

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN D. BOOKS,

Plaintiff/Counter-Defendant-
Appellant,

v

MARYSVILLE PROPELLER, INC.,

Defendant/Counter-Plaintiff-
Appellee,

and

CIPA USA, INC.,

Defendant.

UNPUBLISHED

July 3, 2003

No. 237357

St. Clair Circuit Court

LC No. 99-001513-CZ

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff Steven Books appeals as of right from a judgment of no cause of action following a bench trial. We affirm.

Plaintiff and defendant Marysville Propeller, Inc., were involved in a business relationship selling and repairing boat propellers. Plaintiff claimed that defendant failed to fulfill its duties under a purported contract, the existence of which defendant denied.

Plaintiff first argues that the trial court erred by not finding that a binding contract existed between the parties. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C). Clear error is present when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *McMillian v Vliet*, 422 Mich 570, 571-572 n 1; 374 NW2d 679 (1985), quoting *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976). The trial court's conclusions of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001), citing *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

A contract will not be found to exist unless there was a meeting of the minds on all essential terms. *Kamalnath v Mercer Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499

(1992), citing *Stanton v Dachtelle*, 186 Mich App 247, 256; 463 NW2d 479 (1990), citing *Heritage Broadcasting Co v Wilson Communications Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988). ““A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not the subjective state of mind.”” *Kamalath, supra*, quoting *Stanton, supra* at 256, *Heritage Broadcasting, supra* at 818. Plaintiff has the burden of proof to show that a contract existed, and there is no presumption in favor of validity. *Kamalath, supra*, citing *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960).

In support of his position, plaintiff presented two pages of unsigned, undated notes written by defendant’s agent, Tom Leveille, that contained phrases, which appeared to signify the makings of a business deal. Leveille testified that the notes were a blueprint of a plan that the parties would later formalize if and when they found and purchased a suitable building on the riverfront from which to do business. Plaintiff’s testimony regarding the purpose and effect of the notes was conflicting. On one hand, he testified that he and Leveille agreed that the notes were a contract that was immediately effective; but on the other hand, he testified that the only reason he would have made any agreement with defendant was because he needed a building from which to operate.

Not only did the parties disagree on whether the document represented a contract, but they also disagreed on the meaning of several of the contract’s essential terms. The evidence supported a finding that there was no meeting of the minds regarding the purported contract. Thus, the trial court did not err by determining that the notes did not constitute a binding contract.¹

Next, plaintiff argues that the trial court erred by determining that defendant was not unjustly enriched. The equitable doctrine of unjust enrichment implies a contract where there is no express contract regarding the disputed matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). The elements of unjust enrichment include: “(1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Id.* The correct measure of damages in an unjust enrichment claim is the benefit conferred on a party. *B & M Die Co v Ford Motor Co*, 167 Mich App 176, 183-184; 421 NW2d 620 (1988).

Plaintiff argues that he should prevail on an unjust enrichment claim because defendant’s accounting methods were a sham, designed to defraud the Internal Revenue Service (IRS), and because plaintiff was entitled to the \$131,262 that defendant made from plaintiff’s propeller

¹ Plaintiff argues that defendant was bound by an admission in defendant’s countercomplaint that the written notes were an outline of the agreement and that the parties were operating under the agreement. However, because defendant withdrew its countercomplaint, the trial court was not bound to accept the facts as conclusive. *Radtko v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 421; 551 NW2d 698 (1996). Plaintiff also argues that because defendant partly performed the purported contract and took certain actions, such as accepting credit card payments for inventory that plaintiff sold, those actions proved that defendant agreed that the purported contract was actually a binding contract. However, plaintiff fails to acknowledge that the trial court did find that the parties had an interim oral agreement, but that no binding contract existed.

sales, less his weekly salary. Plaintiff does not explain how defendant's purported dishonest accounting method supports his claim for unjust enrichment, other than stating that it points to defendant's "motive." This Court will not search for legal authority where none is given. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998).

Regarding the benefit to defendant, although plaintiff claimed that defendant received the benefit of payment for plaintiff's inventory, plaintiff's accounting method appears inadequate. For example, plaintiff failed to decipher between which propellers he sold from his own inventory compared to those that he took from defendant's inventory – plaintiff acknowledged that he removed and sold, at no cost to him, propellers from defendant's inventory. Also plaintiff did not account for the fact that defendant paid plaintiff's health insurance premium, which would act as an offset to defendant's benefit. Defendant, however, presented testimony that although it received approximately \$131,000 gross income from plaintiff's sales, its net income was only \$33,661. Moreover, defendant testified that after deducting monies plaintiff owed defendant, plaintiff actually received more than defendant. Plaintiff failed to counter this testimony. Under the circumstances, the trial court did not err by dismissing plaintiff's unjust enrichment claim.

Next, plaintiff argues that defendant fraudulently induced him to agree to the purported contract. To prevail on a fraud claim, a plaintiff must prove the following elements by clear and convincing evidence:

(1) [D]efendants made a material representation; (2) it was false; (3) when defendants made it, defendants knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendants made it with the intent that plaintiffs would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage. [*Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996), citing *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994). See also *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996), citing *Marble v Butler*, 249 Mich 276; 228 NW 677 (1930).]

Plaintiff states merely that he sustained his burden of proof regarding fraud because he "clearly showed that material representations were made." Plaintiff further argues that the misrepresentations were proved to be false because defendant did not comply with the terms of the purported agreement and that defendant showed bad faith because he refused to provide an accounting, did not have the purported agreement formalized, accepted \$131,000 in payments, and used an illegal cost basis on his tax return.

Beyond these conclusory statements, plaintiff provides no further analysis. It is insufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Further, where a party gives an issue cursory treatment with little or no citation of supporting authority, and fails to properly address the merits of his assertion, this Court considers the issue abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379,

406; 651 NW2d 756 (2002); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Thus, we consider this issue abandoned.

Finally, plaintiff argues that the trial court abused its discretion by denying plaintiff leave to amend his complaint. After mediation, settlement conferences, and docketing the matter for trial, plaintiff proposed to add Leveille as a party-defendant and to add claims for breach of the sales representatives' commission act, MCL 600.2961, and conversion. We review a trial court's decision whether to allow a plaintiff to amend a complaint for an abuse of discretion. *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 405; 605 NW2d 690 (1999), citing *In re Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 397; 389 NW2d 99 (1986). An abuse of discretion will be found only "when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it]" *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 193; 644 NW2d 710 (2002), citing *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Leave to amend may be denied where there is a showing of "[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Delay alone is insufficient, the delay must have been in bad faith or cause actual prejudice. *Id.* at 659. Actual prejudice prevents the opposing party from receiving a fair trial, and

a trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Id.* at 659-660.]

Plaintiff claimed that he discovered new evidence during Leveille's deposition that warranted the claims he sought to add. According to plaintiff, Leveille defrauded both plaintiff and the IRS by using a "fictitious cost basis for the propellers originally owned by [plaintiff] and for which Leveille and [defendant] failed to pay for." Further, according to plaintiff, defendant violated the sales representative's commission act (SRCA) by failing to pay plaintiff commissions for propeller sales and that it wrongfully converted those funds.

There is no support for the proposition that because Leveille allegedly defrauded the IRS, he would be liable to plaintiff for plaintiff's unrelated claims. Further, the SRCA provides for commissions to be paid to sales representatives. MCL 600.2961(e). Plaintiff consistently contended below that he was in a partnership with defendant. In plaintiff's interpretation of the alleged contract, defendant was not employing him or contracting with him for the solicitation of orders or the sale of goods. Therefore, the amendment would have been futile.

Regardless, plaintiff's requested amendments would have been prejudicial because they were based on the same set of facts as the original pleadings, and defendant had no notice of the

proposed claims. *Weymers, supra* at 659-660. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra