STATE OF MICHIGAN

COURT OF APPEALS

APPLEWAY EQUIPMENT LEASING, INC., Plaintiff-Appellant,	UNPUBLISHED December 11, 2012
v	No. 307784 Kent Circuit Court
RIVER CITY EQUIPMENT SALES, INC., and CRAIG SCHOLTEN, Defendants-Appellees.	LC No. 10-012635-CK

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In this action for fraudulent misrepresentation, Appleway Equipment Leasing, Inc. ("Appleway") appeals as of right the trial court's September 15, 2011, order granting summary disposition in favor of River City Equipment Sales, Inc. ("River City") and Craig Scholten.[1] We affirm.

Appleway is a leasing and financing company located in Spokane, Washington. River City, a Michigan corporation, sells used semi trucks; Scholten is the president and owner of River City. Appleway occasionally provided financing for River City's customers by purchasing trucks from River City via a bill of sale and leasing the trucks back to the customers. When Appleway financed transactions for River City, it required River City's customers to pay a "Reduction in Capital Cost" ("RCC") as a down payment.

Three particular transactions from 2005 for which Appleway provided financing for River City customers are at issue on this appeal: the "Walker transaction," the "K&L Express transaction," and the "Mohler transaction." Appleway contends that the RCC payments for each transaction were not made and that River City fraudulently misrepresented to Appleway that the payments were made. In 2010, Appleway filed suit against River City and Scholten alleging breach of contract by River City, fraudulent misrepresentation, conversion/civil embezzlement, breach of fiduciary duty, and tortious interference with a contract against both River City and Scholten. All claims were eventually dismissed except the fraudulent misrepresentation claim.

[1] MCR 2.116(C)(10).

Particularly relevant to a resolution of the issues, is that the breach of contract claim was dismissed on statute of limitations grounds.[2]

After the case proceeded on Appleway's fraudulent misrepresentation claim against Scholten and River City, the trial court granted River City and Scholten's motion for summary disposition[3] after finding that Appleway's fraud claim against River City was barred by the economic loss doctrine and that there was no genuine issue of material fact regarding the fraud claim against Scholten. Appleway challenges the trial court's grant of summary disposition. An appellate court reviews de novo the trial court's decision to grant summary disposition.[4]

Appleway first contends that its fraudulent misrepresentation claim against River City falls within an exception to the economic loss doctrine. We disagree. In *Neibarger v Universal Coop, Inc*, the Michigan Supreme Court adopted the economic loss doctrine.[5] "The economic loss doctrine, simply stated, provides that [w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses."[6] One of the rationales behind the economic loss doctrine is the importance of distinguishing tort claims from contract claims and preventing contract law from being overrun by tort law.[7]

While the rule announced in *Neibarger* applied to negligence actions, the economic loss doctrine also applies to cases where an aggrieved party to a contract alleges an intentional tort by the breaching party.[8] In *Huron Tool*, however, this Court recognized an exception to the economic loss doctrine where the alleged intentional tort was fraudulent inducement.[9] "Fraud in the inducement . . . addresses a situation where the claim is that one party was tricked into contracting."[10] For the fraudulent inducement exception to the economic loss doctrine to apply, the fraud alleged must be extraneous to the alleged breach of contract.[11]

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[2] MCR 2.116(C)(7).

[3] MCR 2.116(C)(10).

[4] *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

[5] *Neibarger v Universal Coop, Inc*, 439 Mich 512; 486 NW2d 612 (1992).

[6] *Id*. at 520 (quotations and footnote omitted).

[7] *Id*. at 528 (noting that if a party to a contract could allege tort claims for a breach of contract, "contract law would drown in a sea of tort.").

[8] *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365; 532 NW2d 541 (1995).

[9] *Id*. at 371.

[10] *Id*. (citation and quotations omitted).

[11] *Id*. at 374 ("We hold that plaintiff may only pursue a claim for fraud in the inducement extraneous to the alleged breach of contract.").

In order to determine whether a claim for fraudulent inducement is extraneous to the alleged breach of contract, "we must look to the four corners of plaintiff's complaint, accept all factual allegations as true, and determine whether the fraud claim falls outside the ambit of the economic loss doctrine."[12] Thus, in this case, we look to Appleway's complaint. Count I of Appleway's complaint, which alleged breach of contract against River City, provided:

> 22. Appleway fully performed its obligations to River City in each of the aforementioned Financing Transactions.
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> 23. In each of the aforementioned Financing Transactions, River City breached a material provision of its contractual obligation by not requiring and/or obtaining an actual RCC payment from the customer at issue.

The crux of this claim was that River City breached the bills of sale, the pertinent contracts, by not requiring or obtaining the requisite RCC payments in each of the transactions at issue on this appeal.

> Appleway's pleaded fraud claim was as follows:
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> 26. River City and Scholten made representation(s) to Appleway that the requisite RCC payments had been made in each of the aforementioned Financing Transactions by delivery of altered and/or fabricated checks, cashier checks and/or other documents. The representations were made as follows:
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> A. By written Bills of Sale (dated January 14 , 2005, May 27, 2005 and December 22, 2005) executed by River City and signed by Craig Scholten, representing and establishing the contractual arrangement between the parties and the amount of the reduction in capital cost ("RCC"). River City and Scholten did not receive the RCC as represented in the Bills of Sale.
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> B. The Bills of Sale which are attached as Exhibits A, B, and C, in conjunction with the approved terms of the transaction, shows the amount of the RCC that is required between Appleway and River City which states "all reductions of cap cost must be accompanied by a copy of the customers check, a copy of a cashier's check, or a copy of a charge card receipt. Cash, copies of cash, or cash receipts will not be accepted as evidence of reduction of cap cost. All leases with private parties as the vendor will be required to pay all cap cost reductions to Appleway Equipment Leasing in certified funds." River City and Mr. Scholten failed to adhere to the RCC requirements and represented they did.
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> i. Craig Scholten, using the River City checking account, signed River City checks that were used to buy "fake" cashiers' checks. The cashiers' checks would show the remitter as the customer of River City. Copies of the cashiers' checks

[12] *Id*. at 375.

were submitted to [Appleway] by River City and Craig Scholten as evidence of a RCC. Consequently, the RCC was not actually made by the customer. The sale price was inflated in the credit package sent to Appleway so River City could show a RCC that did not exist. At a minimum, this occurred in October of 2005 on two occasions and in July of 2003.

ii. Scholten and/or River City would ask customers to write a check for all or some of the RCC. Scholten and/or River City would photocopy the check, send the photocopy to [Appleway] as evidence of the RCC, and returned the undeposited check to River City's customer. Relating to the Mohler transaction, in December of 2005, Mr. Scholten told Randy Mohler that Mr. Scholten would "help make it work" when Mr. Mohler stated he could not pay the required RCC. Scholten and River City, in December 2005, represented a facsimile copy of a check from Mr. Mohler that was received and deposited when it was not.

iii. On the K&L Express transaction, Scholten and/or River City used a cashiers' check dated April 29, 2005 and drawn on Sutton Bank check number 82209 in the amount of $28,500 to fabricate a cashiers' check in the amount of $6,500. See Bates stamped documents 00376, 00927 and 00928 produced in discovery.

iv. Upon information and belief, in January 25, 2005 RCC checks provided by Walker Farms were not cashed or actually paid by Walker Farms to River City. Scholten and/or River City represented they were received and deposited.

27. At the time that River City and Scholten made said representation(s), River City and Scholten knew the representation(s) were false.

28. River City and Scholten made the representation(s) with the intent that Appleway rely on said representation(s) as it relates to its participation in the aforementioned Financing Transactions.

29. Appleway did in fact rely on River City's and Scholten's representations in connection with its participation with the aforementioned Financing Transactions.

30. But for River City's and/or Scholten's representation(s)/misrepresentation(s) Appleway would not have participated in the Financing Transactions at issue.

After examining Appleway's complaint, we find that Appleway's fraud claim is not extraneous to its breach of contract claim and does not fit within the fraudulent inducement exception to the economic loss doctrine. Initially, we find that the claim is not extraneous because Appleway's fraud claim is "undergirded by factual allegations identical to those supporting [the] breach of contract counts . . . ."[13] Here, the crux of the contract claim, i.e., the RCC payments were not made, involved essentially the same facts as Appleway's fraud claim,

[13] *Id*. at 373 (citation and quotations omitted).

i.e., River City represented that the RCC payments had been made. Accordingly, the fraud claim is not extraneous and should be precluded by the economic loss doctrine.[14]

Additionally, we note that on similar facts in *Gen Motors Corp v Alumi-Bunk, Inc*[15] the Michigan Supreme Court adopted the dissenting opinion of this Court written by Judge K. F. Kelly in *Gen Motors Corp v Alumi-Bunk, Inc*,[16] in which Judge Kelly found that the plaintiff's fraud claims did not fit within the fraudulent inducement exception. In that case, General Motors ("GM"), the plaintiff, submitted an offer to the defendants, Alumi-Bunk and Eric Jain, that it would sell Chevrolet Silverado trucks to the defendants at a discount if the defendants agreed to modify or "upfit" the trucks before selling them.[17] For its breach of contract claim, GM alleged that the defendants breached by failing to "upfit" the vehicles before reselling them.[18] GM's fraud claim, meanwhile, alleged fraud on the part of the defendants by contending that defendants fraudulently misrepresented that they would "upfit" the vehicles before reselling them.[19] Judge Kelly examined these two claims and concluded, "[c]learly, the fraud allegations are not extraneous to the contractual dispute as GM's allegations of fraud are so intertwined with its allegations of breach of contract to be indistinguishable."[20] The facts and analysis in *General Motors* are analogous to the facts in the case at bar. In the case at bar, Appleway's breach of contract claim alleged that River City breached by failing to obtain the requisite RCC payments. Appleways's fraudulent misrepresentation claim, meanwhile, alleged that River City fraudulently misrepresented that it obtained the requisite RCC payments. Using the analysis employed by Judge Kelly in *General Motors*, Appleway's fraud claim is not extraneous to its breach of contract claim because the two claims allege essentially the same facts as the basis for each claim, i.e., that River City did not collect the payments despite representing that it had.[21] As such, Appleway's claim for fraudulent misrepresentation is so intertwined with the facts underlying its breach of contract claim that the fraud allegations are not extraneous to Appleway's breach of contract claim.[22] Therefore, Appleway's claim is precluded by the economic loss doctrine.[23]

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[14] *Id*. at 373, 375.

[15] *Gen Motors Corp v Alumi-Bunk, Inc*, 482 Mich 1080; 757 NW2d 859 (2008).

[16] *Gen Motors Corp v Alumi-Bunk, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 270430) (KELLY, J, dissenting).

[17] *Id*. at 1 (KELLY, J, dissenting).

[18] *Id*. at 4.

[19] *Id*.

[20] *Id*. at 5.

[21] See *id*.

[22] See *id*.

[23] *Id*.

Appleway nevertheless contends that the policies underlying the economic loss doctrine preclude application of the doctrine in the case at bar. Appleway observes that in *Huron Tool* we noted that one of the reasons for adopting a fraudulent inducement exception to the economic loss doctrine was that parties are generally able to protect themselves from certain types of contractual harm by negotiating warranties.[24] As to fraudulent inducement, however, parties are generally unable to create a warranty that would provide adequate protection because a party's ability to "make an informed decision is undermined by the other party's fraudulent behavior."[25] Appleway contends that the proper test for whether the economic loss doctrine applies is whether a party can protect itself from fraud through negotiation. In support, Appleway cites the policy noted above, as well as *Woodland Harvesting, Inc v Georgia Pacific Corp*, in which the Eastern District of Michigan held that "the proper inquiry when applying the economic loss doctrine to a fraud claim is whether a plaintiff could have protected its interests through the contract or whether the plaintiff was prevented from making a free and informed decision due to the defendant's fraud."[26]

Appleway's position is without merit. While Appleway correctly identifies one of the policy rationales behind the fraudulent inducement exception to the economic loss doctrine, it fails to consider the test used by this Court in determining whether a fraud claim fits within the exception. Indeed, this Court looks to the "four corners" of Appleway's complaint to determine whether Appleway's fraud claims are extraneous to its contract claims such that the fraudulent inducement exception should apply; this Court does not merely consider whether a party could have protected itself during negotiations.[27] Further, Appleway's citation of *Woodland Harvesting* is unavailing because the decision is not binding on this Court.[28]

Appleway also argues that its fraud claim is not barred by the economic loss doctrine because the claim was predicated on the misrepresentation of a preexisting fact, i.e., River City's receipt of the RCC payments. Again, Appleway ignores the fact that its fraud claim is not extraneous to its contract claim. As such, the fraud claim is barred by the economic loss doctrine.[29]

Next, Appleway contends that our holding in *Mich First Credit Union v Al Long Ford, Inc*[30] supports its position. This argument is without merit for two reasons. First, as an

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[24] *Huron Tool*, 209 Mich App at 372-373.

[25] *Id*. at 373.

[26] *Woodland Harvesting, Inc v Georgia Pacific Corp*, 693 F Supp 2d 732, 741 (ED Mich, 2010).

[27] *Huron*, 209 Mich App at 375.

[28] *Truel v Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010).

[29] *Gen Motors*, unpub op at 5 (KELLY, J, dissenting); *Huron Tool*, 209 Mich App at 375.

[30] *Mich First Credit Union v Al Long Ford, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2010 (Docket No. 291146).

unpublished decision, *Al Long Ford* is not binding on this Court.[31] Second, we find the case has no persuasive value because of its limited discussion of the facts. Indeed, there is almost no discussion in *Al Long Ford* regarding the facts of the case.

Finally, Appleway asks us to find that summary disposition as to its fraud claim against Scholten was inappropriate because there was a genuine issue of material fact concerning Scholten's knowledge of the alleged fraud. On this issue, we hold that the economic loss doctrine bars Appleway's fraud claim against Scholten as well, and we need not consider whether there was a genuine issue of material fact.[32] Because the economic loss doctrine resolves Appleway's fraud claim against Scholten, we affirm the trial court's grant of summary disposition to Scholten on the alternate ground that this claim is barred by the economic loss doctrine.[33]

Affirmed.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan

[31] MCR 7.215(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

[32] See *Gen Motors*, unpub op at 5-6 (KELLY, J, dissenting) (holding that the economic loss doctrine barred the plaintiff's claims against both the corporate and individual defendants). See also *Huron Tool*, 209 Mich App at 375.

[33] *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001) ("[w]hen this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").