

STATE OF MICHIGAN
COURT OF APPEALS

ROCHESTER ENDOSCOPY AND SURGERY
CENTER, LLC and JARO COMPANY, LLC,

UNPUBLISHED
October 22, 2020

Plaintiffs-Appellants,

v

DESROSIERS ARCHITECTS, PC,

No. 349952
Oakland Circuit Court
LC No. 2018-168674-CB

Defendant-Appellee.

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order of the trial court granting defendant summary disposition under MCR 2.116(C)(8), and also denying plaintiffs' motion to amend their complaint. We affirm.

I. FACTS

This case arises out of plaintiffs' allegations that they incurred damages as a result of defendant's professional negligence. Plaintiffs are Rochester Endoscopy and Surgical Center, LLC (RESC), and JARO Company, LLC (JARO). RESC operates as a healthcare facility and is licensed as a freestanding surgical outpatient facility. RESC has several physician members; two of the physician members, Dr. Samir Al-Hadidi and Dr. Kambiz Bral, are also the joint owners of JARO. Dr. Al-Hadidi also owns a 50 percent share in Rochester M.O.B., LLC (Rochester), which he jointly owns with Fred Hadid, a family friend, who at the times relevant to this case was also the manager of OYK Investments, LLC.

In 2012, plaintiffs sought to relocate the RESC surgical facility. To that end, JARO purchased a unit in a commercial real estate condominium association from Rochester, then leased the unit to RESC for the relocation of its surgical facility. RESC hired OYK Investments, doing business as OYK Engineering & Construction (OYK), as the general contractor for the construction of the new surgical facility, and OYK contracted with defendant, Desrosiers Architects, PC, to provide architectural services for the project.

Plaintiffs allege that defendant thereafter created an architectural design that did not comply with the relevant codes as required to construct a freestanding surgical outpatient facility, and OYK proceeded to construct the facility in accordance with the noncompliant plan. Plaintiffs allege that when they learned that the facility was not being constructed in compliance with the relevant codes, they demanded that OYK and defendant correct all noncompliant work. Plaintiffs allege that when OYK and defendant refused to cure their noncompliant work, plaintiffs fired OYK.

Plaintiffs initiated this lawsuit against defendant alleging professional negligence. Plaintiffs allege that although defendant contracted with OYK and not plaintiffs, defendant, as architects, nonetheless owed plaintiffs a duty “to exercise reasonable care and competence” in the design and construction of the surgical facility, and to follow all applicable laws and standards, and that defendant failed to do so. Plaintiffs allege that to cure the noncompliant work they were compelled to hire a new architect and new builders, and plaintiffs thereby incurred economic damages.

Defendant moved for summary disposition under MCR 2.116(C)(8), contending that it could not be liable to plaintiffs for professional malpractice because it did not contract with plaintiffs and did not owe plaintiffs a duty. The trial court granted defendant’s motion and dismissed the complaint, finding that plaintiffs failed to establish that a professional relationship existed between plaintiffs and defendant, and therefore failed to establish that defendant owed plaintiffs any duty. The trial court also denied plaintiffs’ motion to amend their complaint. Plaintiffs now appeal.

II. DISCUSSION

A. PROFESSIONAL NEGLIGENCE

Plaintiffs contend that the trial court erred by granting defendant summary disposition of their claim of professional negligence. We disagree.

We review de novo a trial court’s decision to grant or deny summary disposition. *Nyman v Thomson Reuters Holdings, Inc*, 329 Mich App 539, 543; 942 NW2d 696 (2019). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and may be granted only when the claims alleged are so clearly unenforceable that no possible development of the facts could justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When considering a motion under MCR 2.116(C)(8), a court considers only the pleadings, accepting as true all well-pleaded allegations and construing them in a light most favorable to the nonmoving party. *Nyman*, 329 Mich App at 543. We also review de novo as a question of law whether a defendant owed a plaintiff a duty of care. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011).

Professional negligence (malpractice) arises from a breach of a duty owed by one providing professional services to one who has contracted for those services. *Broz v Plante & Moran, PLLC (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 340381); slip op at 5. A state licensed architect is a member of a state licensed profession subject to civil actions for malpractice. See MCL 600.5805(13); MCL 600.5839; *Stephens v Worden Ins Agency, LLC*, 307

Mich App 220, 231-232; 859 NW2d 723 (2014). The rules of the common law applicable to malpractice actions apply to determining liability for malpractice for a member of a state-licensed profession. See *Broz*, ___ Mich App at ___; slip op at 5, citing *Sam v Balardo*, 411 Mich 405, 425-426; 308 NW2d 142 (1981).

In a malpractice action, the duty owed by the professional arises from that professional's relationship with the client. *Roberts v Salmi*, 308 Mich App 605, 614; 866 NW2d 460 (2014) (discussing medical malpractice). The elements of malpractice are (1) a professional relationship, (2) negligent performance of the duties within that relationship, (3) proximate cause, and (4) damages. See *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995) (discussing elements of legal malpractice). Generally, a professional's duty to perform within a standard of care extends only to the client, and a third party cannot sue in malpractice for derivative damages arising from the professional's negligence. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 517 NW2d 716 (1997) (discussing legal malpractice); *Roberts*, 308 Mich App at 614-615 (discussing medical malpractice).

“The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship.” *Tierney v University of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 775 (2003) (quotation marks and citation omitted). A professional relationship sufficient to support a claim of malpractice exists when a licensed professional had a contractual duty that required that professional to render professional services to the plaintiff. See *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 422; 684 NW2d 864 (2004) (discussing medical malpractice).

In certain circumstances, however, the absence of a direct relationship with the professional has been held to not preclude the imposition of a limited duty upon the professional. *Roberts*, 308 Mich App at 615, citing *Dyer v Trachtman*, 470 Mich 45, 51-54; 679 NW2d 311 (2004) (holding that an independent medical examiner had a limited relationship with the patient giving rise to a limited duty), and *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996) (holding that a lawyer drafting a will has a limited duty to the beneficiaries named in the will). For a professional to be held liable to a third party for professional negligence “(1) a special relationship must exist between the client and the third party in which the potential for conflicts of interests is eliminated because the interest of the two are merged with regard to the particular issue where negligence of [the professional] is alleged, (2) the third party must lack any other available legal remedy, and (3) the third party must not be a “mere volunteer,” i.e., the damage must have been incurred as a consequence of the third party's fulfillment of a legal or equitable duty the third party owed to the client.” *Beaty*, 456 Mich at 255 (discussing legal malpractice).

In this case, plaintiffs' complaint alleges that defendant is liable to them for professional malpractice. Plaintiffs' complaint does not establish, however, that plaintiffs were engaged in a professional relationship with defendant; rather, plaintiffs allege that they contracted with OYK, who in turn contracted with defendant. Nor do plaintiffs allege circumstances that might justify the imposition of a limited duty despite the absence of a professional relationship; plaintiffs do not

allege a special relationship with defendant nor the lack of another legal remedy.¹ Plaintiffs' complaint therefore failed to establish the elements of professional negligence.

However, although malpractice requires the existence of a professional relationship or special circumstances imposing liability despite the absence of such a relationship, outside such a relationship Michigan's common law imposes on every person an obligation to refrain from unreasonably endangering others. *Roberts*, 308 Mich App at 615. "[E]very person engaged in the prosecution of any undertaking [has] an obligation to use due care, or to so govern his [or her] actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Consequently, the threshold question here is whether, although plaintiffs were not a party to the professional relationship between OYK and defendant, there nonetheless existed a legal duty on the part of defendant to plaintiffs as a non-contracting third party, the breach of which could result in tort liability.

Duty is "a legally recognized obligation to conform one's conduct toward another to what a reasonable man would do under similar circumstances." *Finazzo v Fire Equip Co*, 323 Mich App 620, 625; 918 NW2d 200 (2018). "[A] defendant is not liable to a plaintiff unless the defendant owed a legal duty to the plaintiff." *Loweke*, 489 Mich at 162; see also *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). In *Fultz*, our Supreme Court addressed when a plaintiff who was not party to a contract could assert a cause of action in tort based upon the contract. The Court stated:

[L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Id.* at 467.]

In *Loweke*, our Supreme Court clarified *Fultz*'s "separate and distinct" analysis. The Court explained that "[d]etermining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract," and instead involves determining whether a defendant owes a legal duty to a third-party apart from the defendant's contractual duty to the parties of the contract. This separate and distinct duty can arise by statute, by duty imposed because of a special relationship between the parties, or by the common-law duty to use due care in undertakings. *Loweke*, 489 Mich at 169-170. The Court in *Loweke* summarized:

Under *Fultz*, a contracting party's assumption of contractual obligations does not extinguish or limit separate, preexisting common-law or statutory tort duties owed to noncontracting third parties in the performance of a contract. Accordingly, we clarify that when engaging in *Fultz*'s "separate and distinct mode of analysis"

¹ The record indicates that plaintiffs had another available legal remedy and pursued it by filing claims against OYK and defendant in another action, which was later dismissed by agreement of the parties.

courts should not permit the contents of the contract to obscure the proper initial inquiry: whether, aside from the contract, the defendant owed any independent legal duty to the plaintiff. In this case, defendant – by performing an act under the contract - was not relieved of its preexisting common-law duty to use ordinary care in order *to avoid physical harm to foreseeable persons and property* in the execution of its undertakings. That duty, which is imposed by law, is separate and distinct from defendant’s contractual obligations with the general contractor. [*Id.* at 172 (emphasis added).]

As in *Loweke*, the proper inquiry in this case is whether, aside from the contract, defendant owed any independent legal duty to plaintiffs. See *Loweke*, 489 Mich at 172. We conclude that as in *Loweke*, in performing acts under the contract with OYK, defendant in this case was not relieved of its common law duty to use ordinary care to avoid physical harm to foreseeable persons and property in the execution of its undertaking. “This duty, however, does not extend to ‘intangible economic losses.’” *Rinaldo’s Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65, 84; 559 NW2d 647 (1997).

In this case, plaintiffs allege that defendant negligently performed its architectural duties under the contract with OYK, resulting in economic damages to plaintiffs because they had to expend money to cure the defects in the design and construction of the surgical facility. Defendant’s duty, however, only included the duty to use ordinary care to avoid physical harm to foreseeable persons and property, and did not extend to intangible economic losses. “Whether a defendant is under a legal obligation to act for a plaintiff’s benefit—i.e., whether a defendant owes a particular plaintiff a duty—is a question of law.” *Loweke*, 489 Mich at 162. Because plaintiffs failed to demonstrate the type of damages that defendant had a duty to avoid to a third party, the trial court correctly concluded that plaintiffs failed to establish that defendant owed plaintiffs a duty, and thereby failed to state a claim. Defendant therefore was entitled to summary disposition under MCR 2.116(C)(8).

B. MOTION TO AMEND THE COMPLAINT

Plaintiffs also contend that the trial court abused its discretion by denying their motion to amend their complaint to add counts of breach of contract, fraud, and promissory estoppel. Again, we disagree.

When a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), the trial court must give the nonmoving party an opportunity to amend its pleading as provided by MCR 2.118, unless the record demonstrates that amendment of the pleading is not justified. MCR 2.116(D)(5); see also *Jawad A. Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 209; 920 NW2d 148 (2018). Leave to amend should be freely granted when justice requires, MCR 2.118(A)(2), and should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility. *Shah*, 324 Mich App at 208. An amendment is futile if it restates existing allegations or adds allegations that still do not state a claim. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001).

We review a trial court’s decision on a motion to amend a pleading for an abuse of discretion. *Kostadinovski v Harrington*, 321 Mich App 736, 742-743; 909 NW2d 907 (2017).

Although the trial court's discretion in this regard is not boundless, *PT Today, Inc v Comm'r of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006), we defer to the trial court's judgment. *Kostadinovski*, 321 Mich App at 743. If the trial court's decision was within the range of principled outcomes, and if the trial court did not make an error of law, it has not abused its discretion. *Id.*

1. BREACH OF CONTRACT

Plaintiffs contend that their motion for leave to amend the complaint to add a claim of breach of contract should have been granted because plaintiffs were third-party beneficiaries of the contract between defendant and OYK. A person who is a nonparty to a contract may nonetheless be entitled to sue to enforce the contract as a third-party beneficiary. MCL 600.1405; *Shay v Aldrich*, 487 Mich 648, 666; 790 NW2d 629 (2010). A person is a third-party beneficiary of a contract only if the contract establishes that the promisor has undertaken a promise directly to or for that person. *Koenig v South Haven*, 460 Mich 667, 676-677; 597 NW2d 99 (1999). Under MCL 600.1405, only intended beneficiaries, not incidental beneficiaries, may sue for breach of contract. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). "A third person cannot maintain an action on a simple contract merely because he or she would receive a benefit from its performance or would be injured by its breach." *Kisiel v Holz*, 272 Mich App 168, 170-171; 725 NW2d 67 (2006).

To determine whether a person was an intended beneficiary of a contract, we look to the language of the contract itself and apply an objective standard to determine whether the promisor undertook to give or to do, or to refrain from doing, something directly to or for the person asserting status as a third-party beneficiary. *Brunsell v Zeeland*, 467 Mich 293, 298; 651 NW2d 388 (2002). In making that determination, the focus is not on the subjective intent of the contracting parties, but instead upon the intent of the contracting parties as determined from the form and meaning of the contract. *Id.*

Here, in denying plaintiffs' motion to amend the complaint to add a breach-of-contract claim, the trial court found that although defendant was aware that the plans designed under the contract ultimately would benefit plaintiffs, there was no record support for plaintiffs' contention that defendant undertook any work for plaintiffs under the terms of the contract. Plaintiffs argue that the contract contains an express promise to create architectural plans for plaintiffs because the contract states "the Architect shall prepare Schematic Design Documents for the Owners and Tenants approval." However, the contract provides that the ultimate approval of the final construction documents rested solely with OYK. Because the contract did not contain an express promise to act for plaintiffs' benefit, and we are to judge the intent of the parties from an objective perspective based solely on the contract language, plaintiffs were not third-party beneficiaries to the contract between defendant and OYK. The trial court did not abuse its discretion by denying plaintiffs' motion to amend their complaint to add a breach-of-contract claim.

2. FRAUD

Plaintiffs also contend that the trial court abused its discretion by denying their motion to amend their complaint to add claims of fraudulent misrepresentation and silent fraud. To establish fraudulent misrepresentation, the plaintiff must demonstrate that (1) the defendant made a material

representation, (2) the representation was false, (3) the defendant knew the representation was false when it was made, or made it recklessly, without knowing if it was true and as a positive assertion, (4) the defendant made the representation intending that the plaintiff act on the representation, (5) the plaintiff acted in reliance upon it, and (6) as a result, the plaintiff suffered damage. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). Silent fraud, also known as fraudulent concealment, requires that (1) the defendant suppressed a material fact, (2) the defendant had the duty to disclose the fact, and (3) the defendant concealed the fact with the intent to defraud. See *id.* at 557; *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013). A person may be guilty of fraudulent concealment if he or she “remains silent when fair dealing requires him [or her] to speak.” *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 127; 313 NW2d 77 (1981).

In this case, the trial court denied plaintiffs’ motion to amend their complaint to add claims of fraudulent misrepresentation and silent fraud because plaintiffs were not a party to the contract, and any representations made in the inception of the contract were thus made to OYK and not to plaintiffs. Although plaintiffs allege in their proposed amended complaint that defendant made misrepresentations to them, there is no demonstration that they acted upon them; rather, OYK presumably acted upon the alleged misrepresentations. Indeed, plaintiffs state in their proposed amended complaint that “OYK selected and contracted with [defendant] to be the project architect.” With regard to silent fraud, plaintiffs do not allege that defendant had a duty to disclose specific information to plaintiffs. See *Lucas*, 299 Mich App at 363-364. Plaintiffs also failed to plead the proposed fraud claims with sufficient specificity, failing to identify material representations by defendant. The trial court therefore did not abuse its discretion by denying plaintiffs’ motion for leave to amend their complaint to add allegations of fraud.

3. PROMISSORY ESTOPPEL

We similarly reject plaintiffs’ contention that the trial court abused its discretion by denying their motion to amend their complaint to assert promissory estoppel. Promissory estoppel arises from: “(1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided.” *Zaremba Equip, Inc v Harco Nat’l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008). “The promise must be definite and clear, and the reliance on it must be reasonable.” *Id.*

Here, the trial court denied plaintiffs’ motion to amend the complaint to add a promissory estoppel claim because the proposed amendment was contrary to the factual allegations of the complaint. It is undisputed that OYK hired defendant to design the surgical facility and that plaintiffs were not a party to that contract. Plaintiffs’ proposed amended complaint, however, alleges that they “did in fact hire [defendant] as the architect for the surgical center.” The trial court therefore found plaintiffs’ promissory estoppel claim to be unfounded, and thus futile.

Because our review of the record confirms the trial court's finding that a claim of promissory estoppel is unfounded, we conclude that the trial court did not abuse its discretion by denying plaintiffs' motion to amend their complaint.

Affirmed.

/s/ Michael F. Gadola
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien