

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH MUNEM, DONALD MILLER, and
DAVID KLEMM,

UNPUBLISHED
January 25, 2002

Plaintiffs-Appellants,

v

No. 224366
Macomb Circuit Court
LC No. 99-001608-CP

BEST BUY COMPANY,

Defendant-Appellee.

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right from two orders, one granting defendant's motion for summary disposition of plaintiff Munem's claim for unjust enrichment, and another granting defendant's motion for summary disposition of all plaintiffs' claims brought under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Summary disposition of these claims was granted pursuant to MCR 2.116(C)(8). We affirm the summary disposition of the unjust enrichment claim and reverse the summary disposition of the claims brought under the MCPA.

Plaintiffs initially contend that the trial court erred in ruling that a claim brought under the MCPA is held to the requirement of particularized pleading stated in MCR 2.112(B)(1), as is common-law fraud. We disagree.

In allegations of fraud or mistake, the circumstances constituting the fraud or mistake must be stated with particularity. MCR 2.112(B)(1). This rule applies to all cases of fraud or mistake in Michigan courts. MCR 1.103. Plaintiffs have failed to point out any statutory pleading requirement within the MCPA which lessens this burden. Moreover, the nature of plaintiffs' case, although styled under the statute, is that some of defendant's rebate advertisements defraud consumers. Thus, we see no reason why plaintiffs should be exempt from the pleading requirement of MCR 2.112(B)(1) when bringing a statutory claim alleging fraud.

Plaintiffs' further contend that the trial court demanded a more rigorous standard than MCR 2.112(B)(1) required. We disagree. The particularized pleading required by MCR 2.112(B)(1) "is consistent with the general concept of 'fact pleading' in Michigan [and] should not be taken as more demanding." 1 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2112.3, p 290. As noted by plaintiffs, this Court has held that to avoid summary disposition under MCR 2.116(C)(8), a plaintiff must plead the circumstances of the fraud "with

sufficient particularity to apprise the opposite party of the nature of the case he must prepare to defend.” *Kassab v Michigan Basic Prop Ins Assoc*, 185 Mich App 206, 213; 460 NW2d 300 (1990), mod on other grounds 441 Mich 433; 491 NW2d 545 (1992), quoting 1 Martin, Dean & Webster, Michigan Court Rules Practice (3rd ed), p 242. The trial court in this case required plaintiff “to re-plead Count I with particularity, including all causes of action, factual bases, claims and relief that Plaintiff [was] seeking under the [MCPA].” We conclude that the trial court’s requirement did not differ from the standard required under the court rule and *Kassab*.

Nonetheless, we find that plaintiffs have pleaded claims sufficiently to withstand summary disposition under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When reviewing a grant of summary disposition under MCR 2.116(C)(8), a court considers all well-pled factual allegations in support of the claim as true and construes them in the light most favorable to the nonmoving party. *Id.* at 119-120. “The motion should be granted if no factual development could possibly justify recovery.” *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

An individual who suffers harm from any of the acts enumerated in MCL 445.903 can bring suit under the MCPA. MCL 445.911. Plaintiffs’ complaint specifically alleges that defendant violated MCL 445.903(1)(i), (r), (s), (bb) and (cc). Thus, we must review plaintiffs’ claims to see if each plaintiff established the elements for at least one violation of the MCPA.

Plaintiff Munem alleged in his amended complaint that as a result of having read one of defendant’s February 1998 sales circulars advertising computer software subject to a sales rebate, he went to defendant’s store. There, he noticed an in-store promotion for that software indicating that it was subject to a “Buy Two Get One Free” rebate offer. Munem claimed that he purchased the software, expecting to redeem the rebate, but later discovered that the rebate had expired six weeks before his purchase. Munem further alleged that the rebate sticker on the package did not clearly and conspicuously disclose that the rebate had already expired. Assuming Munem’s claims to be true, this factual scenario could show that defendant represented to customers that they would receive a free software program, without clearly and conspicuously disclosing that the offer had already expired, in violation of MCL 445.903(1)(r).¹

Plaintiff Miller claimed that in April 1999 he read one of defendant’s circulars advertising a software product that offered a \$10 rebate, as well as a free coffee grinder, subject to a shipping fee. Miller bought the software, believing that the rebate was valid and intending to claim the rebate. After purchasing the product, Miller noted that, in small print, the rebate indicated an expiration date two weeks before his purchase. Miller further alleged that the information regarding the expiration date was misleading and did not disclose the expiration date with the same prominence as it stated the rebate offer.

¹ “Representing that a consumer will receive goods or services ‘free’, ‘without charge’, or words of similar import without clearly and conspicuously disclosing with equal prominence in immediate conjunction with the use of those words the conditions . . . to the use or retention of the goods or services advertised” is unlawful. MCL 445.903(1)(r).

