

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DR. MARTHA SHADEL,

Plaintiff-Appellant,

v

DOUGLAS FARWELL and COSMEDIC LASER  
CENTER, INC.,

Defendants-Appellees.

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UNPUBLISHED

November 13, 2003

No. 241195

Oakland Circuit Court

LC No. 00-026717-CK

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order granting defendants summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's claims for breach of contract, fraud, unjust enrichment, quantum meruit and equitable estoppel pertaining to her employment/association agreements with defendants. Plaintiff further challenges the grant of summary disposition on her breach of contract claim for defendants' failure to make payments on a medical equipment lease for which plaintiff served as guarantor. Finally, plaintiff appeals the trial court's grant of summary disposition in favor of defendants on defendants' breach of contract counterclaim. Because ambiguity in the compensation agreement requires factual development to determine the intent of the parties, summary disposition on the breach of contract claim and counterclaim is inappropriate. Defendants' obligation for payments under the medical equipment lease is independent of plaintiff's status as a guarantor, and precludes a grant of summary disposition in favor of defendants. We affirm the grant of summary disposition on plaintiff's equitable and fraud claims. We affirm in part, reverse in part, and remand.

Plaintiff contends summary disposition was improper on the breach of contract claim as there exist genuine issues of material fact pertaining to the ambiguous language of the compensation agreement. Plaintiff also asserts the trial court erred in granting defendants summary disposition despite the clear and unambiguous language of the contract between the parties for defendants to make all payments on leased medical equipment. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 516; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201

(1998). In deciding a motion for summary disposition under this section of the court rule, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the non-moving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Pena v Ingham County Road Comm*, 255 Mich App 299, 313; 660 NW2d 351 (2003).

The essential elements of a contract are (a) parties competent to contract, (b) a proper subject matter, (c) legal consideration, (d) mutuality of agreement, and (e) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In addition, to form a valid contract the parties must have a “meeting of the minds” regarding all essential terms of their agreement. *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). The parties do not dispute the existence of a contract, but rather, the interpretation of its terms.

The primary argument involves an interpretation of the term “after phase in” and how it defines when plaintiff’s compensation will initiate. The contract language can, at best, be described as sparse as it merely identifies (a) the parties to the contract, (b) that compensation is for the position entitled medical director and (c) that compensation will be at a salary of \$2000 per week after phase in, with no hourly rate and a 25% profit sharing. Plaintiff claims that defendants breached the contract by failing to pay her during and/or subsequent to her training as she was providing services of a consulting nature to defendants’ west side clinic. Plaintiff further alleges she understood her relationship with defendants to be in the nature of an employment agreement and that, based on her understanding of the relationship, she was entitled to payment of a salary. Defendants argue that “phase in” was understood to mean upon the opening and initiation of operation of the clinic where plaintiff would function as medical director. As such, plaintiff’s resignation, prior to the opening of the clinic, made defendants’ performance impossible and negated any claim by plaintiff for compensation.

“A contract is ambiguous if the language is susceptible to two or more reasonable interpretations.” *D’Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). Ambiguity in contract language requires factual development to determine the intent of the parties and summary disposition is, therefore, inappropriate. *Id.* The fact that the parties dispute the interpretation of the contract does not, by itself, create the ambiguity. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 14; 614 NW2d 169 (2000). Rather, the Court must evaluate the contract language as a matter of law to determine if it is ambiguous. *Brucker v McKinlay Transport, Inc*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997).

A review of the subject contract reveals substantial flaws, not the least of which is the absence of any terms or dates to define “phase in.” Because the disparate interpretation of the parties regarding when plaintiff is entitled to collect a salary are both arguably reasonable, it was improper for the court to grant summary disposition. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 700-702; 552 NW2d 919 (1996).

Defendant also argues that opening of an east side clinic was a condition precedent to plaintiff's receipt of compensation. Pursuant to contract law, a condition precedent is a fact or event the parties intend to occur before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor. Courts will not, in general, construe a contract stipulation as a condition precedent unless such intent is clear from the language of the contract. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). Because the compensation agreement is silent with respect to conditions precedent, defendants' contention fails. Given the ambiguities in language in the compensation agreement and the contradictory testimony of the parties regarding their interpretation of the contract, we find it was premature to grant summary disposition.

The trial court noted, but failed to address the contract dispute between the parties on the obligation to make payments on a medical equipment lease. Plaintiff asserts that the language of the contract for lease payments is clear and unambiguous, and that defendant, Cosmedic, "is responsible and will make all of the lease payments." While the contract is not signed by defendants, defendant Farwell acknowledged the existence of the contract, but contends the opening of an east side office was a condition precedent to defendants making the payments.

Contractual language is to be interpreted or construed in accordance with its plain and ordinary meaning. *Pakideh v Franklin Commercial Mtg Group*, 213 Mich App 636, 640; 540 NW2d 777 (1995). Unlike the compensation agreement discussed *supra*, the lease contract is clear and unambiguous. A condition precedent is a condition that must be met by one party before the other party is obligated to perform. *Archambo v Lawyers Title Insurance Corp*, 466 Mich 402, 441; 646 NW2d 170 (2002). Defendants contend their payment of the lease was contingent upon the opening of an east side office. However, the contract language contains no reference to such a condition precedent. Pursuant to the contract, defendant Cosmedic is deemed responsible and is required to make "all" payments for the equipment lease undertaken with plaintiff independent of plaintiff's status as a guarantor. Defendant breached the contract and as defendants acknowledged, they did not make payments upon receipt of invoices.

