

STATE OF MICHIGAN
COURT OF APPEALS

STEPHANIE G. FISHER,

Plaintiff-Appellant,

v

DATA CONSULTING GROUP, INC., and
WAYNE L. WHEELER,

Defendants-Appellees,

and

VERA M. THOMPSON, HAMMOND SENIOR
SERVICES, and MARSHA E. WHEELER,

Defendants.

UNPUBLISHED
December 28, 2001

No. 225528
Wayne Circuit Court
LC No. 98-833546-CL

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition on plaintiff's claims arising out of allegations of sexual harassment. We affirm.

Although plaintiff's employment status with defendants is in dispute, she claims to have begun employment with defendants in 1990, leaving her employment in 1993, and becoming reemployed in 1995 until being fired in 1997. Plaintiff further alleges that she and defendant Wheeler began a personal and sexual relationship during the course of her employment. In fact, plaintiff alleges that it was her desire to discontinue the sexual relationship that prompted defendant to fire her.

To further complicate matters, defendant Wheeler had obtained a house on Fenton St. in which he allowed plaintiff to live rent-free. Plaintiff contends that, although the house was titled in Wheeler's name, he had told her that the house was hers. However, after plaintiff discontinued their sexual relationship and refused to resume it, Wheeler demanded that she sign a lease agreement. When plaintiff refused, Wheeler had her evicted from the home.

Plaintiff filed a complaint in this case raising numerous claims: violation of the Civil Rights Act in employment for sexual discrimination and sexual harassment, violation of the Civil

Rights Act in housing for sexual discrimination and sexual harassment, violation of the Civil Rights Act for retaliation by evicting plaintiff from the house, breach of contract for the gifting of the house, promissory estoppel on the transfer of the house, fraud with respect to the transfer of the house, and intentional infliction of emotional distress.

The trial court granted summary disposition to defendants. First, the trial court addressed the issues related to the real estate transaction. The trial court concluded that, because plaintiff admitted that her consideration for the house was providing sexual services to Wheeler, any agreement to transfer the house was based upon prostitution and, therefore, was unenforceable as violative of public policy. Turning to the employment related issues, the trial court concluded that any employment relationship was so intertwined with the prostitution that it was impossible to separate the issues and, therefore, summary disposition was also appropriate on the employment issues.

Like the trial court, we first turn to the issue of the alleged agreement to transfer ownership of the house to plaintiff. The trial court opined in part as follows:

I'm going to grant again the motion for summary disposition as to all those counts [Counts III through VIII, the non-employment claims] and at this point I will limit the Count IX dismissal as it pertains to the previous counts that I just mentioned. The testimony of the Plaintiff is clear in this matter and I have – let me see if I can find the total transcript. I have portions that was [sic] given to me by the Defendants and let me look into the Plaintiff's response in terms to see if there was anything else that was included in this.

Let me start on page eighty-nine reading from the Plaintiff's response exhibits. Question: Your retaliation claim Count V at page nine you indicate that you're retaliated against by the Defendant, presumably Wayne Wheeler, by his servicing [sic] a notice to quit upon you with respect to your interest in the real estate located at 16837 Fenton, in Detroit, is that right? Answer: Yes.

As of August 26, of 1998 did you have a lease agreement with Mr. Wheeler allowing you to live on the premises of 16837 Fenton, in Detroit, Michigan? Answer: No. Question: During the period of June of 1996 through August 26th, of 1998 had you ever paid any rent to Mr. Wheeler at any time for your living on the premises on Fenton? Answer: No, not monetary.

Question: Okay. What else did you pay Mr. Wheeler for living there? Answer: Sex. Question: All right. And can I assume that it's your position that in exchange for sex he gave you this house and allowed you to live on Fenton, in Detroit? Answer: As far as relationship, yes. Question: Okay. And I'm going to assume, once again, at item forty-six that your answer applies as to your previously – this afternoon. I'm sorry – you previously gave this afternoon; that there's no medical diagnosis of mental anxiety or emotional distress and that any loss of future income and employee benefits actually ties in your claim that you were fired by DCG, is that correct? Answer: Could you please restate that again?

And I simply wanted to put my portion in the context and that's why I read the question before and the question after, all right. There is no doubt, gentlemen, in terms of what the relationship was between the parties and that is the illegal transaction of prostitution and, quite frankly, I don't see anything that was taken out of that, especially in view of the case authorities that I already have indicated previously as indicated on the record.

So based on that the, as well as the other reasons indicated by Mr. Renfroe in terms of the lack of documentation and proofs, the motion for summary disposition is given on behalf of Defendants on Counts III, IV, V, VI, VII, VIII and partial IX at this point.

As for the ownership of the house, plaintiff points to nothing that contradicts the trial court's analysis. First, plaintiff's complaint does not claim that there was a completed gift. Rather, the Civil Rights Act claims allege that Wheeler refused to engage in a real estate transaction because of his sexual harassment and sexual discrimination towards plaintiff. Further, plaintiff's breach of contract claim alleges that the parties entered into a valid contract to give plaintiff ownership of the house, that plaintiff provided "adequate and sufficient consideration" and that she had performed all of her obligations under the contract. However, plaintiff does not identify what was the adequate consideration. More to the point, we are directed to no evidence of consideration other than that identified by the trial court: sex.

Receiving something of value in exchange for sex is prostitution. Prostitution is a criminal act, MCL 750.448, and therefore violates public policy. Further, plaintiff does not contradict the trial court's conclusion that contracts in violation of public policy will not be enforced in Michigan. See *Cook v Wolverine Stockyards Co*, 344 Mich 207; 73 NW2d 902 (1955); *Lieberthal v Glens Falls Indemnity Co of Glens Falls, New York*, 316 Mich 37; 24 NW2d 547 (1946); *McDonald v Hall*, 193 Mich 50; 159 NW 358 (1916). Therefore, the trial court correctly concluded that any contract for the transfer of the house was unenforceable and, therefore, defendant was entitled to summary disposition.

As for plaintiff's tort claims concerning the transfer of the house, Michigan likewise bars tort recovery premised upon a plaintiff's wrongful conduct. The "wrongful-conduct rule" was reviewed by the Supreme Court in *Orzel v Scott Drug Co*, 449 Mich 550, 558-560; 537 NW2d 208 (1995):

When a plaintiff's action is based, in whole or in part, on his own illegal conduct, a fundamental common-law maxim generally applies to bar the plaintiff's claim:

"[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party. [1A CJS, Actions, § 29, p 386. See also 1 Am Jur 2d, Actions, § 45, p 752.]"

When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common law

maxim, known as the “doctrine of in pari delicto” generally applies to also bar the plaintiff’s claim:

“[A]s between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them. [1A CJS, Actions, § 29, p 388. See also 1 Am Jur 2d, Actions, § 46, p 753.]

We shall refer to these maxims collectively as the “wrongful-conduct rule.” Michigan courts have long recognized the existence of the wrongful-conduct rule. [Citations omitted.]

The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct. *Manning* at 133. *Glazier* at 220. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. *Radikopf* at 89. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. As stated by the Court of Appeals, where the plaintiff has engaged in illegal conduct, it should be the “plaintiff’s own criminal responsibility which is determinative.” *Glazier* at 221. [Footnotes omitted.]

However, the Court did go on to explain that not all wrongful conduct comes within the rule:

The mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule. To implicate the wrongful-conduct rule, the plaintiff’s conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. Cases in which the wrongful-conduct rule has been applied include: *Radikopf* (illegal lottery); *Manning* (trespass and gambling); *Cook* (illegal contract); *Budwit* (murder); *Piechowiak* (embezzlement); *Ohio State Life Ins Co* (murder); *Garwols* (murder); *McDonald* (illegal contract); *Pantely* (perjury); *Glazier* (murder); *Imperial Kosher Catering* (arson).

In contrast, where the plaintiff’s illegal act only amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff’s act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule.

Here, the wrongful conduct, prostitution, is more akin to crimes such as drugs (the *Orzell* case itself) or gambling, than traffic violations. Indeed, two of the cases referenced by the Court, *Cook* and *McDonald*, like this relationship, involved illegal contracts. Absent plaintiff’s acts of prostitution, there would be no claims for the real estate because, by plaintiff’s own admission,

sex was her consideration for the real estate. Accordingly, we are satisfied that the trial court properly relied upon the wrongful-conduct rule in dismissing the tort claims regarding the real estate, including the claims of fraud, promissory estoppel and intentional infliction of emotional distress (as it relates to the loss of the house).

This then leaves the Civil Rights Act claims related to employment (and intentional infliction of emotional distress as it relates to employment). With some reluctance, we agree with plaintiff that the trial court erred in granting summary disposition in favor of defendants on the grounds stated.

After disposing of the non-employment related claims, the trial court took up the employment claims, including the remaining portion of the intentional infliction of emotional distress claim as it related to employment. The trial court, however, concluded that employment-related claims were hopelessly intermingled with the issue of prostitution. Specifically, the trial court opined as follows:

After heard [sic] arguments in this matter now for quite some time as well as having reviewed the submitted briefs I'm of the opinion that the motion for summary disposition in terms of Counts I and II and now the remaining Count IX should be granted.

I'm of the opinion, quite frankly, that the public policy arguments that's [sic] been raised by the Court should be liberally and broadly utilized and in this matter the Court is not going to take any part in any way, shape or form to sanctify or to enforce any kind of activity which is clearly illegal in the matter.

I'm of the opinion that the genesis for the entire relationship between the parties herein, including the Data Corporation, was one of sex. In other words, sex in exchange for something in return and anything that flows from that relationship I'm of the opinion has been so tainted that the Court cannot divide the two together [sic] and based on that I will not attempt to do so.

The plaintiff, by her own words, shut the door upon her relief and it's difficult to understand, Mr. Abeska [plaintiff's counsel], how you can stand here and argue clearly contrary to what your client testified to and that is she was receiving consideration for sex and it wasn't up until the point that that illegal relationship terminated by apparently sex being denied from one to the other that this cause of action arised [sic] and based on that I see no relief that this Court will be giving to the Plaintiff. In addition to that, I'm of the opinion, quite frankly, that under the other grounds indicated by Mr. Renfroe [defense counsel] that the motion shall be properly granted.

The difficulty in applying the wrongful-conduct rule to the employment-related claims is that those claims arise, at least in part, to conduct that occurred *after* the prostitution relationship ended. That is, plaintiff's claims are based upon Wheeler's conduct in reaction to plaintiff terminating the acts of prostitution, including the eventual loss of plaintiff's legitimate job with Data Consulting Group. Simply put, if plaintiff were discharged because of her refusal to engage in further acts of prostitution with Wheeler, that is cognizable under the Civil Rights Act. In

other words, while the Court will not assist plaintiff in profiting from prostitution, there is no such bar to recovery for the employer's retaliation against the employee's refusal to engage in prostitution.

However, while the trial court's opinion focuses on the wrongful-conduct rule, it does not solely rest upon that basis. As indicated in the quotation above, in its ruling, the trial court also makes reference to accepting defendants' other arguments. Plaintiff does not fully address the other arguments raised by defendants in its motion for summary disposition. Therefore, plaintiff has not successfully challenged all of the reasons for the grant of summary disposition. Accordingly, while we agree with plaintiff as to the application of the wrongful-conduct rule to the employment-related claims, plaintiff's failure to fully address the other grounds for summary disposition precludes relief.

Affirmed. Defendants may tax costs.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Peter D. O'Connell