

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

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MARK OLANCE,

Plaintiff-Appellant,

v

TAC WORLDWIDE COMPANIES, d/b/a TAC  
TRANSPORTATION CORPORATION,

Defendant-Appellee.

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UNPUBLISHED

April 11, 2013

No. 308285

Wayne Circuit Court

LC No. 11-002407-CZ

Before: WILDER, P.J., and DONOFRIO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

**I. BASIC FACTS**

Defendant is one of several suppliers that contracted with MSX International ("MSX") to provide personnel to work as "contract workers" or "contract employees" at various automotive facilities, including Ford Motor Company ("Ford"). Plaintiff was hired as an employee of defendant and was assigned to work at Ford. Although plaintiff was employed by defendant, Ford nonetheless was responsible for establishing plaintiff's hours and responsibilities.

From the time of his hiring in December 1999 until February 2001, when plaintiff worked in excess of 40 hours in a week, he would log the time over 40 hours as overtime on his time sheets and was compensated at a higher rate for those overtime hours. However, in February 2001, due to financial constraints in the automotive industry, Ford instituted a no-overtime policy for its contract workers. Thereafter, when plaintiff worked in excess of 40 hours in a week, he would "bank" those extra hours as compensatory, or "comp," time. Plaintiff stated that his Ford supervisors authorized and initiated this system, where he could take time off from work and still be paid for it, essentially cashing in his accrued compensatory time.

Plaintiff tracked his working hours, his accrued compensatory time, and his reimbursed compensatory time on a personal spreadsheet. Plaintiff's spreadsheet showed that as of May 25, 2011, he had accumulated 118 hours of compensatory time. The following week, plaintiff only worked 37 hours, but put 40 hours on his time sheet, thereby taking 3 hours off of his compensatory time balance. In short, plaintiff was paid for 40 hours of work that week, even

though he worked 37 hours that week – the other 3 hours were worked in prior weeks at some point. Occasionally, plaintiff did not work an entire week, but still got paid as if he had because he used 40 hours of accrued compensatory time for that week.

Defendant, who merely paid plaintiff whatever Ford authorized on the timecards, had no knowledge of this compensatory time arrangement. Notably, the time sheets that all of defendant's employees were to submit to defendant did not include any notation for any compensatory time – all time was logged as regular time or overtime.

Defendant was first made aware of any potential compensatory time issue in early January 2009, when plaintiff had a telephone conversation with Popi Stavrou, who was plaintiff's Human Resources Representative at defendant company at the time. During the phone conversation, plaintiff voiced his concerns about potential downsizing at Ford and wanted to know how his accumulated compensatory time would be handled in the event that he was no longer needed at Ford. Stavrou informed plaintiff that she had no knowledge of any compensatory time arrangement, informed him that compensatory time was not authorized, and asked him to supply more information. However, within the next day or so, Stavrou herself was laid off from defendant company.<sup>1</sup> Plaintiff testified that after his conversation with Stavrou, he sent her a copy of the spreadsheet that he had been using to track his compensatory time. But Stavrou testified that as a result of her lay off, she never received it – the first time she saw it was at her deposition.

In September 2009, defendant terminated plaintiff's employment at Ford's request. Ford charged that plaintiff misappropriated five diesel engines and six rear axles from a storage facility. James Cole, who assumed the Human Resources Representative position at defendant company after Stavrou was laid off, notified plaintiff that his employment was being terminated. Plaintiff then inquired about getting compensated for his 1,833 hours of accumulated compensatory time. Cole responded that defendant did not have any compensatory time agreements, and plaintiff said that he would forward the record of the compensatory time that was agreed upon by Ford. Thereafter, plaintiff forwarded a copy of his spreadsheet to Cole, showing that he had an outstanding balance of 1,833.5 hours of compensatory time. Cole again denied that defendant owed plaintiff anything for compensatory time, explaining that defendant never entered into any compensatory time agreement with plaintiff and that there was no provision for compensatory time through MSX.

Plaintiff filed a complaint against defendant, alleging one count of breach of contract. Defendant later moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendant argued (1) that no contract existed between plaintiff and defendant that required defendant to pay plaintiff for any compensatory time and, alternatively, (2) that plaintiff's claim was barred under MCL 408.384a(8) (governs compensatory time) and MCL 408.473 (governs fringe benefits).

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<sup>1</sup> Stavrou was reinstated four months later, but she was no longer responsible for the Ford account and never followed up with plaintiff and never talked with him again.

Plaintiff filed a response, arguing that an implied contractual relationship existed between plaintiff and defendant and even if one did not exist, then the principle of equitable estoppel precluded granting defendant's motion for summary disposition. Additionally, plaintiff's response also contained a request to allow plaintiff to amend the complaint to include an equitable estoppel claim and an implied-in-fact contract claim.

At the motion hearing, the trial court noted that it was only considering the motion pursuant to MCR 2.116(C)(10). The trial court then granted defendant's motion, stating the following:

The undisputed evidence establishes that there was no contract between Plaintiff and Defendant for Defendant to pay Plaintiff comp time. There is not one shred of evidence that supports Plaintiff's contention. There was nothing in the time records submitted by Plaintiff that would suggest that there was comp time. On those occasions where Plaintiff took comp time, he indicated hours worked on his time card. There's no way Defendant would have known this was for comp time. It is clear, beyond dispute, that the only agreement that Plaintiff had with regard to comp time was with Ford.

Alternatively, the trial court also found that defendant was entitled to summary disposition because plaintiff's claims were barred by MCL 498.348a(8)(a)(ii) based on there being "absolutely no evidence that Defendant agreed in writing to pay Plaintiff comp time" and because plaintiff's balance of 1,833 hours exceeded the statutory maximum of 240 hours as allowed by MCL 408.384a(d).

With respect to allowing plaintiff an opportunity to amend his complaint, the trial court denied the request. The trial court noted that such amendment would be futile because there were no facts that supported the proposition that an implied contract existed between plaintiff and defendant and no facts to support a conclusion that equitable estoppel applied as well.

## II. ANALYSIS

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition. We disagree.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dalley v Dykema Gossett*, 287 Mich App 296, 304 n 3; 788 NW2d 679 (2010). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). Additionally, the interpretation of a contract is a question of law that we review de novo. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005).

Plaintiff asserts that the motion was improperly granted because there was evidence that a contract existed between plaintiff and defendant to allow for the payment of compensatory time. Plaintiff claims that there are three ways this contract could be found to exist: through the written employment agreement, through an implied-in-fact contract, or through an implied-in-law contract imposed by equity. We conclude that none of these theories has any merit.

In order to prevail on a breach of contract claim, a plaintiff must establish “(1) that there was a contract, (2) that the other party breached the contract[,] and[] (3) that the party asserting breach of contract suffered damages as a result of the breach.” *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). There is no dispute that a written contract existed between plaintiff and defendant. It also is undisputed that the contract did not provide for the handling of compensatory time, neither prohibiting the use of compensatory time nor obligating defendant to pay for compensatory time. Rather, under the contract, defendant’s legal obligation was to pay plaintiff for hours that were reflected on the timecards “and signed by a client supervisor.” In his deposition, plaintiff acknowledged that defendant did not pay him unless payment had been approved by a Ford supervisor. In his brief on appeal, plaintiff also admits that defendant’s “only responsibility was to make payment for the hours worked *once all appropriate authorizations were received.*” (Emphasis added.) In other words, Ford’s authorization of the hours worked was a condition precedent to defendant’s obligation to pay plaintiff for the hours worked. See *Able Demolition, Inc v Pontiac*, 275 Mich App 577, 583; 739 NW2d 696 (2007) (“A condition precedent ‘is a fact or event that the parties intend must take place before there is a right to performance.’”). However, there was no evidence submitted to the trial court that Ford authorized, let alone signed any timecards related to, the payment for the 1,833.5 hours of accumulated compensatory time. While plaintiff produced a personal spreadsheet that he used to keep track of his claimed compensatory time, there is no evidence that Ford authorized payment for those hours. In the absence of evidence that Ford authorized the payment for these 1,833.5 hours, defendant had no obligation under the written contract to pay plaintiff. Thus, defendant was entitled to judgment as a matter of law on the basis of the express, written contract.

Plaintiff alternatively argues that, while the written contract was silent regarding compensatory time, an implied-in-fact contract existed between the parties concerning this topic. However, a plaintiff is barred from seeking recovery on the basis of an implied contract when there is an express contract regarding “the pertinent subject matter.” *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). We conclude that, even though the contract was silent on the specific matter of “compensatory time,” it nonetheless covered “the pertinent subject matter” of how plaintiff was to be compensated. Regardless of how plaintiff’s hours were characterized, he was to be paid in the same manner – after the satisfaction of the condition precedent discussed above. In any event, assuming arguendo that plaintiff could take advantage of an implied contract, his claim still fails.

An implied-in-fact contract can exist when “the parties do not explicitly manifest their intent to contract by words, [but] their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction.” *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). The key requirement is that mutual assent is still required, as in a normal contract, even though it is not explicit. See *Erickson v Goodell Oil Co*, 384 Mich 207, 211-212; 180 NW2d 798 (1970).

Here, there were no facts presented to suggest that there was any mutual assent between plaintiff and defendant. Accepting plaintiff's allegations as true, the record is undisputed that plaintiff worked and accumulated compensatory time on Ford's request – not defendant's. The record also is clear that plaintiff accumulated compensatory time without the knowledge or consent of defendant. When plaintiff entered compensatory time for reimbursement on his timecards, he entered the time as “standard” time. Thus, defendant was unaware that plaintiff did not actually work all of the reported hours for any given week; consequently, defendant was not aware that it occasionally was paying for work for a given week that was actually accomplished in prior weeks. Defendant first became aware of the possibility of a compensatory time arrangement between plaintiff and Ford in January 2009, and Stavrou promptly informed plaintiff that compensatory time was not authorized and asked plaintiff to supply more information. But Stavrou was laid off before she received any further information from plaintiff, and plaintiff failed to raise the issue with defendant again until informing the new Human Resources Representative, Cole, about the accumulated hours upon termination in September 2009. It was at this time that defendant first received plaintiff's spreadsheet, detailing what he claimed were accrued compensatory time hours. Cole, like Stavrou, explained that compensatory time was not authorized.

Therefore, even viewing the evidence in a light most favorable to plaintiff, we nonetheless conclude that there is no evidence to suggest that plaintiff and defendant engaged in a “meeting of the minds” on the issue of compensatory time, which is necessary for mutual assent. See *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 13 n 6; 824 NW2d 202 (2012) (noting that “meeting of the minds” is a figure of speech for “mutual assent”). In short, there is nothing in the submitted evidence that demonstrates that defendant *knowingly and willingly* participated in any compensatory time arrangements plaintiff had with Ford. Consequently, plaintiff cannot establish that an implied-in-fact contract existed between plaintiff and defendant.

Unlike an implied-in-fact contract, an implied-in-law contract does not require a meeting of the minds. Instead an implied-in-law contract is imposed by fiction of law, in order to enable justice be accomplished, even if no contract was intended. *Detroit v Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949). As this Court has explained:

A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation. [*In re McKim Estate*, 238 Mich App 453, 457; 606 NW2d 30 (1999).]

The courts use the fiction of an implied-in-law contract to prevent unjust enrichment. *Liggett Restaurant Group*, 260 Mich App at 137. Thus, a crucial element in order for a contract to be implied by law is that a defendant be in receipt of a benefit from a plaintiff. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007); *In re McKim Estate*, 238 Mich App at 457. Here, defendant has received no benefit from plaintiff. The only entity to have received any benefit from plaintiff in conjunction with the accrued compensatory time is Ford, who received 1,833.5 hours of labor from plaintiff and did not compensate him *or*

*defendant* for it. Therefore, plaintiff's claim of an implied-in-law contract with defendant necessarily fails.

Because plaintiff could not establish (1) that defendant breached any provision of the written agreement, (2) that there was an implied-in-fact contract, and (3) that there were no circumstances warranting the imposition of an implied-in-law contract, the trial court properly granted defendant's motion for summary disposition on plaintiff's breach of contract claim. As a result, we need not address the trial court's alternate reason for granting the motion based on plaintiff's claim being barred by MCL 408.384a(8), or defendant's argument based on MCL 408.473.

Affirmed. Defendant as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder  
/s/ Pat M. Donofrio  
/s/ Cynthia Diane Stephens