STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY BERNARD,

Plaintiff-Appellant,

v

LOUIS SALVATORE,

Defendant-Appellee,

and

KIPP WILLIAMS, EUGENE SALVATORE, and MAXWELL SALVATORE,

Defendants.

UNPUBLISHED
September 15, 2022

No. 356860
Mackinac Circuit Court
LC No. 20-008511-CZ

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

PER CURIAM.

Plaintiff, Beverly Bernard, appeals by leave granted[1] an order granting partial summary disposition under MCR 2.116(C)(7), (8), and (10) to defendant, Louis Salvatore. We affirm in part, reverse in part, and remand for further proceedings.[2]

[1] *Bernard v Salvatore*, unpublished order of the Court of Appeals, entered September 1, 2021 (Docket No. 356860).

[2] We reject plaintiff's sparsely briefed argument, raised for the first time in her reply brief, that we should vacate the lower court's order on the basis of a lack of jurisdiction. The basis for plaintiff's argument is her apparent claim that venue lay in the Washtenaw Circuit Court and not the Mackinac Circuit Court because the Washtenaw Circuit Court had, at the time of the summary-disposition ruling by the Mackinac Circuit Court, not yet revisited its transfer-of-venue order in accordance with this Court's order in an earlier appeal. See *Bernard v Salvatore*, unpublished

I. BACKGROUND

Plaintiff and defendant were in a romantic relationship that ended in March 2020. Thereafter, plaintiff alleged, among other things, that defendant failed to keep a promise to give her one-half of a valuable piece of property on Mackinac Island known as "the Mackinac house."

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order of the Court of Appeals, entered February 12, 2021 (Docket No. 355264) (vacating the Washtenaw Circuit Court's transfer of venue to the Mackinac Circuit Court and remanding for a new transfer decision). In *Edwards v Meinberg*, 334 Mich 355, 359; 54 NW2d 684 (1952), our Supreme Court explained:

> A failure to meet the requirements of a venue statute does not constitute a true jurisdictional defect. Venue requirements may be waived, but the parties by agreement cannot confer jurisdiction as to subject matter upon the court.
>
> * * *
>
> The statute upon which plaintiff relies is not a true jurisdictional statute, but is one pertaining to venue. Its requirements may be waived by failure to seasonably raise the question in the original proceedings.

Defendant represents that plaintiff agreed to having the Mackinac Circuit Court decide the motion for summary disposition, and this is seemingly confirmed by an e-mail from plaintiff's counsel in the lower court record stating that a "Stip & Order on Venue" was attached. The attachment was a drafted order stating "that venue shall remain transferred to and will remain in Mackinac County." Defendant also submitted an affidavit from defense counsel stating that the parties had agreed to keep the case in Mackinac County, that she signed the drafted order the day of the summary-disposition hearing, and that plaintiff's counsel represented that he would file it that same day. In addition, plaintiff admitted to agreeing that the summary-disposition hearing in Mackinac County should proceed. That plaintiff was not objecting to venue in Mackinac County for purposes of the summary-disposition ruling is evident by the facts that (1) she raised no venue objection at the summary-disposition hearing and (2) she raised no venue objection in her application for leave to appeal or in her primary appellate brief.

Plaintiff argues that the Mackinac Circuit Court "exceeded the scope" of this Court's remand order. In the remand order, this Court did not retain jurisdiction; in other words, the case was to proceed in the lower court to matters beyond venue. While the order also directed the Washtenaw Circuit Court to revisit the transfer-of-venue decision, plaintiff, in the end and in practical effect, decided to waive objection to defendant's motion to transfer for purposes of hearing the motion for summary disposition, and the case duly proceeded to the summary-disposition hearing in the Mackinac Circuit Court. Given all the circumstances, we reject plaintiff's "jurisdiction" argument, which is, in actuality, an argument about venue. See also *Bass v Combs*, 238 Mich App 16, 22-23; 604 NW2d 727 (1999), overruled on other grounds by *Dimmit InsHeading& Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008).

She contended that she expended considerable efforts working on the Mackinac house and gave up a lucrative investment opportunity in Birmingham, Michigan, in order to work on the house. She also claimed that defendant committed unauthorized stock trades with her TD Ameritrade account and thereby committed statutory conversion. The trial court allowed several of plaintiff's claims against defendant to proceed but granted summary disposition to defendant on certain claims of fraud, promissory estoppel, and statutory conversion, and it granted partial summary disposition to defendant on a claim of unjust enrichment/quantum meruit.

II. STANDARD OF REVIEW

Defendant, in seeking summary disposition, cited MCR 2.116(C)(7) (statute of frauds), (8) (legal sufficiency of complaint), and (10) (factual sufficiency of claim).

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). For a motion under MCR 2.116(C)(7),

> this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Id*. at 428-429 (citations omitted).]

As for a motion under MCR 2.116(C)(8):

> A motion under [this subrule] 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. 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. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Finally, under MCR 2.116(C)(10),

> a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of

material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. [*Dextrom*, 287 Mich App at 415-416 (citations omitted).]

III. FRAUD

Plaintiff contends that the trial court improperly dismissed her claims of fraud related to the alleged promise by defendant to give her one-half of the Mackinac house in exchange for her labor in helping to construct it. We disagree.

The parties and the lower court focused on whether plaintiff had sufficiently presented a prima facie claim of fraud or fraudulent misrepresentation such that the statute of frauds, see MCL 566.106,[3] could be avoided. Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition with respect to her claims of fraud because, despite her claim of fraud being based on defendant's alleged future promise to give plaintiff one-half of the Mackinac house, she adequately pleaded the three exceptions to the general rule that promises of future action cannot constitute fraud actionable in tort. See *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336-339; 247 NW2d 813 (1976), and *Rutan v Straehly*, 289 Mich 341, 348-349; 286 NW2d 639 (1939).[4] But neither the parties nor the trial court addressed the threshold question of whether an action for fraud can be used to avoid the statute of frauds. In *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426, 435-440; 280 NW 814 (1938), the Court concluded that an action for fraud cannot be used to overcome enforcement of the statute of frauds. It stated:

> "It is further claimed that a tort was committed, and that the defendants never intended to execute the lease. The addition of that statement in the amended petition does not change the cause of action. If no cause of action existed, the addition of the allegation that it was a fraud, and that the defendants never intended to execute the lease, does not, in the absence of other allegations, take the case out of the statute of frauds." [*Id*. at 435, quoting *Ossage v Foley*, 20 Ohio App 16 (1923).]

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[3] MCL 566.106 states:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

[4] Plaintiff refers to these as "the three exceptions to fraudulent misrepresentation," but that is not accurate, as they are exceptions to the general rule that promises of future action cannot constitute fraud actionable in tort.

That *Cassidy* stands for the proposition that an allegation of fraud cannot be used to overcome enforcement of the statute of frauds in Michigan has been routinely recognized by both this Court and federal courts applying Michigan law. See, e.g, *Johnson v Villa Elizabeth—Butterworth, Inc*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2002 (Docket No. 2284250), p 3; *Taylor v Hockman*, unpublished per curiam opinion of the Court of Appeals, issued August 24, 2010 (Docket No. 288443), p 3; *Formicola v CBS Corp*, unpublished opinion of the Court of Appeals, issued August 23, 2002 (Docket No. 227881), p 2; *Ten Eyck Mineral Trust v Chesapeake Energy Corp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued January 27, 2015 (Case No. 1:14-CV-201); 2015 WL 11422316, p 4. While neither unpublished opinions of this Court nor federal district court decisions are binding, they can be persuasive. See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136,145 n 3; 783 NW2d 133 (2010); *Johnson v Vanderkooi*, 502 Mich 751, 764 n 6; 918 NW2d 785 (2018). Regardless, the cited opinions make clear the continuing validity of *Cassidy*.[5]

Though the trial court did not rely on *Cassidy* to dismiss the fraud claims, a trial court's decision may be upheld if the correct result was reached for an alternative reason. *Smith v Twp of Forester*, 323 Mich App 146, 152; 913 NW2d 662 (2018). We conclude that affirmance on the basis of *Cassidy* and additional persuasive caselaw is appropriate.

IV. PROMISSORY ESTOPPEL AND UNJUST ENRICHMENT/QUANTUM MERUIT

Plaintiff next contends that the trial court erred by dismissing her claim for promissory estoppel in relation to the Mackinac house, as well as by allowing her to seek reimbursement only for construction expenses (and not for her labor) in the context of unjust enrichment/quantum meruit. We agree that the trial court erred by dismissing her claim for promissory estoppel, but conclude that appellate relief on plaintiff's claim of unjust enrichment/quantum meruit is unwarranted.

Promissory estoppel can, in appropriate circumstances, be used to avoid the statute of frauds. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 370; 320 NW2d 836 (1982); *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 548; 619 NW2d 66 (2000).[6] The elements of promissory estoppel are "(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 in circumstances such that the promise must be enforced if injustice is to be avoided." *Cove Creek Condo Ass'n v Vistal Land & Dev, LLC*, 330 Mich App 679, 713; 950 NW2d 502 (2019) (quotation marks and citations omitted).

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[5] We note that, in *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989), this Court allowed a fraud claim pertaining to a long-term lease to proceed, but, in so doing, the Court concluded that there was a question of fact whether the statute of frauds had even been violated, see *id*. at 87-88. At any rate, our Supreme Court's decision in *Cassidy* takes precedence over a Court of Appeals decision.

[6] While the *Crown Technology* Court recognized this principle, it questioned—but ultimately declined to address—its ongoing validity. *Id*. at 548 n 4.

"A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding a commitment has been made." 1 Restatement Contracts, 2d, § 2, p 8. "Variables such as the nature of the relationship between the parties, the clarity of the representation, as well as the circumstances surrounding the making of the representation, are important to the determination of whether the manifestation rises to the level of a promise." *State Bank of Standish v Curry*, 442 Mich 76, 86; 500 NW2d 104 (1993). The *State Bank of Standish* Court continued:

> Both traditional contract and promissory estoppel theories of obligation use an objective standard to ascertain whether a voluntary commitment has been made. To determine the existence and scope of a promise, we look to the words and actions of the transaction as well as the nature of the relationship between the parties and the circumstances surrounding their actions. [*Id*. (citation omitted).]

In the present case, the trial court concluded that the claim was not viable because there was "nothing alleged as to when and how Defendant was to perform his promise." But plaintiff alleged, in the promissory-estoppel count of the complaint, that defendant promised "that she would be a one-half (1/2) legal owner of the Mackinac House *upon its construction*." (Emphasis added.) She alleged that defendant had "made a clear and definite promise" that he "would *execute a deed* to" transfer the one-half interest if she "abandoned her Birmingham House investment plan and worked as a designer, consultant, landscaper, and manager for the construction of the Mackinac House." (Emphasis added.) Plaintiff submitted an affidavit incorporating the allegations from the complaint and stating that defendant told her that she would be given one-half interest in the Mackinac house if she ceased working on the Birmingham plan.

These allegations sufficiently set forth the "when" of performance (when construction is completed) and the "how" (conveyance of a one-half interest by means of executing a deed). The date of the conveyance is not specifically identified, but it need not be. The promise to convey is conditional (upon construction), with performance due when the condition occurs. See 1 Restatement Contracts, 2d, § 91, p 250 ("If a promise within the terms of §§ 82-90 is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the occurrence of the condition or upon the arrival of the specified time.").

Additionally, the allegations can be understood to show that defendant intended and expected that plaintiff alter her position with respect to the Birmingham investment plan, which plaintiff alleged that she did by abandoning the plan. According to plaintiff, defendant induced her to give up the project to devote her time to the Mackinac house, and nothing suggests that she would have done so if the promise had not been given.

The trial court also concluded that "to allow a suit like this to move forward would be resurrecting common law marriage," citing *Featherston v Steinhoff*, 226 Mich App 584; 575 NW2d 6 (1997), and *Carnes v Sheldon*, 109 Mich App 204; 311 NW2d 747 (1981). Those cases, however, involved potential recovery based on contracts implied in fact or implied in law. See *Featherston*, 226 Mich App at 589, and *Carnes*, 109 Mich App at 213-214. An action for promissory estoppel is based upon reliance on a promise, not the existence of an implied contract. When the parties are involved in a meretricious relationship, a claim for an implied-in-fact contract requires proof of additional independent consideration, see *Featherston*, 226 Mich App at 588,

and *Carnes*, 109 Mich App at 211, whereas "promissory estoppel substitutes for consideration in a case where there are no mutual promises," *Cove Creek Condo Ass'n*, 330 Mich App at 713 n 19 (quotation marks and citation omitted). The parties and the lower court appear to have conflated the doctrines of promissory estoppel and contract implied in fact. Plaintiff simply did not raise a claim of a contract implied in fact, so allowing her claim for promissory estoppel to move forward would not be "resurrecting common law marriage."

As for plaintiff's claim of unjust enrichment/quantum meruit, the court partially rejected the claim because it concluded "that the terms of the promise were so indefinite as to not be enforceable," but it allowed plaintiff to proceed with a claim for actual expenses associated with the Mackinac house.

"[I]n order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). "In other words, *the law will imply a contract* to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id*. (emphasis added). In *In re McKim Estate*, 238 Mich App 453, 457; 606 NW2d 30 (1999), this Court stated, "A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended." And in *Featherston*, 226 Mich App at 588, the Court stated:

> Michigan does not recognize common-law marriages arising after January 1, 1957. Those engaged in meretricious relationships do not enjoy property rights afforded a legally married couple. This Court will, however, enforce an agreement made during the relationship upon proof of additional independent consideration. The agreement must be either express or implied in fact. This Court will not allow recovery based on contracts implied in law or quantum meruit because to do so would essentially resurrect common-law marriage. [Citations omitted.]

The agreement here involved the parties' "dream home" during the course of a meretricious relationship. Under *Featherston*, recovery under plaintiff's unjust enrichment/quantum meruit theory was not appropriate. However, because defendant has not filed a cross-appeal to challenge the court's ruling that this theory could be used for recovery of plaintiff's expenses, we decline to vacate that portion of the opinion.

V. STATUTORY CONVERSION

Plaintiff contends that the trial court erred by granting summary disposition of the statutory-conversion claim related to the Ameritrade account. We disagree.

In concluding that the claim was not viable, the court correctly stated that defendant "never took money from the account or used funds to purchase items for himself." It also stated that plaintiff presented no authority for her theory that defendant committed conversion because he traded stocks in the account as a way to control her. Citing *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337; 871 NW2d 136 (2015), plaintiff argues that, for her claim to proceed, she only has to show that defendant converted the property for some purpose. "As

such," she concludes, "the determination of whether Defendant did, in fact, attempt to control [her] by use of her TD Ameritrade account is a question of fact that cannot be resolved at least until discovery is completed."

MCL 600.2919a provides, in relevant part:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.

In *Aroma Wines*, 497 Mich at 359, our Supreme Court explained that proving a defendant converted property to his or her "own use" "requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose."

Plaintiff contends that defendant converted the funds under MCL 600.2919a by using the funds in an attempt to control plaintiff and her finances. We agree with the trial court, however, that plaintiff's theory of "control" is untenable. Her theory is mere conjecture—it is more probable that defendant was attempting to pick successful stocks. Summary disposition is appropriate for speculative claims. See generally *Shaw v Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009).

Regardless, assuming that plaintiff's "control" theory was otherwise viable, plaintiff did not adequately show a question of material fact regarding this theory. Defendant submitted an affidavit stating that plaintiff had access to her account at all times and that all securities in the account were immediately salable. Plaintiff did not sufficiently dispute this in her competing affidavit; she merely stated that "funds were tied up in stock options." That the funds were in stock options does not mean that these options were not salable. Given that plaintiff filed the competing affidavit but did not counter defendant's allegations regarding control of the account and salability, there was no likelihood that further discovery would support plaintiff's claim. See *Redmond v Heller*, 332 Mich App 415, 448; 957 NW2d 357 (2020) ("[S]ummary disposition may still be appropriate before the conclusion of discovery if there is no fair likelihood that further discovery would yield support for the nonmoving party."). Importantly, plaintiff does not even

argue on appeal that further discovery would likely show that she could not access the account or sell the securities.[7,8]

VI. CONCLUSION

We reverse the grant of summary disposition concerning promissory estoppel but affirm in all other respects.

Reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Colleen A. O'Brien
/s/ James Robert Redford

[7] Plaintiff advances a new theory on appeal that defendant statutorily converted the TD Ameritrade funds because he possibly "enjoyed trading on [plaintiff's] account." This was not a pleaded theory, and it is otherwise undeveloped. Regardless, this new theory would fail for the same reasons plaintiff's "control" theory fails.

[8] We acknowledge that the court allowed a claim of common-law conversion to proceed, but common-law conversion is broader in scope than statutory conversion, encompassing, for example, use of chattel without authority. See *Aroma Wines*, 497 Mich at 352.