

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

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DON DECLERCQ,

Plaintiff-Appellant,

v

LORRI ANN LAIR,

Defendant-Appellee.

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UNPUBLISHED  
August 20, 2020

No. 351027  
Oakland Circuit Court  
LC No. 2019-171283-CZ

Before: REDFORD, P.J., and METER and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(8) and (10). We affirm in part, reverse in part, and remand for further proceedings.

**I. BACKGROUND**

The dispute in this case arises from an alleged loan that plaintiff made to defendant in 2018 to redeem property at 02653 Fox Run Court, Boyne Falls, MI 49713 (the property).

Defendant has, at all relevant times, owned the property. In 2014, defendant fell behind on her mortgage payments, and the property risked falling into foreclosure. At the time, defendant and plaintiff were considering marriage, and in contemplation of their future nuptials, plaintiff offered defendant money as a gift to prevent the foreclosure. That attempt failed, however, and the property fell into foreclosure.

In 2018, after a prolonged legal battle, defendant had the opportunity to redeem the property. By this time, the parties were no longer contemplating marriage. According to plaintiff, defendant requested plaintiff's financial assistance to save the property, and plaintiff agreed to provide funds to redeem the property, and in return defendant agreed to either fully repay plaintiff in less than one year or transfer the property to plaintiff. Defendant denied ever making such an agreement and contended that the money plaintiff gave her in 2018 was intended as a gift.

After plaintiff gave defendant the money and defendant redeemed the property, defendant refused to repay plaintiff or transfer title to him. This led plaintiff to file the instant complaint on January 22, 2019. The complaint alleged five counts. Count 1 alleged breach of contract, Count 2 alleged unjust enrichment, Count 3 alleged statutory conversion, Count 4 alleged fraud, and Count 5 alleged “equitable relief.”

In lieu of an answer, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10). In response to Count 1, defendant contended, in relevant part, that plaintiff’s breach-of-contract claim was barred by the statute of frauds. In response to Count 2, defendant argued that based on an affidavit from plaintiff’s attorney Paul Varchetti, the money given to defendant was a gift. For Count 3, defendant contended that plaintiff did not state a claim for conversion of money because such a claim requires that the defendant “have an obligation to return the specific money entrusted to his care.” For Count 4, defendant simply stated that plaintiff’s fraud claim was “legally insufficient” without further explanation. And for Count 5, defendant argued that plaintiff’s claims for equitable relief were barred by the statute of frauds and were inappropriate because plaintiff gave defendant the money as a gift.

In response, plaintiff claimed that he did indeed intend for money to redeem the property in 2014 to be a gift for defendant because they were contemplating marriage, but explained that this attempt to prevent foreclosure was unsuccessful, and the property was eventually foreclosed on. According to plaintiff, the parties shortly thereafter stopped contemplating marriage, and it was in this context that defendant approached plaintiff for funds to redeem the property in 2018. Because the parties were no longer contemplating marriage, plaintiff only agreed to give money to defendant if she agreed to either repay him or transfer him the property. Thus, according to plaintiff, the funds were not a gift to defendant. Plaintiff attached a more recent affidavit from Varchetti attesting to these facts.

Plaintiff then addressed each of defendant’s legal arguments. For Count 1, plaintiff contended that the parties’ oral agreement was not barred by the statute of frauds because the statute of frauds does not apply where one party has already fully performed under the contract, which plaintiff did here. For Count 2, plaintiff argued that the money ultimately given to defendant to redeem the property in 2018 was not a gift, as claimed by defendant, so his claim for unjust enrichment should not be dismissed. For Count 3, plaintiff contended that he stated a claim for conversion for both the funds he gave to defendant that she kept without repaying him and for the property itself. For Count 4, plaintiff pointed out that defendant never specified how his fraud claim was legally insufficient, thereby abandoning the issue. Alternatively, plaintiff contended that he pleaded fraud with sufficient particularity because he identified the factual circumstances constituting the actionable fraud. For Count 5, plaintiff argued that the basis for defendant’s specific-performance arguments was wrong because, again, the money given to defendant in 2018 was not intended as a gift.

The trial court held a hearing on defendant’s motion on September 25, 2019. Following the parties’ argument, the trial court ruled that Counts 3 (statutory conversion) and 5 (equitable relief) were dismissed without explanation. For Count 1 (breach of contract), the trial court ruled that it was barred by the statute of frauds “insofar as it seeks a transfer of the real estate . . . .” The trial court next dismissed Count 2 (unjust enrichment) “based upon the affidavit stating the funds

were intended to be a gift.” Without further explanation, the trial court then stated, “The entirety of the motion for summary disposition is granted.”

This appeal followed.

## II. STANDARD OF REVIEW

Appellate courts review de novo a trial court’s grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). The trial court granted defendants summary disposition under MCR 2.116(C)(8) and (10). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained the process for reviewing a motion filed under MCR 2.116(C)(8):

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

For a motion under MCR 2.116(C)(10), the *Maiden* Court explained the review as follows:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.]

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This Court reviews de novo whether the statute of frauds bars enforcement of a purported contract. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

## III. ANALYSIS

Before addressing the substantive legal questions, we address what appears to be an overarching problem with the trial court’s ruling. Namely, the trial court appeared to conclude that defendant conclusively established that the money plaintiff gave her in 2018 was a gift. This was error. While defendant submitted an affidavit from Varchetti in which he attested that, in 2014, plaintiff made money available to defendant as a gift to prevent foreclosure on the property, plaintiff contended that the money eventually given to defendant in 2018 to redeem the property was not a gift, but rather was given under terms of an oral contract. Plaintiff submitted a more

recent affidavit from Varchetti in which he attested that the money given in 2018 was not a gift, unlike the money made available to defendant in 2014. Thus, at the very least, there is a question of fact whether the money plaintiff gave defendant in 2018 was intended as a gift or was given pursuant to an oral contract. Viewing this evidence in the light most favorable to plaintiff as the nonmoving party, we assume for purposes of this opinion that the money given to defendant in 2018 was not intended as a gift, but rather was given pursuant to an oral agreement. With this in mind, we now address each of plaintiff's substantive claims.

#### A. STATUTE OF FRAUDS

According to the complaint, plaintiff and defendant orally agreed that plaintiff would provide defendant with money to redeem the property, and in return defendant would either repay plaintiff within one year or transfer the property to him. The complaint further alleged that defendant refused to repay defendant or transfer the property to him, thereby breaching the contract. There was no dispute in the trial court that this was a sufficiently plead breach-of-contract claim.

Instead, the issue in the trial court (and now on appeal) is whether this purported contract was barred by the statute of frauds. The statute of frauds, located in MCL 556.108, states in relevant part:

Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing[.]

This statute clearly does not bar that portion of the parties' agreement in which defendant agreed to repay plaintiff within one year, as this statute deals solely with agreements for real property.<sup>1</sup> The trial court appeared to recognize this initially, but then inexplicably dismissed the entire count. This was error. The question remains, however, whether the statute of frauds barred the portion of the parties' agreement in which defendant agreed to transfer the property to plaintiff if she failed to repay him.

Plaintiff contends that this portion of the agreement is valid based on *Guzorek v Williams*, 300 Mich 633; 2 NW2d 796 (1942). In that case, our Supreme Court explained, "If one party to an oral contract, in reliance upon the contract, has performed his obligation thereunder so that it would be a fraud upon him to allow the other party to repudiate the contract, by interposing the statute, equity will regard the contract as removed from the operation of the statute." *Id.* at 638-639. We agree with plaintiff that the doctrine of part performance removed plaintiff's claim as alleged in his complaint from the statute of frauds. See *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 540; 473 NW2d 652 (1991) (identifying the doctrine explained in *Guzorek* as "the doctrine

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<sup>1</sup> MCL 556.132(1)(a) requires that contracts which, by their terms, cannot be performed within one year be in writing. That statute obviously does not apply here because defendant agreed to repay plaintiff in less than one year.

of part performance”). In reliance on the parties’ oral agreement that defendant would transfer the property to plaintiff if she were unable to repay him, plaintiff gave defendant the money to redeem the property. Plaintiff therefore performed his obligation under the contract in reliance on the parties’ oral contract. Because “it would be fraud upon” plaintiff to now allow defendant “to repudiate the contract,” “equity will regard the contract as removed from the operation of the statute” of frauds. *Guzorek*, 300 Mich at 638-639.

## B. UNJUST ENRICHMENT

Count 2 of plaintiff’s complaint alleged unjust enrichment. In *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003), this Court explained:

A claim of unjust enrichment requires the complaining party to establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party. If this is established, the law will imply a contract in order to prevent unjust enrichment. However, a contract will be implied only if there is no express contract covering the same subject matter.

Plaintiff adequately pleaded a claim for unjust enrichment. According to plaintiff’s complaint, plaintiff gave defendant money to redeem the property based on defendant’s representations that she would repay him, but now defendant, after receiving the money and redeeming the property, is refusing to repay plaintiff. If proven true, this could establish a claim for unjust enrichment. See *id.* Though plaintiff alleged in Count 1 that the parties had an express oral contract, plaintiff is permitted to alternatively allege that the parties did not have an express contract and that he is entitled to relief on a claim of unjust enrichment. See MCR 2.111(A)(2); *AFSCME Council 25 v Faust Pub Library*, 311 Mich App 449, 459; 875 NW2d 254 (2015) (“In general, parties are permitted to plead inconsistent claims and facts in the alternative.”).

## C. STATUTORY CONVERSION

For Count 3, plaintiff alleged statutory conversion. Plaintiff does not argue on appeal that the trial court erred by dismissing his claim for statutory conversion, so we need not address it. See *In re Contempt of Rochlin*, 186 Mich App 639, 651 n 1; 465 NW2d 388 (1990) (explaining that this Court need not address issues not raised on appeal).

Even if we were to address Count 3, the trial court correctly dismissed plaintiff’s claim. “To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care.” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). Plaintiff did not allege in his complaint that defendant had an obligation to return specific money entrusted to her care. In fact, it is uncontested that the money plaintiff gave defendant was given to her so she could redeem the property, which is what she did. That is, it is uncontested that defendant did not have an obligation to return the specific money that plaintiff gave to her because that money was to be used to redeem the property. Thus, plaintiff failed to state a claim for statutory conversion, and summary disposition for defendant was appropriate under MCR 2.116(C)(8).

#### D. FRAUD

Plaintiff alleged fraud for Count 4. In *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 n 8; 701 NW2d 144 (2005), our Supreme Court listed the elements for fraud as follows:

(1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury.

In *Dutkiewicz v Bartkowiak*, 372 Mich 386, 389; 126 NW2d 705 (1964), our Supreme Court explained that “an action in fraud must definitely and issuably set forth the facts complained of and relied upon for recovery. Otherwise . . . it gives defendant no fair opportunity to defend.” This rule is embodied in MCR 2.112(B)(1), which states, “In allegations of fraud or mistake, the circumstances constituting fraud and mistake must be stated with particularity.”

Plaintiff sufficiently pleaded a claim of fraud. Plaintiff alleged that (1) defendant represented that, if plaintiff gave her money to redeem the property, she would either repay him within one year or transfer the property to him, (2) this representation was false, (3) when defendant made this representation, she had no intention of repaying defendant, (4) defendant made this representation to persuade plaintiff to give her the money, (5) plaintiff gave defendant money to redeem the property relying on her representation that she would either repay him or transfer him the property, and (6) plaintiff has suffered injury. These allegations were sufficiently particular so as to give defendant a fair opportunity to defend against them. See *Dutkiewicz*, 372 Mich at 389. It is unclear why the trial court dismissed this claim, but it was clearly error because plaintiff sufficiently pleaded a claim for fraud, and there are unresolved material factual issues related to that claim.

#### E. EQUITABLE RELIEF

For Count 5, plaintiff alleged “equitable relief.” Plaintiff concedes on appeal that “equitable relief” is not a separate cause of action. Thus, the trial court appropriately dismissed Count 5 of plaintiff’s complaint under MCR 2.116(C)(8).<sup>2</sup>

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<sup>2</sup> Our ruling on this count does not preclude plaintiff from seeking equitable relief where otherwise appropriate.

#### IV. CONCLUSION

The trial court properly dismissed Counts 3 and 5 of plaintiff's complaint, but erred by granting summary disposition to defendant on Counts 1, 2, and 4 of plaintiff's complaint.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ James Robert Redford

/s/ Patrick M. Meter

/s/ Colleen A. O'Brien