STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MONTIJO, REJI THOMAS, and TONY KOKKATT,

Plaintiffs-Appellants,

v

FIRST COMMUNITY BANK and SANDEE ADAMS,

Defendants-Appellees.

UNPUBLISHED
April 22, 2021

No. 354348
Oakland Circuit Court
LC No. 2020-180584-CZ

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants under MCR 2.116(C)(8). Because the trial court properly granted summary disposition of plaintiffs' claims, we affirm.

I. BACKGROUND

This case arises from a failed attempt to secure a commercial loan. Plaintiff Michael Montijo acted as broker for plaintiffs Reji Thomas and Tony Kokkatt, who sought financing for the purchase of commercial real property. Defendant Sandee Adams, Senior Vice President of Lending for First Community Bank, handled the matter for the defendant bank. When Adams informed plaintiffs that the bank could not grant the loan, Thomas and Kokkatt purportedly lost the $100,000 earnest-money deposit that they had paid to the sellers of the real property. Plaintiffs filed this lawsuit against Adams and the bank, asserting claims for negligence, promissory estoppel, tortious interference with contract, and tortious interference with business expectancy.

In their complaint, plaintiffs alleged that, during September 2018, Montijo had discussed with Adams the potential for procuring a commercial loan for his "long-time clients," Thomas and Kokkatt. Plaintiffs alleged that, "[u]pon a preliminary viewing of the qualifying loan documents," Adams "agreed to proceed with the funding of the commercial loan, while further committing to

completing a credit line to facilitate its funding." Plaintiffs further alleged that, on November 5, 2018, while acting as an agent for defendant bank, Adams "delivered a written loan proposal" to plaintiffs. Plaintiffs attached the so-called "written loan proposal" to their complaint. This was a letter that Adams sent to Montijo, dated November 4, 2018, on stationary of First Community Bank. On the first page of that letter, Adams stated:

> Based upon my understanding of your current financial needs, please receive this as a proposal of structure for the loan facility as previously discussed. This proposal is intended to serve as an outline and does not purport to summarize all terms, conditional representations, warranties, etc. **This is not a commitment to lend, rather a structure presentation for discussion purposes only.** [Emphasis in original.]

The second page of the letter described the proposed terms of the loan. According to this document, the proposed loan was a 10-year loan in the amount of $3,980,000, with a 25-year amortization, and was intended to facilitate the acquisition of commercial real property. The pricing for the first five years was fixed at 5.5%, with a rate reset at the beginning of the sixth year, and the payments for the first 24 months of the loan would be interest only. The fee was 1.55%, plus all out-of-pocket expenses, including "Appraisal, Environmental, Title, Credit Report, Etc." The collateral for the loan would be a commercial-real-estate mortgage, as well as an assignment of leases and rents.

Plaintiffs alleged that on November 19, 2018, Montijo "confirmed" with Adams the bank's purported "loan commitment" and a $775,000 credit line. According to plaintiffs, on December 5, 2018, Adams sent an email to Montijo stating that "the loan had cleared underwriting and she was sending out appraisal quotes." Then on December 10, 2018, Adams sent an email to Montijo requesting that the appraisal payment be wired to defendant bank, and Thomas and Kokkatt "immediately satisfied" that payment. According to plaintiffs, Adams then "committed in writing to a closing date" of December 19, 2018. Plaintiffs did not attach to their complaint any documents confirming these written conversations that allegedly occurred between Adams and Montijo.

At this point, the loan application appears to have fallen apart. According to plaintiffs, Adams scheduled but failed to appear for several closings on the commercial loan. Plaintiffs alleged that on December 12, 2018, one week before the first scheduled closing, Adams told Montijo that there was "an issue with the appraisal" and that the bank would be unable to close until the "appraisal issue" was resolved. Therefore, Adams asked to reschedule the closing date to January 5, 2019. Plaintiffs further alleged that Thomas and Kokkat "hesitatingly agreed" to reschedule the closing date, and did so only because of Adams's request.

According to plaintiffs, the "appraisal issue" was resolved on or about December 21, 2018. But on January 5, 2019, the date purportedly scheduled for the closing, Adams "failed to show up at the closing and failed to respond" to any of the title company's emails. Plaintiffs alleged that, on or about January 5, 2019, Adams stated that "the participant fell out of the loan and she was 'scrambling to find another one,' " resulting in Adams again requesting to reschedule the closing date to January 9, 2019.

Plaintiffs alleged that, on the date of the January 9, 2019 closing, Adams "again failed to show for the closing, or respond to the title company." That day, Adams purportedly informed Montijo that she was going to travel personally to Harbor Springs, on a Saturday, to speak to the CEO of the defendant bank "to discuss and resolve the issues impeding the closing." Plaintiffs alleged that, over that weekend, Montijo "made exhaustive efforts" to reach Adams, "who failed to respond" and who failed to provide Montijo updates on Adams's "supposed efforts of resolving matters" with the CEO of the defendant bank.

Plaintiffs alleged that, as "a result of the two prior failed closings," Adams scheduled "a third and final closing" for January 14, 2019. But when Montijo contacted Adams, she "advised him that she was sick" and that she had been unable to meet with the CEO of the defendant bank. That same day, Adams informed the sellers of the property that "there was an issue with the $325,000 declarant." Thomas and Kokkatt responded by agreeing to pay the escrow separately, which would have reduced the loan amount requested. On January 15, 2019, Adams texted Montijo, stating that the bank "could not do the loan," allegedly causing Thomas and Kokkatt to forfeit their $100,000 earnest-money deposit that they had paid to the sellers of the commercial real property. Although plaintiffs also allude to other text messages between the parties, those text messages are not relevant to any of the claims.

Plaintiffs also alleged that Montijo had "Broker Agreements" with third parties, including Madan Aheer and Luk Dedvukaj, and that these Broker Agreements were "provided to and acknowledged by" Adams. According to plaintiffs, despite "being fully aware of the contractual relationship that existed between Plaintiff Montijo and those third parties who were the subjects of the Broker Agreements," Adams contacted those third parties and "tortiously interfered with both the contractual relationship, as well as the business expectancy, between Plaintiff Montijo and those third parties." Plaintiffs claimed that "Adams' tortious interference proximately resulted in damages and loss of commissions to Plaintiff Montijo, as well as irreparable financial and reputational harm." Plaintiffs further alleged that Adams acted as the bank's agent when she interfered with Montijo's contractual relationships, and that the interference "was malicious, intentional, willful, reckless, and in grossly negligent disregard for the state laws and the rights" of the plaintiffs.

In lieu of filing an answer to plaintiffs' complaint, defendants filed a motion for summary disposition under MCR 2.116(C)(8). Regarding the negligence claim, defendants relied on *Ulrich v Fed'l Land Bank of St. Paul*, 192 Mich App 194; 480 NW2d 910 (1991), for the proposition that a bank has no legal duty to exercise reasonable care in determining a borrower's eligibility for a loan. Owing a duty is the first element of a negligence claim, and defendants argued that the lack of duty was fatal to plaintiffs' claim. Regarding the promissory-estoppel claim, defendants relied on MCL 566.132(2) and *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538; 619 NW2d 66 (2000), to argue that any action based on an alleged oral promise to extend credit is absolutely barred. Regarding the tortious-interference claims, defendants relied on *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), for the proposition that one who alleges tortious interference with a contractual or business relationship "must allege the intentional doing of a per se wrongful act or the doing of an unlawful act with malice and unjustified in the law for the purpose of invading the contractual rights or business relationship of another." Defendants argued that plaintiffs' claim failed because they did not allege that Adams did anything unfair, illegal, or wrongful.

The trial court granted defendants' motion for summary disposition. Regarding plaintiffs' negligence claim, the trial court relied on *Ulrich*, 192 Mich App at 198-199, and ruled that defendants owed no duty of care to plaintiffs. The trial court further rejected defendants' reliance on caselaw regarding the duties owed by escrow agents, concluding that the caselaw was inapplicable. Regarding the tortious-interference claim, the trial court ruled that the claim failed as a matter of law because plaintiffs had failed to allege that the defendants' conduct was illegal, unethical, or fraudulent, and because mere interference for the purpose of competition is not enough to support such a claim. Finally, regarding the promissory-estoppel claim, the trial court held that the claim was barred by virtue of MCL 566.132(2) because plaintiffs had failed to show a written promise or commitment from the bank to lend money to Thomas and Kokkatt.

Plaintiffs now appeal from the trial court's grant of summary disposition to defendants.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "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." *Id.* 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.* Questions of law are reviewed de novo, *Jude v Heselschwerdt*, 228 Mich App 667, 670; 578 NW2d 704 (1998), and issues of statutory interpretation are also reviewed de novo, *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 426; 648 NW2d 205 (2002).

B. NEGLIGENCE CLAIM

Plaintiffs first argue that the trial court erred in granting summary disposition to defendants on plaintiffs' negligence claim, based on its conclusion that defendants owed plaintiffs no legal duty. The "threshold question in any negligence action is whether the defendant owed a legal duty to the plaintiff." *Bell & Hudson, PC v Buhl Realty Co*, 185 Mich App 714, 717; 462 NW2d 851 (1990). "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Id.* (cleaned up). "Questions of duty are generally for the court to decide." *Id.* "Unless the defendant owed a duty to the plaintiff, the negligence analysis cannot proceed further." *Id.*

In *Ulrich*, 192 Mich App at 198-199, this Court discussed whether lending institutions processing loan applications owed a duty of reasonable care to a borrower, and concluded that the defendant bank in that case "had no independent legal duty to exercise reasonable care in determining plaintiffs' eligibility for a loan." The federal courts have interpreted this Court's holding in *Ulrich* to mean that "a lender does not owe a duty of care to a loan applicant." *Yaldu v Bank of America Corp*, 700 F Supp 2d 832, 846 (ED Mich, 2010). See also *Noel v Fleet Fin, Inc*, 971 F Supp 1102, 1115 (ED Mich, 1997) (noting that, in *Ulrich*, this Court had declined to hold that a lending institution has a duty of reasonable care in processing loan applications).

Plaintiffs provide no explanation regarding why this Court should not apply the holding of *Ulrich* in this case, other than their argument that "no objective factual review could conclude" that plaintiffs "were merely applicants for a loan," given all of the "communications, commitments, assurances and written representations" made by Adams. This argument is without merit. The essence of plaintiffs' lawsuit is the allegation that plaintiffs Thomas and Kokkatt applied for a commercial loan, and that the bank committed to funding that loan but subsequently failed to deliver on its promise, causing financial injury to plaintiffs. Because a bank does not owe a duty of care to a loan applicant, plaintiffs' negligence claim necessarily fails. See *Ulrich*, 192 Mich App at 198-199.

Plaintiffs rely on *Smith*, 177 Mich App at 270-271, to argue that a bank and its agents may be held liable in tort for the negligent performance of duties or breach of fiduciary duties. In *Smith*, the defendant bank was acting as the plaintiffs' escrow agent, and this Court noted that the "duties and liabilities imposed upon an escrow agent are those set forth in the escrow agreement," which is a contract between the parties. *Id*. at 268. Because "an escrow agent may be liable in tort for the negligent performance of its duties as escrow agent or breach of fiduciary responsibilities owed to its principal," the *Smith* Court held that a question of fact existed regarding whether the defendant bank's actions or inactions "fell short of the proper standards for the performance of its duties as an escrow agent or breached fiduciary duties owed to plaintiffs." *Id*. at 270-271. Plaintiffs further cite *Hills of Lone Pine Assoc v Texel Land Co, Inc*, 226 Mich App 120; 572 NW2d 256 (1997), for the proposition that the duties and liabilities imposed on a financial institution or its agent may be determined by the actions and intent of the parties. In that case, a condominium association sued its escrow agent, alleging that the escrow agent improperly released escrow funds to a developer. *Id*. at 121. This Court reiterated that "the duties and liabilities imposed on an escrow agent are those set forth in the escrow agreement." *Id*. at 124. Simply put, this Court's decisions in *Smith* and *Hills of Lone Pine* are inapposite, as the present case does not involve an alleged breach of the terms of an escrow agreement. The trial court properly relied on this Court's holding in *Ulrich* to rule that defendants in this case owed plaintiffs no duty of care, and that plaintiffs' negligence claim failed as a matter of law.

C. PROMISSORY-ESTOPPEL CLAIM

Plaintiffs next argue that the trial court erred in granting summary disposition to defendants on plaintiffs' promissory-estoppel claim, based on its conclusion that MCL 566.132(2), as interpreted by the Court in *Crown Technology Park*, bars "all actions of any kind based on promises to lend money or extend credit, including actions for promissory estoppel," in the absence of a written promise or commitment from the bank.

In this case, the parties and the trial court appear to have applied the former version of the statute of frauds, MCL 566.132(2), despite the Legislature's amendment of the statute effective March 17, 2020. Plaintiffs filed this complaint after the statute was amended. Therefore, we apply the new version of the statute, which was in effect when plaintiffs filed their complaint and when the trial court issued its decision.

In their trial-court brief supporting their motion for summary disposition, defendants cited the former version of the statute of frauds, which provided:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation. [MCL 566.132(2) (subsequently amended by 2020 PA 63).]

This Court interpreted and applied the former language of the statute in *Crown Technology Park*, 242 Mich App 538. In that case, a borrower brought promissory-estoppel and negligence claims against a bank, alleging that the bank's loan officer had orally represented that the bank would waive the prepayment penalty on a promissory note, and alleging that the borrower relied on that promise to his detriment. The trial court held that the statute of frauds, MCL 566.132, did not bar the plaintiff's promissory-estoppel claim. *Id.* at 547. This Court reversed, holding that Subsection (2) of the statute barred the plaintiff's promissory-estoppel claim. *Id.* at 540, 553.

In *Crown Technology Park*, this Court noted that the Legislature had added Subsection (2) to the statute in 1992, and that the "plain language in this amendment of the statute of frauds addresses the area of conduct promissory estoppel ordinarily governs—oral promises." *Id.* at 549. The Court concluded that the statutory language was unambiguous, and that the statute "plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise" regarding a loan. *Id*. at 550. The Court squarely held that the statute bars promissory-estoppel claims brought against a bank, such as the claim asserted in the present case.

The Legislature subsequently amended this statute, effective March 17, 2020. See 2020 PA 63. The statute now provides:

> (2) A person shall not bring an action against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation. [MCL 566.132(2), as amended by 2020 PA 63, effective March 17, 2020.]

Thus, the Legislature altered Subsection (2) to read "A person shall not bring an action against a financial institution" instead of "An action shall not be brought against a financial institution." This Court's holding in *Crown Technology Park* continues to apply, despite the Legislature's amendment of the statutory language. The statute, as amended, still "plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise" regarding a loan. *Id*. at 550.

In this case, the only document on which plaintiffs rely is the letter written by Adams and sent to Montijo on November 4, 2018. Plaintiffs refer to this document as a "written loan proposal." Despite plaintiffs' protestations to the contrary, the document states quite clearly that

it was not a commitment to lend, but was a "presentation for discussion purposes only." Because plaintiffs have provided no *written* "promise or commitment to lend money, grant or extend credit, or make any other financial accommodation," their promissory-estoppel claim is barred by the statute of frauds, MCL 566.132(2), and the trial court properly granted defendants' motion for summary disposition on this claim.

D. TORTIOUS-INTERFERENCE CLAIM

Plaintiffs next argue that the trial court erred in granting summary disposition to defendants on plaintiffs' tortious-interference claims. To "succeed under a claim of tortious interference with a business relationship, the plaintiffs must allege that the interferer did something illegal, unethical, or fraudulent." *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 631; 403 NW2d 830 (1986). The same requirement exists for a claim of tortious interference with a business expectancy. *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 78; 919 NW2d 439 (2018). It has long been held in Michigan that a legitimate pursuit of a business interest through mere competition is not actionable conduct in a tortious-interference claim. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96; 443 NW2d 451 (1989); *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 376-377; 354 NW2d 341 (1984). Simply taking initiative to gain advantage over one's competitor is not improper interference. *Knight Enterprises, Inc v RPF Oil Co*, 299 Mich App 275, 282; 829 NW2d 345 (2013).

In this case, plaintiffs alleged that Adams contacted Montijo's clients and dealt with those clients directly regarding their banking business, cutting Montijo out of the role of broker. The trial court held that defendants were entitled to summary disposition on plaintiffs' tortious-interference claims because plaintiffs had failed to allege that defendants' conduct was illegal, unethical, or fraudulent. We conclude that the trial court correctly granted defendants' motion for summary disposition on this claim. Plaintiffs did not allege that Adams did anything that rises to the level of tortious interference.

E. AMENDMENT OF PLAINTIFFS' COMPLAINT

Finally, to the extent that plaintiffs argue that they should be allowed to amend their complaint, this argument is without merit. As defendants point out, plaintiffs never filed a motion in the trial court seeking leave to amend their complaint. And, because plaintiffs did not raise this issue in the questions-presented section of their appellate brief, we consider the issue abandoned. See MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

III. CONCLUSION

The trial court properly granted defendants' motion for summary disposition as to all of plaintiffs' claims.

Affirmed. Defendants, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Brock A. Swartzle