

STATE OF MICHIGAN
COURT OF APPEALS

FREDERICK D. ADAMS, KAREN L. ADAMS,
SARAH JO ADAMS, DAVID J. ADAMS and
SUSAN A. ADAMS,

UNPUBLISHED
February 21, 2008

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF ORION,

No. 275376
Oakland Circuit Court
LC No. 2005-071418-CZ

Defendant-Appellee.

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendant. This case arises from a dispute between defendant Orion Township and plaintiffs, homeowners in Hi Hill Village in Orion Township, regarding whether defendant was obligated to reimburse plaintiffs for a special assessment taxed to them for the installation of public water and sewer systems. Plaintiffs argue that defendant promised reimbursement and brought claims of promissory estoppel and fraudulent misrepresentation in the lower court. Defendant maintains that the trial court properly granted summary disposition and argues that summary disposition was appropriate for the additional or alternative reasons that the trial court lacked jurisdiction over this matter and plaintiffs' claims were time-barred. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

In 1996, plaintiffs petitioned defendant to install water and sewer service. Included in their petition was a request for the formation of a 10-year Special Assessment District (SAD) that would allow the residents to pay for the improvements over a ten-year period. On May 15, 2000, the Township Board of Trustees passed a series of motions to initiate the project. One of the motions provided, "if it is legal, a contingency be added to the SAD that if an expansion of the landfill is granted or a settlement is reached with Waste Management, that reimbursement of funds by Waste Management will be made to the residents and the Township for any SAD charges already paid."

On July 6, 2000, the Board of Trustees passed two resolutions which declared the Board's tentative intent to proceed with the project and directing preparation of plans and cost

estimate. Also, the Board of Trustees adopted a resolution titled “Use of Host Fee Funds from Eagle Valley Recycle and Disposal for Hi Hill Village Improvements,” stating that the Host Fee funds from the settlement agreement between defendant and Waste Management would be used to pay “as much of the cost as possible for installing sewer and re-capping roads in Hi Hill Village.”

At a public hearing, held on December 18, 2000, a township engineer reported that defendant had committed to pay 100 percent of the costs for the installation of the water infrastructure, 50 percent of the sewer installation costs and 10 percent of the road-capping costs. He informed residents that they would be responsible for the costs to connect their home to the system and that the special assessment for the sewer improvement was \$7,750. That same night, the Board of Trustees passed resolutions establishing the SADs, which commenced the project.

On September 20, 2004, defendant issued a report titled “Report on Request for Repayment for Hi-Hill Village Residents.” The Board, through its report, stated that it “never took any official action to guarantee that the residents of Hi-Hill subdivision would be reimbursed by the Township for costs assessed against Hi-Hill residents as part of the SADs.” Following issuance of the report, plaintiffs filed suit on December 27, 2005. In their complaint, they alleged that defendant “explicitly promised the Plaintiffs . . . that if they would acquiesce and consent to the formation of a Special Assessment District . . . that upon receipt of host or impact fees . . . that such fees would be utilized to reimburse such costs of sewer installation.” Plaintiffs claimed that defendant made similar promises on other occasions and alleged that they had relied upon defendant’s promises to their “substantial detriment.” The complaint contained two theories of liability: promissory estoppel and intentional misrepresentation. Plaintiffs also asked the trial court to certify the matter as a class action. Plaintiffs sought damages of \$7,750 per household.

Defendant moved for summary disposition on January 19, 2006, on four grounds: 1) lack of jurisdiction; 2) untimely complaint; 3) no evidence of an “explicit promise” in the public records; and 4) plaintiffs’ inability to establish reliance.

The trial court issued a written order and opinion on June 30, 2006. In it, the trial court granted summary disposition in favor of defendant on the basis that plaintiffs failed to establish the reliance element for promissory estoppel and fraudulent misrepresentation and opined, in part:

Thus, plaintiffs were without authority to prevent the Board from establishing the Special Assessment District, and could not be said to have “acquiesced” or “consented” to the formation of the District. As “acquiesce” and “consent” to the formation of the district are the only ways Plaintiffs claim to have relied on the Township’s promise, their claim must be considered defective.

II. Standard of Review

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion under MCR 2.116(C)(10), the trial court must consider the pleadings, affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Id.*; *Smith*

v Globe Life Ins Co, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III. Analysis

Plaintiffs argue that the trial court erred in granting summary disposition on the ground that they failed to satisfy the reliance element of promissory estoppel. The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably expect to induce action or forbearance on the part of the promisee, (3) that in fact induces such action or forbearance, and (4) injustice can be avoided only by performance of the promise. Restatement Contracts 2d, § 90, p 242. Action or forbearance must be of a definite and substantial character. *In re Timko Estate*, 51 Mich App 662, 666; 215 NW2d 750 (1974).

On July 31, 2000, at a Township Board of Commissioners meeting, defendant resolved to use “Host Fee” funds from a settlement agreement between defendant and a waste management company to pay “as much of the cost as possible for installing sewer and re-capping roads in Hi Hill Village.” Plaintiffs argue that, in reliance on that promise, they allowed the sewer and water project to be implemented without opposition.

The township board has the authority to engage in the construction, improvement, and maintenance of storm or sanitary sewers and water systems under MCL 41.722(1)(a) and (b). MCL 41.723(1)(a) gives a township board discretion to carry out an improvement unless written objections are filed by property owners at or before a hearing on the matter. A township board may require a petition filed by the property owners, constituting more than 50 percent of the total land area in the SAD, before proceeding. MCL 41.723(2), (3)(a).

On receipt of a petition, the township board may elect to proceed on the project and, if so, is required to prepare plans, estimate costs, and tentatively declare by resolution its intent to proceed and tentatively designate the special assessment district. MCL 41.724(1). A hearing must be held and any objections to the petition heard. MCL 41.724(2), (3). After the hearing the “township board may revise, correct, amend, or change the plans, estimate of cost, or special assessment district.” MCL 41.724(3). The word “may” when used in a statute indicates the Legislature’s intent to make something permissive, not mandatory. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Thus, even after a hearing and noting objections, the township did not have to change or abandon its plan.

In this case, defendant required a petition to be filed and one was filed. There is no evidence in the record that the petition was statutorily deficient and it can be inferred, by the Board of Trustee’s acceptance of the petition and initiation of the project, that the petition contained the requisite number of signatures. Therefore, as the trial court found, plaintiffs did not have the ability to stop the project. It was commenced on a valid petition, and once the Board of Trustees agreed, it did not have to stop the project. Plaintiffs cannot be said to have relied on defendant’s promise, which was made after the petition was filed. More importantly, although plaintiffs argue that, in reliance on defendant’s promise, they did not oppose the project; this inaction does not constitute “reliance.” Unlike in more traditional promissory estoppel cases, plaintiffs did not forfeit an alternative opportunity that was less expensive based

on defendant's promise or suffer a harsh result. Once plaintiffs petitioned for the project and the Board of Trustees evidenced its intent to proceed, plaintiffs' objections could not control the township's decision. Any forbearance by plaintiffs in light of the promise was not definite and substantial. *In re Timko Estate, supra* at 666.

Plaintiffs also argue that the trial court erred by granting summary disposition based on defendant's unsupported assertion that, "[a]lthough the SADs in question were initiated by Plaintiffs' petitions, once the Township Board decided to move forward, no further consent of the Plaintiffs was required." Even though defendant did not support its assertion with documentary evidence, no documentary evidence was necessary because defendant cited the Special Assessment District statute, which authorized defendant to carry out the improvement project and assess the costs to the residents, either in part or in whole. MCL 41.721. The applicable statutory scheme provided sufficient authority on which the trial court could conclude that plaintiffs could not stop the project once they petitioned for it and thus, could not have detrimentally relied on defendant's promise.

Plaintiffs also argue that the trial court erred by summarily disposing of their fraudulent misrepresentation claim based on their failure to show reliance.¹ The elements of fraudulent misrepresentation are: (1) defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. *Campbell v Sullins*, 257 Mich App 179, 195; 667 NW2d 887 (2003); *M&D, Inc v W B McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

We find that plaintiffs failed to satisfy the first element of fraudulent misrepresentation because defendant's promise was to act in the future and were based on a future event, i.e. whether it was possible to pay for the improvement. Generally, a claim of fraud cannot be based on a promise of future conduct. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). There is an exception, however, that if a promise is made in bad faith without the intention to perform then the promise can form a basis for a fraudulent misrepresentation claim. *Hi-Way Motor, supra* at 337-338. "[E]vidence of fraudulent intent, to come within the exception, must relate to conduct of the actor 'at the very time of making the representations, or almost immediately thereafter.'" *Id.* at 338-339, quoting *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930). Plaintiffs therefore must demonstrate that at the time defendant made the promise to them, defendant did not intend to fulfill the promises. See *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 490; 559 NW2d 379 (1996) (O'Connell, J., dissenting), citing Pappas & Steiger, Michigan Business Torts (ICLE, 1991), § 6.7, p 84; *Derderian v Genesys*

¹ Plaintiffs asserted in their complaint that "defendant . . . made its promise to Plaintiffs and those similarly situated with the undisclosed intent not to perform or without the intention to perform[.]" Defendants did not make this argument in their brief on appeal, however.

Health Care Sys, 263 Mich App 364, 379; 689 NW2d 145 (2004). Plaintiffs have failed to produce any evidence that at the time defendant made assertions of reimbursement it had no intention of fulfilling that promise. Therefore, the bad faith exception does not apply and this Court concludes that defendant's promise is not actionable for purposes of a claim of fraudulent misrepresentation.

IV. Conclusion and Holding

For the foregoing reasons, we hold that the trial court did not err when it granted summary disposition in favor of defendant and reversal is not required. In light of our decision to affirm, we need not address defendant's alternative arguments in support of affirming the trial court's dismissal of this case.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello