S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SUE ELLEN (HINES) HENRY,

Plaintiff-Appellant,

v

DAVID WILLACKER,

Defendant-Appellee,

and

WILLACKER HOMES, INC.,

Defendant.

UNPUBLISHED
January 8, 2004

No. 242667
Oakland Circuit Court
LC No. 01-030566-CK

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

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition as to defendant David Willacker. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson,* 241 Mich App 611, 616; 617 NW2d 351 (2000). When reviewing a motion decided under MCR 2.116(C)(8), the Court accepts as true all factual allegations and any reasonable inferences drawn from them in support of the claim. Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery. *Stott v Wayne Co,* 224 Mich App 422, 426; 569 NW2d 633 (1997), aff'd 459 Mich 999; 595 NW2d 855 (1999).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff sued defendant under theories of breach of promise and promissory estoppel. Both claims were premised on a note defendant had written. It stated, in pertinent part:

> As confirmation of our conversation today, it is my intention to give you an additional $60,000 over the course of the next two years. The monies and services that I have given you and/or your fathers [sic] house are in addition to the money outlined above. I am unable to make a commitment to the exact timing or the exact amounts of the money exchange due to financial problems I am currently experiencing at work. The purpose of this compensation is to act as a complete settlement for our time spent together that unfortunately resulted as it has.

The elements of a valid contract are (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja,* 187 Mich App 418, 422; 468 NW2d 58 (1991). Mutual agreement or mutual assent refers to a meeting of the minds on all material terms of the contract. *Kamalnath v Mercy Memorial Hosp Corp,* 194 Mich App 543, 548-549; 487 NW2d 499 (1992). "Mutual assent exists where each party makes a promise or begins or renders performance." *Borg-Warner Acceptance Corp v Dep't of State,* 169 Mich App 587, 592; 426 NW2d 717 (1988), rev'd on other grounds 433 Mich 16; 444 NW2d 786 (1989). A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *State Bank of Standish v Curry,* 442 Mich 76, 85; 500 NW2d 104 (1993), quoting 1 Restatement Contracts, 2d, § 2, p 8.

The language of the document itself discloses no promise by defendant to pay plaintiff $60,000. Although he stated that it was his intention to pay such a sum within two years, he qualified the statement by saying that he could not commit to the amount to be paid or the time in which it was to be paid. In addition, the alleged agreement to pay plaintiff would not result in an enforceable contract due to a want of consideration, an essential element of any contract. *Yerkovich v AAA,* 461 Mich 732, 740; 610 NW2d 542 (2000). Plaintiff did not promise to do or refrain from doing anything in exchange for the payment of money. *Dep't of Natural Resources v Bd of Trustees of Westminster Church of Detroit,* 114 Mich App 99, 104; 318 NW2d 830 (1982). To the extent she relied on services rendered to defendant in the past, such services constituted "a past consideration which would not constitute a legal consideration for the subsequent . . . agreement." *Shirey v Camden,* 314 Mich 128, 138; 22 NW2d 98 (1946). The trial court did not err in dismissing plaintiff's breach of contract claim.

We likewise find no error in the dismissal of plaintiff's promissory estoppel claim. Defendant's alleged agreement to pay is too indefinite and vague to constitute an enforceable promise. *Schmidt v Bretzlaff,* 208 Mich App 376, 378-379; 528 NW2d 760 (1995). In addition, defendant's alleged promise did not induce any reliance or forbearance on the part of plaintiff such that it would be unjust not to enforce it. *Id*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff

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WHITE, J. (*dissenting*).

I respectfully dissent. I agree with the majority's statement of the controlling legal principles. I dissent, however, from the conclusion that, as a matter of law, the memorandum is not a binding contract. Although the memorandum does, indeed, use the word "intent," it is quite specific, and also uses language that would indicate an intent to form a contract, specifically, language of settlement, referring to "compensation" acting as "a complete settlement."

Viewed in the light most favorable to plaintiff, the circumstances were such that the parties apparently regarded themselves as having a continuing financial tie, despite their breakup. Defendant continued to make certain payment in plaintiff's behalf after they separated. Plaintiff testified that on January 16, 1995, she met defendant in his office, and he told her either that he planned to marry his girlfriend, or that she was pregnant, and that he "wanted to make a settlement and . . . move on with his life." Plaintiff was happy to wrap things up as well. Defendant came up with the $60,000 figure; plaintiff felt the figure represented what defendant felt he owed her, less what he had spent for her benefit since the breakup. After defendant told plaintiff what he wanted to do, plaintiff asked him to put it in writing. Defendant wrote in long hand:

> Dear Sue,
>
> As confirmation of our conversation today, it is my intention to give you an additional $60,000 over the course of the next two years. The monies and services that I have given you and/or your fathers [sic] house are in addition to the money outlined above. I am unable to make a commitment to the exact timing or the exact amounts of the money exchange due to financial problems I am currently experiencing at work. The purpose of this compensation is to act as a complete settlement for our time spent together that unfortunately resulted as it has.
>
> I'll always be there,

At the bottom of the memorandum, plaintiff wrote:

> I acknowledge that I have read this and understand Dave's intentions.
>
> Best wishes,

The memorandum can be understood as defendant's promise to pay $60,000, over two years, in settlement of any further claims plaintiff may assert. The indefinite language regarding the manner of payment is irrelevant, and pertains only to the schedule of payment. The total amount and the total time to pay are stated with specificity. The context and the words

> [t]he purpose of this compensation is to act as a complete settlement for our time spent together that unfortunately resulted as it has

can be seen as indicative of an intent to form a binding contract of settlement. Plaintiff understood the meeting and memorandum in this fashion and acted accordingly.

I conclude that there were genuine issues of material fact concerning the parties' intentions and understandings regarding the memorandum, and that the court erred in granting summary disposition. I would reverse and remand for further proceedings against David Willacker only.[1]

/s/ Helene N. White

[1] I agree that summary disposition was properly granted as to Willacker Homes, Inc.