Plaintiff alleges in the alternative that defendants fraudulently induced her to secure the lease equipment. Plaintiff specifically argues defendants had no intention of opening an east side clinic and had no intention to honor their commitment to pay all the lease payments for the equipment procured. To assert a claim of fraud, plaintiff must prove: "(1) that the defendant made a material representation, (2) that the representation was false, (3) that when the defendant made the representation, it was known to be false, or was made recklessly, without any knowledge of its truth and was made as a positive assertion, (4) that the defendant made the representation with the intention that it should be acted on by the plaintiff, (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff suffered damages as a result." *H J Tucker & Assoc v Allied Chucker Co*, 234 Mich App 550, 571; 595 NW2d 176 (1999). Plaintiff's pleadings and evidence are deficient.

There is no evidence to support plaintiff's assertion that defendants did not intend to open an east side office. It is acknowledged that defendants provided plaintiff with training, engaged a realtor and sought an east side location, secured equipment and staff, and initiated advertising. We find no evidence to support plaintiff's allegation that defendants never intended to make payments on the lease equipment. To the contrary, there is an agreement indicating defendants

would be responsible for payments. At best, there is a dispute pertaining to the interpretation of the agreement regarding when payments are to initiate. We find this insufficient to evidence fraud and affirm the trial court's grant of summary disposition in this regard.

Plaintiff's final assertion, that defendants fraudulently induced her to sign as a guarantor for the lease of medical equipment also fails. Plaintiff acknowledges she failed to read the agreement she signed and did not understand or question the meaning of the term guarantor. Michigan recognizes the existence of a cause of action for fraud in the inducement as occurring "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." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995). Plaintiff's claim is insufficient, in part, based on her acknowledged failure to read the contract. A party that signs a contract may not avoid enforcement of the contract because they failed to read or understand the included terms. *Farm Bureau Mutual Insurance Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999). In addition, the evidence fails to support the conclusion that defendants did not intend to pay on the lease agreement. At best, the parties have demonstrated disagreement regarding the interpretation of the agreement and when it was intended to initiate. Hence the court did not err in granting summary disposition in favor of defendants on this issue.

Plaintiff also takes issue with the trial court's grant of summary disposition in favor of defendants on plaintiff's claims of unjust enrichment and for quantum meruit. Plaintiff contends the court should have implied a contract under her theories of quantum meruit and unjust enrichment. Specifically, plaintiff argues defendants benefited from the availability of the leased medical equipment secured through plaintiff's guaranty. Alternatively, plaintiff contends she not be entitled to compensation pursuant to the compensation agreement, defendants benefited from her involvement in their west side location and she should be entitled to compensation on the basis of quantum meruit. A claim for unjust enrichment involves (a) the receipt of a benefit by a defendant from a plaintiff and (b) an inequity resulting to the plaintiff due to the retention of the benefit by a defendant. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). "In such instances, the law operates to imply a contract in order to prevent unjust enrichment." *Id.*

Plaintiff's argument for unjust enrichment is controverted by her own testimony. She had no evidence that defendants retained or used the leased equipment she procured as a guarantor. As such, no benefit was conferred upon defendants to the detriment of plaintiff. Further, her claim that defendants benefited by advertising and securing patients for a nonexistent east side clinic is not supported by evidence. Plaintiff had no documentation evidencing how many, if any, patients were secured from the potential east side clinic. She did not contribute to any advertising costs to secure the patients and provided no treatment services. Plaintiff failed to demonstrate that she conferred a benefit upon defendants. The trial court correctly granted defendants summary disposition regarding this claim.

Plaintiff also alleges she should be entitled to compensation from defendants, for organizational services she rendered to the west side office. Quantum meruit is defined as meaning "as much as deserved." *Keywell and Rosenfeld v Bithell*, 254 Mich App 300, 359; 657 NW2d 759 (2002). Quantum meruit permits a party to recover the reasonable value of services rendered. *Kamalnath, supra*, 194 Mich App 551. Plaintiff cannot recover under this theory and her contract theory. "[A] contract cannot be implied in law while an express contract covering

the same subject matter is in force between the parties.” *H J Tucker & Assoc, supra*, 234 Mich App 573. The contract between the parties specifically omitted any hourly salary, further evidencing the absence of any intention of the parties consistent with a piecemeal or quantum meruit-based form of compensation. The court properly granted defendants summary disposition on this claim as plaintiff’s only recovery, if any, would be under the express contract in effect between the parties.

Plaintiff’s final issue on appeal concerns the trial court’s grant of summary disposition to defendants on their counterclaim for plaintiff’s breach of her employment contract. Based upon the analysis, *supra*, the court erred. Before the court can determine plaintiff breached her contract with defendants, the ambiguous terms of the contract must be resolved. Without further factual development regarding the claim that defendants owed plaintiff monies under the contract, it cannot be determined which party was the first to breach the agreement. “The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.” *Flamm v Scherer*, 40 Mich App 1, 9; 198 NW2d 702 (1972), citing 5 Callaghan’s Michigan Civil Jurisprudence, § 249, pp 820-821.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio