integration clause did not make it patently unreasonable for plaintiff to rely on such pre-contractual representations and the trial court's holding that plaintiff failed to state a claim in their regard is reversed.

The statement defendant allegedly made regarding the former Subway location requires closer consideration. According to plaintiff, defendant represented that the location would not be leased to a food vendor therefore plaintiff could not lease that space. This statement appears, at least in part, to relate to defendant's future conduct, but a fraud claim may be predicated on future conduct. See *Samuel D Begola Servs, Inc*, 210 Mich App at 639. Defendant argued in the trial court that this fraud claim could not survive the integration clause because plaintiff was essentially claiming that it was led to believe an exclusive use clause was not necessary. But that is not what plaintiff claimed. Plaintiff did not claim that defendant orally *agreed* not to lease the former Subway space to a food vendor; rather, plaintiff claimed that defendant told plaintiff, as a statement of fact, that defendant would not lease the space to a food vendor. “[T]he mere fact that statements relate to the future will not preclude liability for fraud if the statements were intended to be, and were accepted as, representations of fact, and involved matters peculiarly within the knowledge of the speaker.” *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005) (citation omitted).

While defendant relies on the holding in *Hamade* as support for its argument, the facts here are distinguishable. In *Hamade*, the plaintiff claimed that he was fraudulently induced into executing an *incomplete* agreement by a representation from defendant that an exclusive territory clause was not necessary. See *Hamade*, 271 Mich App at 168. That is, the *Hamade* plaintiff argued that the contract was only partially integrated because essential, agreed upon, terms were not reduced to writing. *Id.* at 168-169. In this case, plaintiff is not claiming that the parties' contract was incomplete because essential and agreed upon terms were not included in the written lease. Rather, plaintiff is claiming that the false statement of fact—that the former Subway space would not be leased to a food vendor—induced plaintiff to enter into the lease agreement for the retail space plaintiff leased. Because any such pre-contractual misrepresentation of fact by defendant in this regard did not constitute an agreement contradicting or varying the parties' contract terms, the misrepresentation was not merged into the parties' lease. Accordingly, the presence of the integration clause did not make it patently unreasonable for plaintiff to rely on any such pre-contractual representation and the trial court's holding that plaintiff failed to state a claim in this regard is reversed.

Next, plaintiff argues that the trial court erroneously dismissed its unjust enrichment claim. We disagree.

Plaintiff alleged in its complaint that defendant unjustly received the benefit of inflated rental rates and improvements to its premises as a consequence of its misrepresentations. However, the law will imply a contract to prevent unjust enrichment only if there is no express contract covering the same subject matter. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). And here, a lease exists that governed the rental of the retail space at issue; thus, no contract need be implied for plaintiff to seek recovery on its fraud claims. See *Titan Ins Co v Hyten*, 491 Mich 547, 557-558; 817 NW2d 562 (2012). Accordingly, the trial court properly dismissed plaintiff's unjust enrichment claim.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter