

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT KARPIUK, WILLIAM M. LAWLOR,
and WILLIAM M. LAWLOR, INC.,

UNPUBLISHED
August 8, 2006

Plaintiffs/ Counter-Defendants-
Appellants,

and

SOUTHSIDE FOODS, INC.,

Plaintiff-Appellant,

v

CARLTON MYERS, SWEETNERS PLUS, INC.,
SYNERGY FOODS, L.L.C., SELECT
INGREDIENTS, L.L.C., and SELECT FOOD
PROCESSING CORPORATION,

No. 266570
Washtenaw Circuit Court
LC No. 03-000262-CK

Defendants-Appellees,

and

RICHARD KRAMER, DONALD KRAMER, and
HAROLD KRAMER, Co-Personal
Representatives of the ESTATE OF SIGMUND
KRAMER, and HARRIDON ENTERPRISES,
INC.,

Defendants/ Counter-Plaintiffs/
Third-Party Plaintiffs-Appellees,

v

JOHN DICKERSON and ERICKA MANN,

Third-Party Defendants.

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's dismissal of their claims for breach of contract, breach of promissory notes, oppression of a minority interest, and breach of fiduciary duty. We affirm.

I. Background

In 1993, five corporations formed Select Ingredients, LLC ("Select"), a Delaware corporation doing business in Michigan. Select was formed to manufacture and sell sugar blends and peanut butter products. The five corporations were Sweetners Plus, Inc. (the president of which was defendant Carlton Myers),¹ Fundco, Inc. (its president was Joseph Nemeth), defendant Harridon Enterprises, Inc. (its president was Sigmund Kramer),² plaintiff William M. Lawlor, Inc. (its president was plaintiff William Lawlor) and plaintiff Southside Foods, Inc. (its president was Robert Karpiuk).³ Each of the member corporations or individuals loaned money to Select. Karpiuk's corporation loaned \$150,000; Lawlor's corporation loaned \$90,000; they both received promissory notes evidencing the debt from Select. Lawlor was the general manager of Select, and Karpiuk became the Canadian general manager of Select.

In January 1995, after Select began operating, the United States government imposed quotas on the import of sugar from Canada to the United States. Karpiuk and Lawlor learned from others "in the trade" that sugar-gelatin blends were being imported from Canada into the United States, screened to remove almost all of the gelatin and then sold to customers (who would otherwise have purchased pure sugar) for use in sugar-gelatin blend products. Because U.S. Customs determined whether a blend was "sugar" for purposes of the quotas and tariffs on the basis of its end use, even a blend with minimal or trace amounts of gelatin was not subject to the import restrictions if it was ultimately used in a food product that contained gelatin. After researching the law and U.S. Customs practices on this issue, plaintiff suggested to the other members that Select manufacture a sugar-gelatin blend, which could be imported to the United States without being subject to any duties or quotas. Myers told the members at the same meeting that he had a potential customer for the sugar-gelatin blend. During 1995-1996, Myers, on behalf of Sweetners, orally contracted with Select to purchase a sugar-gelatin blend with a gelatin content that would exempt it from sugar quotas and the greater duty that applied to Canadian sugar imports.

¹ Carlton Myers and Sweetners Plus, Inc., will be collectively referred to at the "Myers defendants."

² Sigmund Kramer, Harridon Enterprises, and Sigmund Kramer's personal representatives will be collectively referred to as the "Kramer defendants."

³ As the Lawlor plaintiffs assigned their claims in this case to Karpiuk, the term "plaintiff," when used in the singular form, will refer to Karpiuk only.

In early 1996, U.S. Customs began an investigation of Select's importation of sugar-blend products. It determined that Select's Customs declarations fraudulently misstated that its sugar-gelatin blend was intended for and being used in gelatin-containing foods, when, in fact, the substance was being resold as sugar. In March 1999, Karpiuk pled guilty to Entry of Merchandise Into United States by Means of Presentation of False Documents, a misdemeanor violation of 19 USC 1436, for improper importation of the sugar-gelatin blend into the United States.

On October 4, 1999, Nemeth and Kramer executed a document they entitled "Second Amendment to Operating Agreement of Select Ingredients, LLC." In this Second Amendment, Kramer and Nemeth created a managerial committee and elected Kramer chairman of it. They also authorized Kramer to terminate the employment and membership interests of the plaintiffs, to be redeemed for \$2,000 each, and awarded Kramer an annual salary of \$150,000.

On October 14, 1999, plaintiffs received letters signed by Sigmund Kramer and Joseph Nemeth, as presidents of Harridon Enterprises and Fundco, respectively, purporting to be acting on behalf of Select. The letters stated that plaintiffs' memberships in Select were terminated and a check for \$2,000 was tendered to each plaintiff in redemption of his interest. The letter to Karpiuk stated that his employment as general manager of Select was terminated for cause, that cause being: insubordination in the performance of his duties; material breach of the operating agreement; pleading guilty to a felony; neglect of his duties; and self-dealing. In the same letter, however, Karpiuk was offered continuing employment with Select, "in such capacity as the undersigned may specify, with a salary and fringe benefits commensurate with your current salary and fringe benefits," and the possibility that he might be able to earn a membership interest of up to 20 percent in lieu of receiving bonuses. He would be, however, and "at will" employee.

Also on October 14, 1999, Select signed a settlement agreement with the Myers defendants, in which Select agreed to buy back Sweetners' interest in Select. Sweetners and Myers, in the same agreement, granted a proxy allowing Nemeth and Kramer to exercise the votes of Sweetners and/or Myers as members of Select. After this time, Nemeth and Kramer operated Select as though they were 50 percent owners.

Finally, on August 31, 2000, Select, without notice to members other than Kramer's and Nemeth's companies, sold all its assets for \$4 million to a corporation called Synergy Foods. Synergy was owned by relatives of Kramer and Nemeth and chaired by Kramer. Synergy assumed the promissory notes to Kramer's and Nemeth's corporations but no mention was made of those due Karpiuk's and Lawlor's corporations. Select and Harridon Enterprises are no longer active corporations.

Plaintiffs filed their complaint in the instant action on March 13, 2003. During Lawlor's March 29, 2005, deposition, it was revealed that the Lawlor plaintiffs had assigned all of their claims to Karpiuk prior to this litigation.

II. Standard of review

Both the Kramer defendants and the Myers defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Our Supreme Court clearly articulated the

standard under which an appellate court reviews a trial court's ruling under each subrule in *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999):

A. Legal Standard Under MCR 2.116(C)(7)

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994).

B. Legal Standard Under MCR 2.116(C)(8)

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

C. Legal Standard under MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

III. Discussion

Plaintiffs first argue that the trial court erred when it dismissed their claim against the Kramer defendants for breach of the operating agreement on the basis of prior substantial breach and failure of consideration. We disagree.

With regard to plaintiffs' claim that defendants breached Select's operating agreement, the trial court relied on evidence outside the pleadings; therefore, this court reviews the trial court's ruling under the standard for a motion under MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). The trial court found that the evidence of Karpiuk's guilty plea to sugar smuggling activities indisputably demonstrated that he was the

first to breach the operating agreement and that such breach resulted in a complete failure of consideration.

It has long been settled that “[o]ne who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform.” *Sentry Ins v Lardner Elevator Co*, 153 Mich App 317, 323; 395 NW2d 31 (1986). A substantial breach is one that “has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, *such as the causing of a complete failure of consideration* or the prevention of further performance by the other party.” *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted, emphasis added).

The only consideration Karpiuk offered in support of the operating agreement was his promise to act as general manager of Select, and in Select’s best interests, for a term of five years. Karpiuk’s plea agreement, however, demonstrates that Karpiuk knowingly violated the laws of the United States by using Select to import a sugar-gelatin blend and sell it as pure sugar. Karpiuk then falsely represented to the other members of Select that these activities were legal. As a result, Select was forced to plead guilty to a felony and pay a substantial fine. Thus, plaintiff’s purported consideration for the operating agreement was worth less to Select than if plaintiff had given nothing at all; plaintiff’s services as general manager were a detriment. Therefore, despite plaintiffs’ argument that Karpiuk’s breach was not substantial, Karpiuk’s failure to act in Select’s best interests resulted in a complete failure of consideration for the operating agreement, which is a substantial breach.⁴ *McCarty, supra*. The trial court, therefore, did not err in dismissing plaintiffs’ claims for breach of the operating agreement.

Next, plaintiffs argue that the trial court erred in dismissing their claims with regard to the promissory notes. Plaintiffs’ brief, however, does not develop this argument or contain appropriate citation to authority. Because this Court will not search for authority to support a party’s position, *Schadewald v Brule*, 225 Mich App 26, 34; 570 NW2d 788 (1997), this claim is considered abandoned, *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

Plaintiffs next argue that the trial court erred when it dismissed their claim of breach of fiduciary duty base on the doctrine of unclean hands. We disagree.

Plaintiffs’ claims of breach of fiduciary duty call on the equitable powers of this Court. See *Rapistan Corp v Michaels*, 203 Mich App 301, 313-314; 511 NW2d 918 (1994). This Court reviews equitable actions de novo and the trial court’s findings for clear error. *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). A party seeking equity must have “clean hands,” meaning equity will not aid a party who has acted in bad faith or

⁴ The dissent’s citation of plaintiff’s \$150,000 loan to Select as consideration for the operating agreement is misplaced. Plaintiff received a promissory note, separate from the operating agreement, in consideration for his loan. As discussed below, plaintiff’s failure to properly brief his claim on the promissory note abandons the issue.

inequitably, irrespective of the other party's improprieties. *Rose v Nat'l Auction Group*, 466 Mich 453, 462-463; 646 NW2d 455 (2002). The unclean hands doctrine is "invoked by the Court in its discretion to protect the integrity of the Court." *Stachnik v Winkel*, 394 Mich 375, 386; 230 NW2d 529 (1979). "The misconduct which will move a court of equity to deny relief must bear a more or less direct relation to the transaction concerning which complaint is made. Relief is not denied merely because of the general morals, character or conduct of the party seeking relief." *McFerren, supra* at 524, quoting *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 671; 5 NW2d 524 (1942).

Here, Karpiuk's illegal conduct damaged Select and bore a direct relation to the other members' decision to terminate his employment and redeem his membership interest. In fact, as a direct result of Karpiuk's illegal conduct, U.S. Customs required Select to adopt a compliance plan, which required Karpiuk to be (1) removed as an officer, (2) stripped of all discretion on matters of compliance with State and Federal Regulatory standards, (3) abstain from voting on any matters to be decided by the Board of Directors during any probation period, (4) precluded from entering into any oral contracts on behalf of Select and from entering into any written contract for more than \$500 without prior approval of senior management, and (5) prohibited from signing any documents on behalf Select dealing with U.S. Customs or with Canadian export authorities. Thus, the mandatory restrictions placed on Karpiuk through the compliance plan, because of his own illegal conduct, made it impossible for him to continue in any managerial or officer positions for Select and justified Select in terminating his employment and redeeming his ownership interest. The trial court did not err in denying plaintiff equitable relief because of his own unclean hands.

Plaintiffs next argue that the trial court erred in dismissing their minority oppression claim on the basis of the wrongful conduct doctrine. Although we agree that the trial court erroneously cited the wrongful conduct rule in its opinion, the trial court did not err in dismissing plaintiff's minority oppression claim.

A close reading of the trial court's opinion shows that, although the trial court cited the wrongful conduct rule in its opinion, it did not dismiss plaintiffs' minority oppression claim on the basis of wrongful conduct. The trial court stated in its opinion,

Because the Court has previously ruled, however, that the minority oppression claim is, essentially, part of the breach of contract claim; and because a minority oppression is, in its origins, an equitable claim, the wrongful conduct rule does bar plaintiff's minority oppression claim as well as the breach of contract claim.

The trial court, however, expressly ruled that all of plaintiffs' claims based on the operating agreement, including breach of contract and termination of employment, were dismissed based on plaintiffs' prior breach and failure of consideration, not the wrongful conduct rule. When read in context, it is clear that plaintiff's minority oppression claim is based on the operating agreement and that the trial court dismissed this claim for these same reasons that it dismissed

plaintiff's breach of contract claim.⁵ Additionally, in so far as plaintiffs' minority oppression claim sought equitable relief, plaintiffs' claims were barred by the doctrine of unclean hands.

Next, plaintiffs argue that the trial court erred in dismissing the Lawlor plaintiffs' claims because they were assigned to Karpiuk. We disagree.

MCR 2.111(B) requires a party to plead a statement of facts "on which the pleader relies in stating the cause of action, with the specific allegations reasonably necessary to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.116(C)(7) requires the court, on motion of a party, to dismiss a claim that is barred because of "assignment or other disposition of the claim before commencement of the action." Plaintiffs filed their complaint on March 13, 2003, but the pleadings made no mention of any claim asserted by Karpiuk through assignment from the Lawlor plaintiffs. During discovery, plaintiffs proffered no documents showing an assignment having been made from Lawlor to plaintiff. The first time Lawlor's assignment to Karpiuk was revealed was during Lawlor's March 29, 2005, deposition—over two years into the litigation. Plaintiffs admitted during a May 18, 2005, motion hearing that the assignment occurred prior to the filing of the complaint. Thus, the Lawlor plaintiffs' claims were properly dismissed pursuant to MCR 2.116(C)(7).

Plaintiffs first attempted to rectify their failure to plead the assignment by bringing a motion to substitute Karpiuk for Lawlor pursuant to MCR 2.202(B) and (D). The trial court, however, denied this motion because the assignment was made prior to the commencement of litigation. During oral argument on the motion, plaintiffs' counsel requested to amend the pleadings to include the assignment, but the trial court denied this motion, noting that Karpiuk knew of the assignment prior to filing the complaint yet waited two and a half years to include it in the pleadings. A trial court's decision whether to allow amendment of the pleadings is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Given Karpiuk's undue delay in requesting to amend the pleadings and apparent lack of good faith in failing to disclose the assignment, we cannot say that the trial court abused its discretion in refusing to allow plaintiffs to amend the pleadings.

Lastly, plaintiffs argue that the trial court erred in dismissing their claims of breach of contract and breach of fiduciary duty against the Myers defendants. We disagree.

The trial court granted the Myers defendants' motion for summary disposition with regard to plaintiffs' breach of contract claim on the grounds that there was no genuine issue of material fact. The court stated, "This was a sale of [Sweetners'] shares, it was a redemption of their shares. The granting of the proxy, in this Court's opinion, as a matter of law was not in violation of the operating agreement." To the extent that plaintiffs' claims involved a breach of fiduciary duty, the trial court found that these claims were barred by the statute of limitations.

⁵ In any event, this Court will not reverse a trial court's order if the trial court reached the correct result, albeit for the wrong reasons. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

It is unnecessary, however, to address whether the granting of the proxy violated the terms of the operating agreement or whether plaintiffs brought their claim within the period of the statute of limitations, as the trial court did. As discussed above, Karpiuk's illegal sugar smuggling activities constituted a substantial breach of the operating agreement. As between Karpiuk and the Myers defendants, it is undisputed that Karpiuk breached the operating agreement before Myers entered into the settlement agreement with Select, which is the alleged breach of the operating agreement that Karpiuk claims caused damages to him. Karpiuk, therefore, "cannot maintain an action against [Myers] for failure to perform." *Sentry Ins, supra* at 323.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot