

STATE OF MICHIGAN
COURT OF APPEALS

SUN MEDICAL EQUIPMENT COMPANY, INC.,

Plaintiff-Appellant,

v

COMERICA BANK, f/k/a MANUFACTURERS
BANK, N.A.,

Defendant-Appellee.

UNPUBLISHED

July 28, 1998

No. 195424

Wayne Circuit Court

LC No. 95-505262-NO

Before: Wahls, P.J., and White and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff, a medical equipment business, filed suit alleging that defendant bank, a long-time creditor of plaintiff, agreed to restructure plaintiff's line of credit after plaintiff suffered a net loss in 1988. Defendant allegedly failed to abide by this agreement. Defendant also allegedly made errors in its operation of a "dominion of funds lock box" procedure established between the parties by failing to properly credit plaintiff's account, which caused plaintiff to bounce several checks. Plaintiff sought damages under several theories, including breach of contract, promissory estoppel, breach of fiduciary duty, fraud, and tortious interference with contractual relations. Defendant moved for summary disposition under MCR 2.116(C)(10).¹

In its opposition to the motion and now on appeal, plaintiff relied primarily upon the affidavit of Gregory Jamian, one of its owners and an officer, to establish that an oral contract existed before a 1991 written agreement. Jamian indicated in his affidavit that the parties had "a long-term contractual relationship" under which plaintiff "continually increased its borrowings at the Bank's encouragement, while decreasing its reliance on other lenders." Jamian also averred that plaintiff's primary lending officer at the bank, James Skotak, "urged" plaintiff to "undertake a growth strategy which forced [plaintiff] to be dependent upon [defendant's] continued supply of working capital." Moreover, Skotak repeatedly told plaintiff's officers that plaintiff and defendant were "partners."

In 1988, according to Jamian, Skotak advised plaintiff's two owners that defendant would restore plaintiff to "a normal banking relationship, term out its existing debt over three years, unfreeze its lines of credit and increase its primary line of credit to \$700,000," as long as an independent financial review showed that plaintiff was "back on track financially." Jamian averred that plaintiff had fulfilled its obligations under this oral contract, but the bank refused to keep its promises and demanded additional collateral for its loans. In oral argument to the circuit court, plaintiff's counsel contended that "the contract in this case consists primarily of the seven year course of dealing and course of performance between the Bank and Sun Medical. . . . It is that course of dealing that led to my client having reasonable expectations . . . that they would continue this relationship as it had continued for 7 years." Responding to the court's questions, counsel further stated that the breach occurred in March of 1989, "when the bank refused to restore Sun" even though the plaintiff had produced a "black" statement from Plante & Moran for the March 31 through December 31, 1988 period. Restore, according to plaintiff's counsel, "means continue the historical course of performance that occurred over 7 years." Plaintiff further claimed to the circuit court that the oral contract consisted of defendant's promise that it would "continue to roll over the notes every year like they had done for 7 consecutive years . . . [a]s long as Sun was viable and continued to provide the Bank with adequate security and collateral for the loans, and Sun did." When the circuit court pressed plaintiff on which parts of this contract were not reduced to a writing, plaintiff replied "that every year the notes would be renewed."

Although defendant denied the existence of any oral contracts, it also claimed that if any oral agreements existed between the parties they were superseded by a 1991 written contract consisting of a demand note and a security agreement. The demand note indicated, "No amendment or waiver hereunder shall be effective except as expressly made in a writing signed by Bank." Defendant argued to the circuit court that plaintiff was attempting to amend the demand note by prior alleged oral representations. Defendant provided a series of written letters and agreements leading up to the 1991 contract, which paint a picture of defendant extending plaintiff's repayment deadlines and forbearing when plaintiff repeatedly missed deadlines. Defendant maintained that these agreements and letters controlled the parties' relationship. The circuit court granted defendant's motion for summary disposition, noting that the alleged oral promise by defendant to restore a "normal banking relationship" when plaintiff was "back on track financially" was vague and subjective and therefore not enforceable.

This Court reviews an order granting a motion under MCR 2.116(C)(10) de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Such a motion tests the factual basis of plaintiff's allegations. *Id.* This Court must view the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the nonmoving party. *Id.* We must then review the record evidence, and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

We first address plaintiff's argument that the circuit court erred in dismissing its breach of contract claim. Plaintiff's argument that the court erred by refusing to consider parol evidence concerning alleged oral promises made between 1988 and 1991 is not preserved for appellate review. Our review of the record indicates that the trial court did not decide this issue but instead based its ruling

on other grounds. Furthermore, plaintiff's argument that defendant breached the 1991 written agreement by improperly operating the "lock box" was not raised before the trial court and is therefore also not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). We therefore limit our analysis of this issue to determining whether the evidence offered by plaintiff established a material factual issue concerning the existence of an oral contract that was formed before the 1991 written agreement.

In order to form a valid contract, there must be a meeting of the minds on all the material facts. *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988). A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Id.* Here, we find that the Jamian affidavit relied upon by plaintiff does not create a material factual issue regarding whether the parties reached a meeting of the minds on all essential terms of the alleged oral agreement. The affidavit avers that defendant stated it would take certain actions if plaintiff was "back on track financially." The precise circumstances under which defendant would increase its credit line to plaintiff was an essential term of the proposed agreement, but the record does not indicate the meaning attached to this term by the parties. Moreover, the phrase, "normal banking relationship," is also undefined in the record, and there is no indication that the parties reached a mutual understanding about its meaning. Because the record evidence fails to create a material factual issue as to whether the parties created an oral contract prior to the written 1991 agreement, plaintiff's breach of contract claim based upon the alleged oral agreement must fail.

Next, plaintiff contends that the circuit court erred in dismissing plaintiff's promissory estoppel claim. In *Schmidt v Bretzlaff*, 208 Mich App 376, 378-379; 528 NW2d 760 (1995), this Court defined the elements of promissory estoppel as:

- (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided.

A promise must be clear and definite in order to support an estoppel claim. *Id.* at 379. In order for a promise to loan money in the future to be sufficiently clear and definite, there must exist evidence of the material terms of the loan. *State Bank of Standish v Curry*, 442 Mich 76, 88; 500 NW2d 104 (1993).

In the present case, the evidence does not establish that defendant made a clear and definite promise. Again, the phrase, "back on track financially," contained in the alleged promise is not clear or definite. Plaintiff's assertion that the phrase meant "in the black, viable, and with adequate collateral" is not supported by the record. Moreover, such a definition would hardly render the promise clear and definite because there is no evidence of the terms of the loan. We thus conclude that because plaintiff failed to establish a material factual dispute with regard to the existence of a clear and definite promise, the circuit court did not err in dismissing plaintiff's promissory estoppel claim.

We next address plaintiff's argument that the circuit court erred in dismissing plaintiff's claim for breach of the implied covenant of good faith. Plaintiff contends that defendant acted in bad faith with respect to its obligations under the alleged oral agreements. We disagree because we have already concluded that such contracts were never formed according to the record evidence. Plaintiff also contends that defendant breached its duty to act in good faith with respect to its operation of the lock box procedure provided for in the 1991 written contract. "Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v City National Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). Plaintiff claims that defendant's operation of the lock box violated this duty because defendant's failure to properly credit plaintiff's account caused plaintiff to bounce several checks. However, plaintiff presented no evidence beyond mere allegations that defendant acted dishonestly or in bad faith when these alleged errors were made. The mere fact that defendant made mistakes does not establish a breach of the duty of good faith. Although the Jamian affidavit asserts that defendant acted in reckless disregard of plaintiff's interests, that statement is a legal conclusion and is not supported by any facts of record. We therefore conclude that plaintiff failed to establish a material factual issue regarding its claim for breach of the duty of good faith, and the circuit court did not err in dismissing this claim.

Plaintiff also argues that the circuit court erred in dismissing its claim for breach of fiduciary duty. According to plaintiff, defendant breached its fiduciary duty to plaintiff through its mismanagement of the lock box procedure. This argument was not raised below and is therefore not preserved. *Adam, supra* at 98. In any event, plaintiff's argument is without merit because a fiduciary relationship did not exist between the parties. Plaintiff has not demonstrated that it reposed faith, confidence, and trust in defendant or that plaintiff relied on defendant's judgment and advice. *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). Plaintiff's claims of reliance stated in Jamian's affidavit are insufficient to raise a claim of fiduciary relationship. See *Id.* Similarly, despite plaintiff's assertion to the contrary, there is no evidence that indicates that a partnership existed between the parties. Defendant did not control plaintiff's business and did not share in plaintiff's profits and losses. *Miller v City Bank & Trust Co*, 82 Mich App 120, 124; 266 NW2d 687 (1978). No evidence was presented showing defendant's intent to be plaintiff's partner. *Id.* This conclusion is not altered by the fact that defendant exercised its rights as a creditor. Therefore, plaintiff's claim for breach of fiduciary duty is devoid of merit.

Next, we address plaintiff's argument that the circuit court erred in dismissing plaintiff's fraud claim. Again, we disagree. In *Baker, supra* at 208, this Court stated that in order to show fraud or misrepresentation,

plaintiff must prove (1) that defendant made a material representation; (2) that the representation was false; (3) when defendant made the representation, defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity; (4) that defendant made it with the intent that plaintiff would act upon it; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff suffered injury.

Generally, a future promise cannot constitute actionable fraud. *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 554; 487 NW2d 499 (1992). However, a fraud claim may be

based on a promise made in bad faith without any intention of performing it. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 337-338; 247 NW2d 813 (1976). The evidence of fraudulent intent must relate to conduct of the defendant at the time that the representations were made or almost immediately thereafter. *Id.* at 338-339.

Here, there is no evidence that defendant's promises were made in bad faith without intention of performance. The promise to restore a normal banking relationship was allegedly made in 1988, although plaintiff contends that defendant continued to make similar promises through 1991. However, the only evidence of fraudulent intent offered by plaintiff is a statement allegedly made by one of defendant's agents in 1992, that "no one ever gets out of loan control." Such a statement does not establish that defendant had no intention of performing the promises allegedly made in 1988 through 1991. Moreover, the 1992 statement was not made at the time of the promises or immediately thereafter. The purported evidence of bad faith is therefore "too remote in time to indicate that when the agents made the promise[s] they had no intention of fulfilling [them]." *Id.* at 339. Because plaintiff failed to raise a material factual dispute with regard to its fraud claim, the circuit court did not err in granting summary disposition to defendant on this claim.

Finally, we address plaintiff's contention that the circuit court erred in dismissing plaintiff's claim for tortious interference with a contract. The elements of tortious interference with a contractual relationship are "(1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989). To meet the third element, a plaintiff must establish "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Id.* at 96, quoting *Formall, Inc v Community Nat Bank of Pontiac*, 166 Mich App 772, 779; 421 NW2d 289 (1988). A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. *Prysak v RL Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

In the present case, plaintiff argues that defendant's errors in using the lock box procedure constituted wrongful conduct per se. We disagree. There is no evidence that defendant acted with wrongful or malicious intent to interfere or that defendant's alleged errors in using the lock box were anything other than mere mistakes. Finally, plaintiff's contention that defendant engaged in tortious interference by asking plaintiff's business competitors if they wished to purchase plaintiff's assets is without merit. Plaintiff has not identified any contracts with third parties that were breached as a result of such communications. Plaintiff has therefore failed to satisfy the first and second elements of a tortious interference claim. *Jim-Bob, Inc, supra* at 95. We therefore conclude that plaintiff has failed to establish a genuine issue of material fact regarding its tortious interference claim.

In light of our resolution of the above issues, we do not need to address plaintiff's remaining argument that the circuit court erred in holding that the 1991 written demand note and security agreement extinguished all claims that plaintiff had resulting from its reliance on the bank's promises. We agree with the circuit court that plaintiff had no such claims.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

¹ We note that defendant's motion for summary disposition and accompanying brief are missing from the lower court record supplied to this Court. Despite several requests from this Court to the appellant to provide a copy of this motion, a copy had not been provided when this opinion was written.