In a similar manner, plaintiff Klemm alleged that he saw an advertisement from defendant's store, in November or December 1998, promoting computer disks for \$0.99, after a \$29.00 rebate. Klemm purchased the disks with the intent of claiming the rebate. After applying for the rebate, Klemm was advised that it would not be honored. Klemm further alleged that defendant did not conspicuously disclose any information indicating that the rebate was invalid.

Both Miller and Klemm allege a situation where defendant's advertisements made misleading statements about the existence of a valid rebate or price reduction. Thus, Miller's and Klemm's claims, taken as true, establish a valid claim under MCL 445.903(1)(i).²

Therefore, we find that summary disposition under MCR 2.116(C)(8) was improper as each plaintiff sufficiently pleaded at least one of the acts listed as an unfair trade practice under the MCPA. Additionally, the allegations properly apprised defendant of the factual scenario which made up plaintiffs' claims of unfair, unconscionable or deceptive methods, acts or practices on the part of defendant. *Kassab, supra* at 213. Because we hold that the trial court improperly granted summary disposition of plaintiffs' MCPA claims, we need not address the trial court's denial of plaintiffs Miller's and Klemm's requested leave to amend their complaint.

Plaintiff Munem further purports that the trial court erroneously granted summary disposition, under MCR 2.116(C)(8), on his unjust enrichment claim. We disagree.

"The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Absent an express contract covering the subject matter, the law will imply a contract to prevent unjust enrichment. *Id.* Munem suggests that defendant received increased sales traffic and profits due to its misleading advertisements and promotional rebates. However, after a careful review of Munem's complaint, this Court finds that it failed to allege any loss that he personally suffered due to defendant's alleged increased sales traffic and profits. Because Munem has failed to assert facts in support of both elements of an unjust enrichment claim, we affirm the trial court's grant of summary disposition.

We therefore reverse the trial court's grant of summary disposition with regard to all of plaintiffs' MCPA claims. We remand the case to the trial court and reinstate those claims against defendant. However, we affirm the trial court's grant of summary disposition on plaintiff Munem's unjust enrichment claim. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Jessica R. Cooper

² "Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions" is unlawful. MCL 445.903(1)(i).

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WILDER, J. (*concurring in part, dissenting in part*)

I agree with the majority's finding that summary disposition was properly granted on plaintiff Munem's claim for unjust enrichment. I also agree with the majority's conclusion that all of plaintiffs' allegations under the MCPA must meet the requirement of particularized pleading stated in MCR 2.112(B)(1), and that the trial court did not demand a more rigorous pleading standard than required under this court rule. Therefore, I join in these aspects of the majority's opinion. I do not agree, however, that plaintiffs have pleaded claims under the MCPA sufficiently to withstand summary disposition under MCR 2.116(C)(8). As to this aspect of the opinion, I respectfully dissent.

I

MCPA Claims of Plaintiff Joe Munem

Plaintiff Joe Munem (hereafter Munem) alleged the following in the first amended complaint:

16. In February 1998, Joe Munem read a Best Buy advertising circular which prominently promoted computer software products supposedly subject to rebates. Among the products advertised as subject to rebate were Turbo Tax and Norton Utilities.

17. As a result of the advertising circular, Joe Munem traveled to the Best Buy store on Hall Road in Utica, Macomb County, Michigan.

18. While in the Utica store, Munem noticed a promotion for software products including "Norton Utilities," which was one of the products in the

advertising circular. Best Buy's in store promotion was different than the rebate in the advertising circular. This promotion was a "Buy Two Get One Free" mail-in rebate offer. Other Norton products were subject to this promotion.

19. Best Buy's in store promotion did not clearly and conspicuously disclose that the rebate offer had already expired.

20. Munem purchased two Norton software products, including "Utilities," which Best Buy promoted as subject to a "Buy Two Get One Free" mail-in rebate offer.

21. When Munem purchased the Norton products, he fully expected that they were subject to a valid rebate and he intended to claim the rebate.

22. After Munem returned home and installed the "Utilities" software in his computer, Munem learned that the rebate had expired.

23. Munem also discovered that a sticker in the package prominently promoting the rebate contained information in small type indicating that the offer had expired on January 3, 1998 – six weeks before his purchase.

24. Munem had not noticed this language prior to making his purchase or prior to installing the software in his computer.

25. The language on the sticker indicating the expiration date was not conspicuous, and the sticker did not disclose the expiration date with equal prominence that it stated the rebate offer; and , by its terms, the sticker was misleading.

Munem's allegations do not plead fraud with specificity. First, although Munem's pleadings acknowledged a distinction between the rebate advertised in the circular and the "Buy Two Get One Free" in-store rebate, first amended complaint, paragraph 18, Munem's pleadings do not clearly describe whether the expired rebate alleged in paragraph 22, and the expired rebate (which was displayed on the sticker on the product package) alleged in paragraph 23, are the *same* expired rebate or two *different* expired rebates. Second, Munem does not allege that the "Buy Two Get One Free" rebate offer, the only rebate offer clearly identified in the pleadings as a *Best Buy* rebate offer, was either expired when he purchased the product, or submitted to Best Buy and not honored. These pleading deficiencies clearly render Munem's claims appropriate for dismissal under MCR 2.116(C)(8) and MCR 2.112(B)(1), and I would affirm the lower court's finding that the complaint "fails to allege specific facts, which if proven, demonstrate any misrepresentation on the part of the defendant."

II

MCPA Claims of Plaintiff Don Miller

Plaintiff Don Miller (hereafter Miller) alleged the following in the first amended complaint:

26. In April, 1999, Don Miller read a Best Buy advertising circular which prominently promoted computer software products allegedly subject to rebates. Among the products advertised as subject to rebates were “USA 99: Streets & Destinations.” The advertising circular stated: “\$19.99-\$10 Rebate=\$9.99,” and it also stated: “Free Coffee Grinder by mail with purchase of this title. \$15.99 value with \$2.95 shipping.”

27. As a result of the advertising circular, Don Miller traveled to the Best Buy store on Hall Road in Utica, Macomb County, Michigan.

28. On April 14, 1999, Miller purchased the “USA 99 Streets & Destinations” advertised in the circular.

29. When Miller purchased the “USA 99 Streets & Destinations,” he fully expected that it was subject to a valid rebate and he intended to claim the rebate.

30. After Miller returned home, he peeled off a “rebate” sticker that was on the front of the product; and, at that time, he discovered that the rebate has expired.

31. The “rebate” sticker on the package contained information in small type indicating that the offer had expired on March 31, 1999-two weeks before his purchase; however, Miller did not notice this small type either at the time of the purchase or after he had peeled the “rebate” sticker off the package.

32. The language on the sticker indicating the expiration date was not conspicuous, and the sticker did not disclose the expiration date with equal prominence that it stated the rebate offer; and, in fact, by its terms, the sticker was misleading.

Miller also fails to plead fraud with specificity. Similar to the deficient allegations made by Munem, Miller does not allege that the Best Buy advertising circular and the package sticker promoted the same rebate. Additionally, Miller does not allege either that he attempted to redeem the rebate advertised in the Best Buy circular and that it was not honored, or that the Best Buy circular rebate had expired. Accordingly, Miller’s claims were appropriately dismissed pursuant to MCR 2.116(C)(8) and MCR 2.112(B)(1).

III

MCPA Claims of Plaintiff Dave Klemm

Plaintiff Dave Klemm (hereafter Klemm) alleged the following in the first amended complaint:

33. In November or December, 1998, Dave Klemm read a Best Buy advertising circular which prominently promoted computer products allegedly subject to rebates. Among the products advertised as subject to rebates was a set of Maxell 3 ½” computer disks for \$0.99-\$29.99 subject to a \$29.00 rebate.

34. As a result of the advertising circular, Klemm traveled to the Best Buy store in Clinton Township, Macomb County, Michigan.

35. Klemm purchased the Maxell computer disks advertised in the circular.

36. When Klemm purchased the set of Maxell computer disks, he fully expected that the purchase was subject to a valid rebate and he intended to claim the rebate.

37. After Klemm returned home, Klemm applied for the rebate.

38. Klemm was later advised, in writing, that the rebate would not be honored.

39. Best Buy did not conspicuously disclose any information which would have informed Klemm that the rebate offer was not valid.

While Klemm asserts that he purchased the product advertised in the circular, he fails to allege that the rebate he applied for was a Best Buy rebate. Further, he does not describe to whom he applied to redeem the alleged rebate, who advised him that the alleged rebate would not be honored, and the reasons provided as to why the alleged rebate would not be honored.

The absence of specificity is especially pronounced in Klemm's allegations in the first amended complaint. As such, the trial court correctly dismissed these claims pursuant to MCR 2.116(C)(8) and MCR 2.112(B)(1).

IV

Conclusion

The result reached by the majority, in effect, communicates to Michigan retailers that it is misleading to simultaneously offer multiple rebates of differing benefit, that it is misleading to offer rebates in competition with rebates offered by manufacturers of the products sold by the retailer, and that similarly, competitive rebates offered by a retailer which expire at a different time than that of the manufacturer's rebate are fraudulent communications under the MCPA. The MCPA does not compel or sanction such a conclusion. I would find, instead, that the allegations in this case were woefully insufficient, and that savvy Michigan consumers are more than able to comprehend the myriad of competitive and cost-saving options represented by the rebates at issue here. Accordingly, I would affirm.

/s/ Kurtis T. Wilder