

STATE OF MICHIGAN
COURT OF APPEALS

RUDOLPH T. STONISCH III,

Plaintiff-Appellant,

v

BIRMINGHAM MANAGEMENT I, L.L.C.,

Defendant-Appellee,

and

KOUSAY ASKAR,

Defendant.

UNPUBLISHED

September 19, 2006

No. 267684

Oakland Circuit Court

LC No. 2005-063582-CH

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant Birmingham Management I, L.L.C., under MCR 2.116(C)(10). We affirm.

Kousay Askar entered into a contract to purchase a five-story building in the city of Birmingham on behalf of a corporation to be formed (defendant) for the purpose of purchasing the property. The first floor of the building has two 400-square-foot retail units, while the four upper floors are condominiums. Defendant was later formed, and the purchase agreement was signed in October 2004. Before the closing on the building, defendant retained real estate agent Lou Sabatini, who entered into a listing agreement with Askar, for the purpose of selling the condominium units only. Plaintiff approached Sabatini, and inquired about leasing one of the two retail units. Sabatini averred that plaintiff told him that he planned to operate an art gallery out of the retail space. Sabatini contacted Askar about plaintiff's interest, and Askar advised him to contact defendant's attorney, Paul G. Valentino. Valentino advised Sabatini that defendant had not yet acquired the building and, thus, no lease agreement could be negotiated. Valentino suggested the execution of a letter of intent, and, because Sabatini did not have a form letter of intent, Valentino provided one to Sabatini containing the terms that Sabatini indicated were proposed by plaintiff. Sabatini averred that he contacted plaintiff and advised him that "a form letter outlining the terms [plaintiff] had indicated he was offering to lease the space for would be included." Dorothy Perrotta, plaintiff's realtor, indicated that she spoke with Sabatini, and that the terms for which plaintiff was willing to lease the retail space were set forth in the letter of

intent. Valentino never spoke directly with plaintiff before drafting the letter of intent, but received the terms from Sabatini. Valentino indicated that the letter of intent was drafted so that plaintiff could make an offer to lease the space, and that no representative of defendant had contact with plaintiff, or agreed to the terms in the letter of intent.

The letter of intent prepared by Valentino, dated August 23, 2004, stated, inter alia, the duration of five years for the proposed lease, the rental rate per square foot, and responsibility for utilities. The letter also stated:

Our client has not closed on the purchase but anticipates that the closing will be in the next 60 days. Due to the fact that our client has not closed on the purchase of this building, we can not enter into a binding lease agreement for one of the two retail spaces located on the first floor of the building. However, our client is ready, willing and able to enter into this letter of intent to bind the limited liability to be formed to enter into a lease agreement for one of the retail spaces located on the first floor of the 180 Pierce Street to you.

. . . . It is our understanding that you will be selling some art work out of this location

If the foregoing letter of intent is agreeable to you, please sign where indicated below. Upon receipt by us of a signed letter of intent, we shall prepare a proposed lease. In the event you wish to have the lease in the name of a corporation or other entity you will be required to sign a personal guarantee.

The letter contained a signature block that included, “Yours very truly, Lehman & Valentino, P.C. Paul G. Valentino,” and the notation “dictated but not read.” Neither Valentino, nor anyone from defendant actually signed the letter. Plaintiff signed the letter on August 26, 2004, and returned it to Sabatini.

Sabatini averred that, after receiving the letter of intent, he learned that plaintiff had no intention of operating a retail business selling artwork in the space, but intended “to place a piece of art in the window in order to ‘get around the retail limitation.’” Sabatini forwarded the letter of intent to Valentino, and advised him of his conversation with plaintiff. Valentino advised Sabatini that defendant would not enter into a “sham lease that would violate the city ordinance” Defendant thereafter refused to execute the letter of intent or negotiate a lease.

Plaintiff filed a two-count complaint, alleging breach of contract, and seeking specific performance. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that the letter of intent does not satisfy the statute of frauds because it “was not signed by defendant . . . no consideration was rendered, and that no meeting of the minds was reached.”

In response, plaintiff maintained that the notation “dictated but not read” appeared in lieu of a signature, that the letter of intent is an enforceable contract, and that the letter of intent contained every essential term found in a typical lease agreement. Plaintiff asserted that the expression in the letter that “our client is ready, willing, and able to enter into this letter of intent to bind the limited liability to be formed” should bind defendant. Plaintiff further asserted that there were several conversations between the parties’ realtors concerning the lease specifics,

which were incorporated into the letter of intent, thereby evidencing a meeting of the minds. Plaintiff sought summary disposition under MCR 2.116(I)(2).

In granting defendant summary disposition, the trial court concluded that there was no genuine issue of material fact “as to acceptance by Defendant.” The trial court reasoned:

The main issue for this Court to decide is one of acceptance by Defendant, the party to be bound. Plaintiff requests that this Court accept a blank signature line of the law firm who drafted the letter to be an acceptance. As noted in *Eerdmans [v Maki]*, 226 Mich App 360; 573 NW2d 329 (1997)], acceptance must be unambiguous and in strict conformance with the offer. The absence of any signature on behalf of the party to be bound, a not-yet-formed corporation, on the August 23, 2004, letter is ambiguous and cannot be construed as an acceptance. This Court also finds that Plaintiff has failed to establish a genuine issue of material fact as to a writing signed by either (1) the party making the sale or (2) a person lawfully authorized in writing to act on behalf of the person making the sale. *Eerdmans, supra*. Plaintiff has not demonstrated that Valentino was an agent of the not-yet-formed corporation or a person lawfully authorized in writing to act on behalf of the not-yet-formed corporation. In fact, the order dated July 7, 2005 [order dismissing Askar] . . . lists Kousay Askar as Defendant’s agent.

The trial court’s ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).

“The essential elements of a valid contract are the following: ‘(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.’” *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

In this case, whether there was mutuality of agreement is at issue. “Before a contract can be completed, there must be an offer and an acceptance.” *Eerdmans, supra* at 364. “An offer is defined as ‘the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.’” *Id.* (citation omitted). “Acceptance must be unambiguous and in strict conformance with the offer.” *Id.* “[I]f [the acceptance] differs from the offer, the transaction amounts only to a proposal and a counter-proposal.” *Marshall Mfg Co v Berrien Co Package Co*, 269 Mich 337, 339; 257 NW 714 (1934).

A contract to lease property for a period longer than one year must also satisfy the statute of frauds. To satisfy the statute of frauds, there must be a writing signed by either the party making the sale or a person lawfully authorized in writing to act on behalf of the person making the sale. MCL 566.108; *Eerdmans, supra* at 364-365 (citation omitted).

Viewed in a light most favorable to plaintiff, the submitted evidence did not create an issue of material fact with respect to whether the letter of intent constituted an enforceable contract. The parties dispute whether the letter of intent should be characterized as an offer or an acceptance by defendant. In either case, the letter of intent does not satisfy the statute of frauds requirement that it be signed by the party making the sale or a person lawfully authorized in writing to act on behalf of the person making the sale. It is undisputed that the letter of intent was not signed by defendant or Valentino, the party who drafted the document. Even if we accept plaintiff's position that the phrase "dictated but not read" may be considered a signature, there is no evidence that Valentino was an authorized agent of defendant, or lawfully authorized in writing to act on behalf of defendant. Valentino testified that he had "no authority to enter into a binding letter of intent." "Contracts conveying an interest in land made by an agent having no written authority are invalid under the statute of frauds unless ratified by the principal." *Forge v Smith*, 458 Mich 198, 208-209; 580 NW2d 876 (1998). Further, even plaintiff's realtor averred that Sabatini was the broker, although the record shows that Sabatini was authorized to sell only the condominium units. Because plaintiff failed to establish an agency relationship sufficient to satisfy the statute of frauds, summary disposition was proper on this basis alone.

Plaintiff argues that because the letter of intent dictated the essential terms of the lease, which he accepted, it constituted a valid contract. Indeed, the letter of intent listed various terms including the rental rate, responsibility for utilities, and the duration of the lease. But the letter of intent also stated that "[i]t is our understanding that you will be selling some art work out of this location. However, the art work must be of a tasteful nature"

According to Sabatini, after plaintiff signed the letter of intent, he advised him that he did not intend to retail art in the space. In his affidavit, plaintiff denied ever informing Sabatini that he intended to sell art in the retail space. Yet, plaintiff signed the letter of intent which included an implicit limitation on the use of the retail space to the sale of art. Immediately above plaintiff's signature, the letter provides: "I have read the foregoing letter of intent and agree that its [sic] sets forth the understanding of the parties." Thus, plaintiff seeks to rely on the letter of intent as evidencing the parties' agreement, while also seeking to disregard one of its terms. As such, even if we accepted plaintiff's argument that the letter of intent was an offer, "an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested." *Harper Bldg Co v Kaplan*, 332 Mich 651, 656; 52 NW2d 536 (1952) (citation omitted).

We additionally note that, immediately after delineating the principal terms of the lease, the letter of intent provides, "The remaining terms of the lease agreement shall be as set forth on a lease agreement to be negotiated between the parties." This reference to the negotiation of the "remaining terms" indicates that the letter in and of itself did not create in plaintiff the power to enter into a contract by merely accepting the terms set forth in the letter. This reservation prevents the proposal from being an offer. See *Eerdmans*, *supra* at 364.

In sum, viewing the evidence in a light most favorable to plaintiff, there was no genuine issue of material fact concerning the existence of an enforceable contract. "Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract." *Id.* (citation omitted). The trial court properly granted summary disposition for defendant.

We also reject plaintiff's claim that the trial court abused its discretion in denying his motion to amend his complaint to add Valentino as a defendant. This Court reviews a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). Generally, leave to amend shall be freely granted where justice requires. MCR 2.118(A)(2); *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). But leave to amend should be denied where the amendment would be futile. *Jenks, supra* at 420. An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

Plaintiff did not seek to add any new claims against defendant, but sought to add Valentino as a defendant to assert a claim of fraudulent misrepresentation against him. In the proposed count III, plaintiff alleged that Valentino misrepresented that he had authority to act on behalf of defendant. Plaintiff relies on Valentino's statement in the letter of intent that "our client is ready, willing and able to enter into this letter of intent to bind the limited liability to be formed to enter into a lease agreement for one of the retail spaces located on the first floor of 180 Pierce Street to you."

The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. *Eerdmans, supra* at 366.

On this record, we cannot conclude that the trial court abused its discretion. Plaintiff cannot show injury due to reliance on the representation. Plaintiff sought specific performance based on the letter of intent. Despite Valentino's alleged false representation, if the letter of intent was enforceable, defendant would have to execute a lease, and adding Valentino to the lawsuit against defendant would have been immaterial. As discussed previously, the letter of intent is not itself an offer because defendant retained the power to negotiate the remaining terms of a proposed lease. And even if the letter did constitute an offer, plaintiff altered the offer when he stated that he did not intend to sell art out of the space, as the letter of intent had indicated. Accordingly, the trial court did not abuse its discretion by denying plaintiff's motion to amend his complaint.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto