

STATE OF MICHIGAN
COURT OF APPEALS

JOHN RICHARDS HOMES MANAGEMENT,
L.L.C.,

UNPUBLISHED
July 27, 2004

Plaintiff-Appellant,

v

DEBORAH LEE BJORKLY,

No. 246292
Oakland Circuit Court
LC No. 2002-042565-CK

Defendant-Appellee.

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

In this contract action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8). We reverse and remand for further proceedings under plaintiff's second amended complaint.

I

Defendant is a former employee of plaintiff who, in connection with her employment, came into possession of confidential and proprietary information relating to plaintiff and its affiliates, including, but not limited to, customer and supplier lists. Defendant allegedly misappropriated and misused this confidential information and thereby violated the written acknowledgement and confidentiality agreement she made with plaintiff.

Plaintiff filed its complaint in circuit court stating two counts: breach of contract, alleging that defendant had disclosed confidential information to unnamed third parties in violation of a written employment agreement (count I), and tortious interference with contractual relations (count II). Defendant thereafter filed a motion for summary disposition pursuant to MCR 2.116(C)(8). In her motion, defendant argued that plaintiff, by failing to attach the written instrument on which the breach of contract claim was based, as required by MCR 2.113(F)(1), and by failing to set forth adequate factual allegations to support the tortious interference with contractual relations claim, failed to state claims on which relief could be granted. Plaintiff then filed an amended complaint, averring that defendant was in possession of the confidentiality agreement on which the breach of contract claim was based and giving further factual information regarding the tortious interference with contractual relations claim.

Following a hearing, the trial court granted summary disposition in favor of defendant on both counts of plaintiff's complaint. The court dismissed plaintiff's breach of contract claim for failure to attach the pertinent written instrument to the complaint pursuant to MCR 2.113(F)(1). The trial court also summarily concluded that plaintiff had failed to state a claim for tortious interference. The court refused to permit plaintiff to file the amended complaint, finding that it would be "futile inasmuch as the Amended Complaint also lacks the required written instruments."

Plaintiff then filed a motion for reconsideration pursuant to MCR 2.119(F), contending that the breach of contract claim in the amended complaint complied with the court rules, and, because plaintiff had purportedly amended the complaint as of right, the trial court should have accepted the amended complaint. Further, plaintiff argued that both the complaint and the amended complaint contained sufficient facts to allege a claim of tortious interference. Plaintiff also moved to amend its complaint and submitted a proposed second amended complaint, with employment documents signed by defendant and a portion of plaintiff's personnel manual attached to it. However, the trial court denied plaintiff's motion for reconsideration, stating only that there was no palpable error. Plaintiff now appeals.

II

On appeal, plaintiff contends that the trial court erred in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8). A trial court's decision to grant summary disposition is reviewed de novo. *The Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and only allows consideration of the pleadings. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In a motion under MCR 2.116(C)(8), every factual allegation in support of the claim is accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). However, mere statements of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

With regard to its breach of contract claim, plaintiff notes that the trial court granted summary disposition because it found that plaintiff failed to attach either the written employment agreement or the personnel manual to its initial complaint as required by MCR 2.113(F)(1). However, plaintiff maintains that the breach of contract claim set forth in its amended complaint complied with the court rules, specifically MCR 2.113(F)(1)(b). Moreover, plaintiff asserts that, because it was authorized to file the amended complaint without first seeking leave of the court, the trial court should have accepted the amended complaint.

Here, summary disposition was granted based on the initial complaint. MCR 2.113(F)(1)(b) states:

- (1) If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleadings as an exhibit unless the instrument is

* * *

(b) in the possession of the adverse party and the pleading so states.

In its initial complaint, plaintiff failed to comply with the written instrument requirement of MCR 2.113(F)(1) by failing to attach the employment agreement on which the contract claim was based or aver that the written agreement was in the possession of the adverse party. Accordingly, the trial court correctly concluded that count I of plaintiff's original complaint failed to state a claim on which relief could be granted.

However, we agree with plaintiff that the trial court erred in refusing to accept plaintiff's first amended complaint. Interpretation of a court rule is treated the same as the interpretation of a statute, and it is a question of law that is reviewed de novo. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003); *CAM Const v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). As a general matter, "decisions granting or denying motions to amend pleadings . . . are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001), quoting *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). However, the present situation does not involve amendment by leave of the court, but, rather, amendment by right.

As previously noted, in response to plaintiff's original complaint, defendant filed only a motion for summary disposition, alleging, in pertinent part, failure to state a claim because the written instrument on which the contract action was based was not attached to the complaint as required by court rule. Prior to the summary disposition hearing, plaintiff submitted an amended complaint in which plaintiff added the allegation in paragraph 9 that "[a] copy of Bjorkly's written employment agreement containing the acknowledgement and agreement is in the possession of Bjorkly." The trial court nonetheless granted summary disposition and denied plaintiff's "request" to file the amended complaint on the ground that such amendment would be futile because the requisite written instruments were not attached to the amended complaint.

MCR 2.118(A) reads in pertinent part:

(1) A party may amend a pleading once as a matter of course within 14 days after being served with a *responsive pleading* by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.

(2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires. [Emphasis added.]

A motion for summary disposition is not considered a responsive pleading. MCR 2.110(A); *City of Huntington Woods v Ajax Paving Industries, Inc*, 179 Mich App 600, 601; 446 NW2d 331 (1989). Under MCR 2.110(A), a "pleading" includes only a complaint, a cross-complaint, a counterclaim, a third-party complaint, an answer to any of the former, and a reply to an answer. MCR 2.110(A) specifically states, "[n]o other form of pleading is allowed." Here, because defendant never filed a responsive pleading to the complaint, but only a motion for summary disposition, plaintiff had the right to file an amended complaint as a matter of course

under MCR 2.118(A)(1). As authors Dean and Longhofer note in their commentary in Michigan Court Rules Practice (4th ed), § 2118.2, p 552:

Since the time allowed for an amendment as of right is limited to 14 days after service of a responsive “pleading,” it is important to note that the term “pleading” is defined under MCR 2.110(A) to include only complaints, cross-claims, counterclaims, third-party complaints, an answer to any of these, and a reply to an answer. The list does not include, for example, a motion for summary disposition, under MCR 2.116, or a motion to strike or for a more definite statement under MCR 2.115. *A party may therefore appropriately reply to a motion under either rule with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment).* [Emphasis added.]

Thus, in the present circumstances, the trial court was required to consider the amended complaint, which was properly filed as of right. Moreover, because the amended complaint complied with MCR 2.113(F)(1)(b), in that plaintiff sufficiently averred that the relevant written instrument was “in the possession of the adverse party and the pleading so states,” the trial court erred in granting defendant’s motion for summary disposition on plaintiff’s breach of contract claim.¹

III

Plaintiff further argues that the trial court erred in granting summary disposition on the claim for tortious interference with a contractual relationship. To allege tortious interference with a contractual relationship, a plaintiff must allege “the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). The plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference, if the defendant’s conduct was not wrongful per se. *CMI Int’l, supra* at 131; *Feldman, supra* at 369-370; see also SJI2d 125.04.

In the amended complaint, plaintiff alleged that defendant misappropriated confidential and proprietary information and disseminated it to third parties with the purpose of injuring plaintiff’s business relations. Plaintiff stated specific instances of this behavior, and, therefore, plaintiff stated a claim upon which relief could be granted. Because the trial court erred by

¹ Defendant argues that this allegation is not sufficient because, in reply to the motion for summary disposition, she submitted an affidavit in which she claims that she is not in possession of the employment contract and personnel manual referenced in plaintiff’s amended complaint. Whether or not defendant’s allegations about the current status of her possession of these materials is true, such argument ignores the fact that dismissal under MCR 2.116(C)(8) must be judged on the complaint alone, and all facts alleged in the complaint must be taken as true.

denying plaintiff the right to file an amended complaint, plaintiff did not fail to state a claim upon which relief could be granted regarding the tortious interference with contractual relations claim.

IV

While further amendment should not have been necessary because the first amended complaint, filed as of right, complied with MCR 2.113(F)(1)(b), and also adequately pleaded a claim of tortious interference with a contractual relationship, the trial court abused its discretion in not permitting further amendment of the complaint.

If a court grants summary disposition pursuant to MCR 2.116(C)(8), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5). An amendment is considered futile if it would merely restate the allegations already made or add allegations and still fail to state a claim. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001). MCR 2.118(A)(2) provides that leave to amend a pleading “shall be freely given when justice so requires.” A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons:

“[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” [*Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).]

See also *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 598; 669 NW2d 304 (2003).

If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision. *Fyke, supra* at 656-657.

Here, the trial court denied plaintiff’s motion for reconsideration, which included the second amended complaint. The court stated in its opinion and order that, in the motion for reconsideration, plaintiff presented the “same issues as ruled upon in the trial court.” However, attached to plaintiff’s second amended complaint were documents signed by defendant, showing that she agreed, as a condition of her employment, to execute a confidentiality and non-compete agreement and to be bound by the policies set forth in the company’s personnel manual. The relevant portions of the personnel manual were also attached, which contained the confidentiality provision to which defendant agreed to be bound. Thus, plaintiff did not present the same issues as previously ruled upon by the trial court. There was no undue delay, bad faith, repeated failure to cure deficiencies, or undue prejudice to defendant. *Fyke, supra* at 656. Plaintiff’s amendment, instead, cured the defects under MCR 2.113 by attaching the written instruments on which the breach of contract claim was based and fully stated the facts in the pleadings for the claim of tortious interference with contractual relations. Therefore, the second amended complaint was not futile. The trial court abused its discretion in denying plaintiff leave to file the second amended complaint.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood