

STATE OF MICHIGAN
COURT OF APPEALS

SAULT STE. MARIE TRIBE OF CHIPPEWA
INDIANS,

UNPUBLISHED
October 20, 2015

Plaintiff-Appellant,

v

No. 323136
Wayne Circuit Court
LC No. 12-016946-CB

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

In this fraud case, plaintiff appeals as of right an order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10). We reverse.

Plaintiff provided health care coverage to its employees and their families through a self-insured plan which was administered by a third-party. The third-party which processed and paid claims was NGS. In an effort to reduce its cost for health care claims, plaintiff was amenable to considering a change. Thus, in 2008 plaintiff provided its claims data for a one-year time period and a "repricing" was performed which compared plaintiff's actual cost with the cost if defendant had administered plaintiff's plan. On January 16, 2009, defendant advised plaintiff that it would have provided the same services as NGS during that time period for \$2.3 million less. Specifically, defendant stated that "[h]ad the BCBS network been in place, [plaintiff] would have achieved a 45.2% combined discount for both in and out-of-network. This represents \$2,353,375 in savings over the current carrier."

Plaintiff then gave additional information to defendant and, in an extensive report dated April 30, 2009, titled "Total Value Proposition," defendant represented: "With Blue Cross and Blue Shield of Michigan, we project you will save 42.4 percent or \$1,981,400 in claims dollars over your current carrier and project a \$12,271,300 savings over a 5-year forecast." On June 30, 2009, defendant presented its "Finalist Presentation" to plaintiff which represented that, based on an "estimated discount advantage to current carrier," plaintiff would pay \$1,981,400 less for claims if defendant was its administrator. On July 31, 2009, defendant sent an email to plaintiff stating again that, with regard to claims cost, defendant "is bringing an overall discount savings of \$1.9 million in cost over NGS/Cofinity." In August 2009, in reliance on defendant's repeated representations of claims cost savings, plaintiff's Board of Director's voted to switch its health

care plan administrator from NGS to defendant, effective January 1, 2010. However, instead of plaintiff's claims cost for health care decreasing, the cost substantially increased. In fact, in 2010, plaintiff did not save \$1,981,400; rather, it paid about \$1.2 million more. And in 2011, plaintiff's cost increased by about \$2.7 million. Thus, in 2012, plaintiff terminated defendant and retained NGS again.

In December 2012, plaintiff filed this action seeking rescission of the parties' contract and damages resulting from defendant's fraud. In Count I, plaintiff alleged that defendant fraudulently represented that, if it had been plaintiff's third-party health care administrator, plaintiff would have saved over \$2.3 million and that, over five years, it would save over \$12 million. In Count II, plaintiff alleged a claim of fraud based on a bad faith promise that plaintiff would save millions of dollars if defendant was its administrator, which plaintiff relied on to its detriment. In Count III, plaintiff alleged a claim of innocent misrepresentation premised on defendant's misrepresentations of material facts that plaintiff relied on to its detriment.

In March 2014, following extensive discovery, defendant filed a motion for summary disposition, arguing that plaintiff could not establish that a genuine issue of material fact existed with regard to its claims and defendant was entitled to judgment as a matter of law pursuant to MCR 2.116(C)(10). Defendant first argued that any alleged promises of future benefit, including savings, were contractual in nature and could not form the basis of a fraud claim. Second, any reliance on defendant's alleged misrepresentations of past and future savings was unreasonable because the parties' contract indicated that provider discounts may be different than estimated, and the contract also contained a merger clause which disclaimed any prior agreements between the parties. Moreover, plaintiff knew that defendant's estimates and projections were based on the repricing report, which in turn was based upon estimates and assumptions. In fact, plaintiff's insurance manager, Holly Haapala, expressed her concerns to plaintiff's Board of Directors regarding the accuracy of defendant's projections and estimates of health care expenditure savings, but the Board voted to retain defendant anyway. Therefore, plaintiff's claimed reliance on defendant's alleged misrepresentations regarding past and future savings, if true, would be unreasonable. And finally, plaintiff could not seek to rescind a contract that was already performed and terminated. Accordingly, defendant requested that the trial court dismiss plaintiff's complaint.

Plaintiff opposed defendant's motion, arguing that defendant's written, specific, repeated, and false representations regarding past and future savings of millions of dollars induced it to retain defendant to administer its self-insured employee health care plan. Defendant's representations included that, based on the repricing it had performed through Milliman—an allegedly “independent” actuarial company which almost exclusively did work for defendant—if plaintiff had used defendant as its administrator from December 2007 through November 2008, plaintiff would have saved \$2,353,375. Further, defendant represented that it would save plaintiff \$1,981,400 a year and, over five years, it would save plaintiff \$12,274,300. However, during discovery plaintiff determined that the “repricing” analysis was false; instead of plaintiff saving over \$2.3 million, it showed that defendant was about \$167,000 more expensive. Thus, plaintiff could establish that all of defendant's representations regarding the money plaintiff would have saved in the past and would save in the future were fraudulent. Such fraud invalidated the entire contract, including the merger clause.

Plaintiff further argued that whether its reliance on defendant's representations was reasonable was a question of fact for the jury, not the court. But, in any case, plaintiff was incapable of independently verifying or discrediting defendant's representations because defendant withheld and refused to provide significant information, including its reimbursement rates to providers; thus, plaintiff's reliance was reasonable. And while plaintiff agreed that any discussion regarding future health care costs was necessarily an "estimate" or "projection," plaintiff argued that defendant's representations of savings were so grossly inflated that they were clearly designed to induce plaintiff to act. Defendant even used plaintiff's actual claims experience to generate its projections which made such representations especially persuasive and actionable. See *Mesh v Citrin*, 299 Mich 527, 533-534; 300 NW 870 (1941). And, finally, plaintiff argued, contrary to defendant's argument, a terminated contract may be rescinded—even one for personal services for which the defendant was paid, as in this case. Accordingly, plaintiff argued, there were questions of material fact for the jury to decide as to whether it was defrauded by defendant; thus, defendant's motion for summary disposition should be denied.

Defendant replied to plaintiff's response, arguing that the holding in *Novak v Nationwide Mut Ins Co*, 235 Mich App 675; 599 NW2d 546 (1999), was controlling in this case. It was unreasonable for plaintiff to rely on pre-contractual representations in light of the contract's merger clause. And the parties' contract specifically disclaimed any reliance on defendant's pre-contract estimates so plaintiff's reliance on those estimates was unreasonable as a matter of law. Further, defendant argued, plaintiff was seeking to rescind an already performed and terminated contract; such remedy was not available. Moreover, plaintiff had already sought the contract remedy for a short-fall in projections provided by the Guaranty Discounts provision of their contract and was paid about \$56,000. Accordingly, defendant was entitled to dismissal of plaintiff's complaint.

The trial court agreed with defendant and dismissed plaintiff's complaint. The trial court noted that the parties to the contract were sophisticated corporate entities; the contract was the result of months of due diligence by both parties; and the projected estimates were based on information provided to defendant during the due diligence phase. The court also noted that plaintiff's insurance benefits manager, Haapala, "withheld cost information from the third-party Milliman and the defendant" which impacted the estimates and projections of savings. Thus, the trial court granted defendant's motion and adopted "defendant's arguments and law in support of the motion."

Plaintiff filed a motion for reconsideration. Plaintiff argued that the court misunderstood a key fact regarding the exchange of information; specifically, the court believed that plaintiff withheld information from defendant which affected the repricing of plaintiff's claims but that belief was erroneous. It was undisputed that Milliman and defendant were provided with all necessary information for the repricing and other reports. Further, the trial court erroneously concluded that plaintiff was a sophisticated corporate entity and, thus, its reliance on defendant's representations was unreasonable. In that regard, plaintiff argued, the trial court impermissibly substituted its judgment for that of the jury because genuine issues of material fact existed. Accordingly, plaintiff requested the trial court to reconsider its decision to grant defendant's motion for summary disposition. The trial court refused, and denied plaintiff's motion for reconsideration. This appeal followed.

Plaintiff argues that the trial court's decision to grant defendant's motion for summary disposition was based on a clearly erroneous understanding of the facts, as well as a misapplication of the law; thus, the decision should be reversed. We agree.

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim and should be granted only if, considering the pleadings and documentary evidence submitted by the parties in the light most favorable to the nonmoving party, no genuine issue of any material fact exists to warrant a trial. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Spiek*, 456 Mich at 337.

Generally, a fraud claim must be based on a statement relating to a past or existing fact; thus, a promise relating to a future action is usually considered contractual and cannot constitute fraud. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). In other words, misrepresentations that relate to a party's performance under a contract do not generally give rise to a cause of action in tort; rather, a breach of contract action arises. But when "a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon," a claim for fraud in the inducement may be stated. *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 242; 733 NW2d 102 (2006), quoting *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). A claim of fraudulent misrepresentation or fraud in the inducement requires the plaintiff to prove that: (1) the defendant made a material representation; (2) it was false; (3) the defendant either knew it was false or made it recklessly without knowledge of its truth; (4) the representation was made with the intent that the plaintiff would act upon it; and (5) the plaintiff did act, which caused the plaintiff to suffer damages. *Hi-Way Motor Co*, 398 Mich at 336 (citation omitted); *Custom Data Solutions, Inc*, 274 Mich App at 243 (citations omitted). The plaintiff's reliance on the false representation must have been reasonable. *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

Here, plaintiff's fraud claims are predicated on pre-contractual false representations allegedly made by defendant regarding costs that could have been saved in the past if defendant had been plaintiff's third-party claims administrator and costs that could be saved in the future if defendant became plaintiff's third-party claims administrator. In particular, with regard to the costs plaintiff could have saved in the past, defendant represented that plaintiff was only receiving a 28.1 percent discount for services with NGS but, if defendant had been its administrator, plaintiff would have received a 45.2 percent discount which meant \$2,353,375 in savings. This representation was a statement of fact, not a promise about defendant's future conduct if the parties entered into a contract. And with regard to costs plaintiff could save in the future with defendant as its administrator, defendant represented that plaintiff would save 42.4 percent or \$1,981,400, which meant \$12,271,300 in savings over a 5-year period. These were representations about defendant's future conduct if the parties entered into a contract.

Plaintiff alleged that these representations were material and induced it to enter into a contract with defendant but the representations were false, and defendant knew the representations were false or made them recklessly, intending that plaintiff would act upon them, and plaintiff did act upon them to its detriment. See *Hi-Way Motor Co*, 398 Mich at 336.

Plaintiff also claimed that its reliance on defendant's false misrepresentations was reasonable because defendant purportedly retained an "independent" company to specifically perform an analysis of plaintiff's actual claims data, and defendant refused to disclose discount or reimbursement information so that plaintiff could conduct its own analysis and evaluation of defendant's representations of substantial savings.

In granting defendant's motion for summary disposition, the trial court apparently concluded that defendant could not have made fraudulent misrepresentations because its representations were based on the repricing performed by Milliman and plaintiff provided incomplete claims data to Milliman. But defendant never admitted that its representations were false and did not argue that plaintiff provided incomplete claims data to Milliman which resulted in Milliman issuing an incomplete or misleading repricing report upon which defendant relied. And Liz Meyers from Milliman testified that it received "a good data set for use" from plaintiff. Thus, the factual basis of the trial court's holding was erroneous. And plaintiff presented evidence in support of its claim that defendant knew its representations of past and future savings were false or were made recklessly with the intent to induce plaintiff to act on them. Plaintiff argued, for example, that its expert, Laurence Gelman, considered the same claims data and would testify that, if defendant had provided the same services as NGS, it would have cost plaintiff \$167,000 more, not \$2.3 million less as defendant had represented. Such intentional deception, if established, supports a claim of fraud in the inducement. *Mesh*, 299 Mich at 533. Therefore, summary disposition was precluded by the existence of genuine issues of material fact in this regard. See MCR 2.116(C)(10).

And the trial court's conclusion that plaintiff could not demonstrate reasonable reliance on defendant's representations was also erroneous. It appears that that trial court concluded that plaintiff was a sophisticated entity and performed its due diligence before entering into the contract with defendant; thus, it could not have been unfairly induced by defendant's allegedly false representations to enter into the contract. But plaintiff presented evidence that its ability to make an informed decision was undermined by defendant's claim that an "independent" company performed the repricing, and Milliman may not have been a true "independent" company since it had no competition and Meyers testified that 75 percent of her work at Milliman was for defendant. Plaintiff also presented evidence that it could not conduct its own analysis of defendant's representations because defendant would not provide plaintiff with specific discount or reimbursement information before they entered into the contract. Therefore, whether plaintiff reasonably relied on defendant's allegedly false representations was for the jury to determine. See *Nieves*, 204 Mich App at 464.

We note and reject defendant's argument that the existence of a merger clause caused plaintiff's alleged reliance on defendant's representations to be unreasonable. While a merger clause prevents a contractual party from presenting evidence of a prior or collateral agreement that varies the terms of the parties' written agreement, *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 507 n 14; 579 NW2d 411 (1998), plaintiff argued that pre-contractual misrepresentations of material facts related to past and future savings induced it to enter into a contract with defendant. "[W]here the inducements for the execution of a contract are fraudulent representations as to existing facts, testimony as to such representations is not within the parol evidence rule. They do not vary, change, or alter the terms of the written contract and are admissible in evidence, as bearing upon the question of whether the contract,

fair on its face, was procured by fraud.” *Robinson v Great Lakes College, Inc*, 294 Mich 192, 196; 292 NW 701 (1940). Further, “[t]he mere fact that statements relate to the future will not preclude liability for fraud if the statements were intended to be, and were accepted as, representations of fact, and involved matters peculiarly within the knowledge of the speaker.” *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005) (citation omitted). And defendant’s reliance on the holding in *Novak*, 235 Mich App 675, is misplaced. In that case, the allegedly false oral representations relied upon by the plaintiff were specifically and expressly contradicted by the written contract terms which is not the case here. Defendant repeatedly represented that it would have saved plaintiff millions of dollars in the past and would do so in the future if defendant was plaintiff’s claims administrator. The parties’ contract terms did not specifically and expressly contradict these representations.

Moreover, defendant’s allegedly false representations regarding past and future health care cost savings were not merely expressions of opinion or sales talk. See *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987). These representations were premised on a specific analysis of plaintiff’s actual claims data that was purportedly performed by an independent company hired by defendant, Milliman. As stated in an October 16, 2008 email from defendant to plaintiff: “As you can see, the final Milliman report provides a prospective client details ‘specific’ to them by comparing their current financial offering to one had [defendant] been in place.” Under these circumstances, defendant’s assertions may reasonably be expected to be relied upon. See *Samuel D Begola Servs, Inc*, 210 Mich App at 639.

In summary, the trial court erroneously concluded that defendant was entitled to judgment as a matter of law under MCR 2.116(C)(10). See *Maiden*, 461 Mich at 120; *Spiek*, 456 Mich at 337. Thus, the order granting defendant’s motion for summary disposition is reversed and this matter is remanded for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly