

STATE OF MICHIGAN
COURT OF APPEALS

BOBBY BURLESON,
Plaintiff-Appellant,

UNPUBLISHED
November 12, 2002

v

NORWEST BANK INDIANA,
Defendant-Appellee.

No. 233876
Berrien Circuit Court
LC No. 00-003635-NZ

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action involving defendant's conveyance of real property to plaintiff, and plaintiff's subsequent failure to secure the necessary permits to connect the property to water mains and sanitary sewer lines. Plaintiff asserted that the real estate transaction obligated defendant to provide him the right to connect to water and sewer lines at anytime in the future. Plaintiff's complaint alleged innocent misrepresentation, mistake of fact, and breach of contract. We affirm.

I. PLAINTIFF'S COMPLAINT

Plaintiff alleged that the causes of action arose out of his purchase of an undeveloped parcel of real estate (parcel C) from defendant, a national banking association. On August 5, 1995, plaintiff and defendant executed a buy-sell agreement for parcel C. A closing took place on September 29, 1995, finalizing the sale. At the closing, defendant delivered to plaintiff a limited warranty deed and an easement agreement. Plaintiff alleged that the easement created a dominant tenement in parcel C over an adjacent parcel of property, the servient tenement, and granted plaintiff the right to connect parcel C to water mains and sanitary sewer lines at anytime in the future.¹

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

¹ Defendant had purchased the access and utility easement for parcel C a year and a half before plaintiff purchased parcel C in the transaction at issue. Defendant purchased this easement from the South Cove Condominium Association, a neighboring development, for \$50,000. Through the real estate transaction between the parties, plaintiff obtained defendant's rights under the
(continued...)

Plaintiff further alleged that the availability of water and sewer access substantially increased the market value of parcel C. Plaintiff asserted that defendant knew that he intended to develop parcel C, and defendant made material representations that plaintiff would be able to secure the necessary permits to connect to the water and sewer lines through the servient tenement. Plaintiff claimed that the representations were false, and plaintiff was denied the required permits, which necessitated further expenditures by plaintiff in order to connect water and sewer lines to parcel C.² Plaintiff alleged that defendant's representations were made in connection with the real estate transaction and constituted an inducement to plaintiff to purchase the property. Plaintiff relied on the representations in purchasing parcel C for \$350,000. For these reasons, plaintiff alleged a cause of action based on innocent misrepresentation, requesting damages suffered in paying an inflated price for the property.

Plaintiff also alleged a cause of action sounding in mistake of fact, arguing that both parties were mistaken in their assumption that the easement over the servient tenement could be utilized to provide for water and sewer line connections. Plaintiff claimed that this assumption was fundamental to the real estate transaction because of plaintiff's development plans. Plaintiff charged that defendant was unjustly enriched by the real estate transaction, where plaintiff paid for a worthless easement.

Finally, plaintiff alleged a cause of action premised on breach of contract for defendant's failure to fulfill its promise that plaintiff would be able to obtain the necessary connection permits.

II. PROVISIONS IN REAL ESTATE DOCUMENTS

Paragraph 8 of the buy-sell agreement provided that "[t]he parties hereto agree that this is a legal and binding agreement, consisting of one sheet, front and back, and the exhibits and addendums specifically referred to herein and constitutes the entire understanding of the parties and there are no other agreements, expressed or implied."

Paragraph 14 of the buy-sell agreement provided:

BUYER has examined this property and BUYER is satisfied with its present condition except as may be specified herein. BUYER understands and

(...continued)

easement agreement. All of the necessary work, as contemplated by the easement agreement, had been completed to allow connection of water and sewer lines to parcel C prior to the sale; however, the necessary permits to make the actual connection were not sought until after the sale. We will discuss details of the easement agreement infra.

² Parcel C is located at the tip of a peninsula bounded by water on three sides; a marina basin and channel on the north and south and the Galien River on the east, with the South Cove property (servient tenement) located to the west. Plaintiff's intent was to connect the water and sewer lines through the South Cove property. However, after the sale, the Michigan Department of Environmental Quality (DEQ) denied plaintiff's request to connect to the water and sewer lines located on the South Cove property, which forced plaintiff to construct, at significant expense, sewer and water lines under the Galien River in order to connect to parcel C.

agrees BUYER is purchasing the property in an “AS IS” condition It is further understood that no representations or promises have been made to BUYER . . . by the SELLER other than those contained in the Agreement or as otherwise made or given by SELLER to BUYER in a written disclosure statement.

The 1994 easement agreement³ between defendant and the South Cove Condominium Association, under which plaintiff obtained rights through his transaction with defendant in 1995, provided, in part:

South Cove shall, as soon as possible after execution of this Agreement commence and complete the installation of new water mains and sanitary sewer lines within the Easement Property (“South Cove’s Work”). South Cove’s Work shall be completed in accordance with specifications for the same repaired by Merritt Engineering, Inc, all of which shall be subject to prior review and approval by the City of New Buffalo and the Michigan Department of Public Health. . . . South Cove’s Work shall include the extension of the 4 inch water main and the sanitary sewer line into the boundaries of the Norwest Property In consideration of the payment to be made by Norwest to South Cove, as provided hereafter, Norwest shall be entitled to connect to the water mains and sanitary sewer lines at anytime in the future. The cost of undertaking such connections, any extensions of the mains or lines, and any enlargement of such mains or lines or the installation of any additional equipment which is required to benefit the Norwest Property, shall be borne by Norwest.

Norwest shall pay to South Cove the sum of Fifty Thousand Dollars (\$50,000.00) at the time of completion of South Cove’s Work. Payment shall be due within twenty (20) days after written certification by Merritt that South Cove’s Work has been satisfactorily completed and has been approved by the City of New Buffalo and the Michigan Department of Public Health.

Neither the buy-sell agreement, the deed, nor the easement agreement contain any specific promise that permits would be granted to finalize connection of water and sewer lines.

III. MOTION FOR SUMMARY DISPOSITION AND TRIAL COURT’S OPINION

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that all three of plaintiff’s claims relied on allegations that defendant made representations that it would be possible to obtain permits to connect water and sewer lines; however, the parties’ buy-sell agreement contained an express integration clause, along with an “as is” clause. Therefore, plaintiff’s claims for relief were foreclosed as a matter of law.

The trial court granted defendant’s motions as to all three counts contained in plaintiff’s complaint. The trial court ruled that the “as is” and integration clauses barred plaintiff’s

³ The document is specifically titled “Agreement Ratifying and Modifying Easements.” The parties agree that the easement agreement was integrated into their real estate transaction.

innocent misrepresentation claim. The court found that neither the buy-sell agreement nor the easement agreement contained any language assuring plaintiff that the permits would be approved or that permit approval was a condition precedent to the real estate contract. Moreover, the trial court agreed with defendant that if there were any representations made to plaintiff, they were opinions and could not form the basis of a fraud-like cause of action.

Concerning the breach of contract claim, the trial court ruled that the parol evidence rule precluded any evidence of alleged oral promises given the valid integration clause and unambiguous buy-sell agreement.

Finally, concerning the mistake of fact claim, the trial court found that the doctrine could only be invoked where the mistake related to a fact presently in existence and not a mistake related to the occurrence of a future event. The trial court found that the alleged mistake related to the future issuance of water and sewer permits by governmental authorities; therefore, summary disposition was proper. Additionally, the court ruled that the “as is” clause barred a claim based on mistake of fact.

Plaintiff filed a motion for reconsideration of the trial court’s opinion and order. Plaintiff argued that his innocent misrepresentation and breach of contract claims were premised on written representations found in the easement agreement and not on oral statements. Specifically, plaintiff maintained that in light of the fact that Norwest paid South Cove the \$50,000 under the easement agreement, the work contemplated by the agreement had been completed and approved by public authorities; therefore, plaintiff believed that he had a right to connect to the water and sewer lines at the time of the real estate transaction. The trial court rejected this argument stating that plaintiff failed to take into account the fact that the City of Buffalo and the Michigan Department of Public Health [DPH] were not the final voices in permitting plaintiff’s connection, i.e., their approval of the water and sewer lines was not the end of the process. Rather, it was the Department of Environmental Quality [DEQ]⁴ that denied plaintiff’s permit application. Moreover, the trial court ruled that as to plaintiff’s claim that the easement agreement language gave him the right to connect, the language referred only to the rights between the parties and did not address plaintiff’s legal ability to connect via governmental authorities. Finally, plaintiff had requested the opportunity to amend his complaint should the trial court deny the motion for reconsideration, and the trial court denied the request finding that any amendment would be futile because plaintiff could not plead any viable cause of action.

IV. ANALYSIS

Standard of Review and Tests for Summary Disposition

This Court reviews rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to

⁴ The powers of the DPH were transferred to the DEQ on April 1, 1996, pursuant to Executive Reorganization Order No. 1996-1; MCL 330.3101. This transfer of power occurred about six months after the real estate transaction.

judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

Appellate Arguments

Plaintiff argues that the trial court was mistaken in believing that he relied on oral representations in support of his action.⁵ Plaintiff further maintains that the trial court erred in determining that the parties' contract did not have an explicit provision assuring plaintiff that the permits would be approved, where the easement agreement provided that local and state approval had already been obtained.

Plaintiff asserts that it was his "understanding that the 'review and approval' by the City of New Buffalo and the [DPH] was the governmental permission needed to connect to the sewer and water lines and that obtaining the actual permits was a mere formality." Plaintiff continues by arguing that "even if the trial court could reasonably read the agreement as not promising governmental approval of a future connection to the water and sewer lines, that reading [is] not the only reasonable interpretation of the language and thus the matter should have been submitted to the factfinder."

Defendant replies that the easement agreement contains no language concerning "permits." Defendant agrees with plaintiff's assertion that the work and improvements required by the easement agreement were completed under the supervision of a professional engineer and were actually approved by the City of New Buffalo and the DPH; however, according to defendant, those approvals could not and did not constitute permits to extend utility services onto parcel C because no such extension work was then under way as plaintiff recognized by describing them as "pre-approvals."

Innocent Misrepresentation and Mistake of Fact

In *M&D, Inc v McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998), a special conflict panel of this Court stated:

⁵ We note that plaintiff pointed this out in the motion for reconsideration, and the trial court issued an opinion denying the motion and addressing the argument as noted by us above.

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a *fraudulent purpose* or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party who made the misrepresentation. [Citations omitted; emphasis in original.]

Innocent misrepresentation must be predicated on a statement relating to a past or existing fact, rather than a promise of future conduct. *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998).

Regarding mistake of fact, in *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982), our Supreme Court stated:

A contractual mistake “is a belief that is not in accord with the facts.” 1 Restatement Contracts, 2d, § 151, p 383. The erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed. That is to say, the belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence. [Citations omitted.]

Therefore, in order to support a claim for either innocent misrepresentation or mistake of fact, plaintiff must rely on facts existing at the time of the parties’ real estate transaction and not purely on promises of future conduct. We initially note that the easement agreement speaks only of promises of future conduct; therefore, it would appear that oral representations would have been necessary in order to communicate to plaintiff at the time of the closing that defendant’s and South Cove’s easement obligations had been satisfied. However, as properly found by the trial court, the integration clause contained in the buy-sell agreement bars consideration of oral promises. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 494-495; 579 NW2d 411 (1998).

That being said, we do not find it unreasonable to conclude that at the time of the real estate transaction, plaintiff understood that the specific obligations in the easement agreement had been satisfied, where it was executed a year and a half earlier by defendant and South Cove and presented to plaintiff by defendant. Moreover, the parties appear to agree on that matter. Although plaintiff’s argument is somewhat ambiguous, he still apparently argues that the misrepresentation and mistake of fact relate to defendant failing to fulfill a promise or representation that plaintiff would have the right to connect parcel C to water mains and sewer lines through the servient tenement. This argument necessarily relates to future occurrences, i.e., that *after* the sale, plaintiff would be able to connect to existing water and sewer lines. The act which caused plaintiff to file suit was the DEQ’s refusal to issue permits, and this act occurred *after* the real estate transaction. Plaintiff failed to submit any documentation indicating that defendant’s representation was premised on false or mistaken facts in relation to facts existing at the time of the closing.

Plaintiff's argument could also be construed as claiming that he understood the city and DPH "approval" language in the easement agreement to mean that those entities had in fact granted approval to connect; therefore, because plaintiff was not able to connect, defendant made a misrepresentation and there was a mistake of fact. We disagree. If plaintiff's argument is meant to assert that the easement agreement represented that actual "permits" had been issued, the argument fails because the agreement makes no reference whatsoever to "permits." There was no belief on plaintiff's part that permits had been issued where plaintiff himself asserts his belief that obtaining the permits after sale would be a mere "formality."

With regard to plaintiff's claim that defendant represented, either mistakenly or falsely, that the proposed water and sewer line connection to parcel C had been approved prior to closing, there is no issue of fact that there had been pre-approval by the DPH before the closing. Defendant asserts that there was pre-approval by the DPH.⁶ Plaintiff failed to submit documentation, as required by *Quinto* in creating an issue of fact, to show that the DPH had not pre-approved the water and sewer line connection or that the DPH had not made a decision on the matter. We are left with a record which indicates that there was governmental pre-approval of a water and sewer line connection to parcel C. Therefore, there necessarily was no misrepresentation or mistake of fact premised on the easement agreement based on the facts existing at the time of the parties' real estate transaction. It is evident, that to the surprise and consternation of both parties, the DEQ ignored the DPH's prior approval and refused to issue the permits after the sale of parcel C and upon application by plaintiff. The trial court did not err in granting defendant summary disposition with regards to the misrepresentation and mistake of fact claims.

Breach of Contract

The essential elements of a contract are: (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989).

⁶ Defendant makes the following statements in its brief which are not contradicted by any statements in plaintiff's brief or the record:

Plaintiff has represented to this Court that in the interim between the time of the easement agreement and the time plaintiff applied for water and sewer permits, permitting authority was transferred from the DPH to the [DEQ]. Upon plaintiff's application, the DEQ refused to issue the requisite permits. It cannot be questioned that this action was in direct opposition to the intentions of both parties and in direct contravention of the pre-approvals of the preparatory work by the City of New Buffalo and the DPH. The denial of the permits was the very circumstance which Norwest had sought to avoid by obtaining the prior approval of the then-current permitting authorities for the preparatory work done in connection with the easement agreement. Apparently, the DEQ decided it was not bound by its predecessor's pre-approvals.

In order to form a valid contract, there must be a meeting of minds on all of the material facts, which can be determined by looking at the express words of the parties' contract. *Stark v Kent Products, Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975). Here, the easement agreement does not make any reference to "permits," let alone a promise that permits would be issued. We decline to read that language into the agreement. Plaintiff relies on the following language in the easement agreement: "Norwest [therefore plaintiff] shall be entitled to connect to the water mains and sanitary sewer lines at anytime in the future." As a matter of law, it is clear from the context of the easement agreement that the promise was simply that plaintiff had the future right to utilize the water and sewer lines located on the servient tenement to connect to parcel C, not an additional promise or guarantee that the government would issue permits or not change its position concerning connection. Defendant had no authority or power to control the actions of the DEQ, and it is illogical to conclude that defendant would bind itself and be liable for a breach based on the future conduct of a governmental entity. The express language of the easement agreement contains no guarantee that the government would continue its approval and issue permits in the future. Plaintiff's interpretation of the easement agreement is not reasonable, and the trial court did not err in granting the motion for summary disposition with regard to the breach of contract claim. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

Amendment of Complaint

Plaintiff argues that the trial court erred in refusing to allow an amendment of the complaint to bring a claim of fraud. We review a trial court's decision not to allow amendment of a complaint for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court does not commit error in refusing to allow an amendment where the amendment would be futile. *Noyd v Claxton, Morgan, Flockhart & VanLiere*, 186 Mich App 333, 340; 463 NW2d 268 (1990). Here, there was no abuse of discretion because a fraud claim would fail for the same reasons the innocent misrepresentation claim fails; therefore, any amendment would be futile.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof