

STATE OF MICHIGAN
COURT OF APPEALS

VIC'S QUALITY FRUIT MARKET, III, INC.,
VIC-SDM, INC., VIC-EAT, INC., VICLAND,
LLC, and VIC-KID, LLC,

UNPUBLISHED
June 25, 2002

Plaintiffs-Appellants,

v

BUSCH'S, INC., and TRI-BRO, LLC,

No. 231176
Oakland Circuit Court
LC No. 00-023661

Defendants-Appellees.

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants and dismissing plaintiffs' breach of contract and tort claims related to a business transaction between the parties. We affirm.

I

Plaintiffs own and operate two supermarkets in Novi and Bloomfield Hills; defendants¹ own and operate supermarkets in Ann Arbor and metropolitan Detroit. In March 2000, the parties entered an Asset Purchase Agreement under which defendants would purchase the Novi and Bloomfield stores from plaintiffs. The Agreement included an arbitration provision governing any disputes that arose over the terms of the agreement. It also included a clause that specified plaintiffs' remedies should defendants terminate the agreement.

When defendants failed to consummate the purchase of the stores after a period of investigation and negotiation, plaintiffs filed a lawsuit alleging breach of contract, fraud, trade secret misappropriation, and tortious interference with a business relationship, and seeking declaratory judgments that plaintiffs' claims were not subject to the Agreement's arbitration or limitation of remedy provisions. Defendants moved for summary disposition pursuant to MCR

¹ For ease of reference, this opinion refers to plaintiffs and defendants collectively, without distinguishing their separate legal interests in this action.

2.116(C)(7), and to compel arbitration, on the ground that plaintiffs' claims were barred because the parties agreed to arbitrate any disputes. The trial court granted defendants' motion.

II

Plaintiffs first argue that the trial court erred in granting summary disposition for defendants on the basis of the arbitration provision because plaintiffs' complaint alleged that the arbitration provision was induced by fraud and therefore void. Further, to the extent that plaintiffs' complaint was deficient in pleading a claim of fraud, the deficiency could have been cured by an amendment to the complaint, and the court abused its discretion in denying plaintiffs' motion to amend the complaint. We disagree.

A

This Court reviews de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(7). *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). We review a decision to grant or deny leave to amend a complaint for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998).

B

The parties' Asset Purchase Agreement included an arbitration provision, which provided in relevant part:

12.16 Arbitration of Disputes. In the event of any dispute under or relating to the terms of this Agreement, or breach thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association, at Southfield, Michigan. The arbitration shall be conducted in accordance with the rules promulgated by that Association, except that discovery shall be conducted pursuant to the Federal Rules of Civil Procedure

Plaintiffs contend that although the Agreement contains the above provision for arbitration, the provision is unenforceable because plaintiffs' representative and signator to the agreement, Vic Ventimiglia, was fraudulently induced to agree to the arbitration provision by defendants' representative and signator, John J. Busch, on the basis of Busch's promises that 1) as long as all of Vic's assets covered by the Agreement were, in fact, able to be delivered by Vic pursuant to the Agreement, defendants would not invoke or utilize the arbitration provision, and 2) that defendants would conduct all due diligence under the Agreement in good faith.

Plaintiffs contend that before signing the Agreement, Ventimiglia rejected the arbitration provision, and subsequently agreed to it based solely on Busch's representations, which were false and part of an overall scheme to defraud plaintiffs because defendants never intended to consummate the purchase of plaintiffs' stores. On appeal, plaintiffs argue that because their complaint alleged fraudulent inducement, the trial court erred in relying on the arbitration provision as the basis for summary disposition.

“Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.” *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). A contract procured by fraudulent inducement is voidable at the option of the defrauded party. *Id.* at 640; see also *Horn v Cooke*, 118 Mich App 740, 745; 325 NW2d 558 (1982) (arbitration agreement signed as a result of force or coercion does not bind the parties).

In this case, we agree with the trial court’s conclusion that plaintiffs have failed to allege circumstances constituting fraudulent inducement to render the arbitration provision voidable, for several reasons. First, plaintiffs failed to plead sufficient facts constituting fraud. The circumstances constituting fraud must be pleaded with particularity. MCR 2.112(B)(1). Allegations that are general in nature or conclusory will not suffice to constitute a fraud claim. *LaMothe v Auto Club Ins Ass’n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 184; 318 NW2d 679 (1982).

Plaintiff’s complaint alleged that the inclusion of the arbitration provision was the product of defendants’ fraud: in reliance on Busch’s representations and defendants’ agreement to fulfill their obligations, plaintiffs agreed to the arbitration provision. The substantive pleadings underlying the fraud allegation stated:

Unknown to Vic’s ..., Busch’s had no intention of performing such obligations and, in bad faith, did not intend to perform its material obligations. Moreover, Busch’s representations and omissions that it would do so were false and made with the intent to induce Vic’s to enter into the Purchase Agreement with Paragraph 12.16. Had such representations not been made, and Busch’s had fully disclosed its bad faith intent, Vic’s would not have entered into [the agreement] and would not have agreed to the inclusion of Paragraph 12.16 in the Asset Purchase Agreement.

Although plaintiffs pleaded the factual details of defendants’ alleged representations, the basis of plaintiffs’ fraud claim is conclusory and speculative. The fact that defendants ultimately did not perform does not support a conclusion that defendants never intended to perform, particularly in light of the parties’ subsequent disputes over the value of the assets and other issues. As defendants point out, Busch represented, in effect, that if plaintiffs performed as promised, the arbitration clause would not be invoked. However, in a June 1, 2000 letter to plaintiffs, defendants stated that due diligence had raised a number of concerns with the purchase, such as plaintiffs’ overvaluation of the assets at issue, which, along with other matters, became disputed issues. Mere failure to perform does not constitute fraud and does not support plaintiffs’ claim that defendants never intended to perform at the time they entered into the Agreement. Plaintiffs have failed to establish facts to support their claim that Busch’s promises were made “in bad faith without present intention to perform.” *Van Marter, supra* at 184.

Plaintiffs also argue that even if the original complaint was insufficient with regard to pleading fraud, plaintiffs were entitled to amend their complaint to cure the insufficiency, and the trial court abused its discretion in denying plaintiffs’ motion to amend their complaint. Reasons that justify denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant,

or futility. *Weymers, supra* at 658. An amendment would be futile if a claim is legally insufficient on its face. *Ben P. Fyke, Inc. & Sons v. Gunter Co.*, 390 Mich 649, 660; 213 NW2d 134 (1973); *Hakari v. Ski Brule, Inc.*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

In moving to amend their complaint, plaintiffs alleged their fraud claim with greater specificity and furnished the affidavit of Ventimiglia in support of their claim of fraudulent inducement in the arbitration provision. However, the underlying factual support for plaintiffs' claim remained unchanged. According to Ventimiglia's affidavit, Busch represented "that as long as all of the assets covered by the Asset Purchase Agreement were, in fact, able to be delivered by Plaintiffs, pursuant to Section 3.1, the arbitration provision would not be triggered or used by Defendants," and that contrary to this representation, even though plaintiffs were prepared to deliver the agreed upon assets, defendants refused to abide by the Agreement and failed to conduct their due diligence in good faith. Further, defendants "made several 'excuses' for their failure to close," but in fact "fraudulently fail [sic] to consummate the proposed transactions by not closing and by not performing their due diligence in good faith." Again, these allegations offer no support for a claim of fraudulent inducement, i.e., that defendants materially misrepresented their future conduct. The addition of allegations that merely restate those already made is futile, as is the addition of allegations that still fail to state a claim. *Lane v. KinderCare Learning Centers, Inc.*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Even if plaintiffs' pleadings were deemed to be stated with sufficient particularity, we would nevertheless conclude that plaintiffs have failed to establish fraud in the inducement because plaintiffs' reliance on Busch's alleged oral representations was unreasonable. Ventimiglia's affidavit averred that he was "a shareholder, director, officer and/or member of each of the Plaintiffs in this litigation," that the parties negotiated the terms and conditions of the Agreement for over two months, and that he was involved in virtually all negotiations on behalf of plaintiffs along with his corporate attorneys. The Agreement contained an integration clause, providing that the Agreement "constitutes the entire agreement among the Parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements, understandings, negotiations, and discussions, whether oral or written" Given Ventimiglia's involvement at various levels in several businesses, the participation of corporate attorneys in negotiating the terms of the Agreement, and Ventimiglia's responsibility as the signator to a \$14,500,000 contract, it is unreasonable to expect that Ventimiglia would reasonably rely on an alleged oral representation in direct contradiction of the contract's written terms in both the arbitration provision and the integration clause. Thus, plaintiffs' fraudulent inducement claim fails as a matter of law.

II

Plaintiffs next argue that even in the absence of fraudulent inducement, the arbitration clause was narrowly drawn and does not cover plaintiffs' claims of trade secret misappropriation and tortious interference. We disagree.

A

Whether a dispute is arbitrable is a question of law, which this Court reviews de novo. *Madison Dist. Pub. Schools v. Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001).

B

The Agreement's arbitration provision states that "[i]n the event of any dispute under or relating to the terms of this Agreement, or breach thereof, it is agreed that the same shall be submitted to arbitration" Plaintiffs argue that the arbitration clause does not cover plaintiffs' two tort claims because the claims "are neither 'under or relating to the terms of the agreement,' nor are they 'based on breach of the agreement.'" Plaintiffs argue that the tort claims are distinguished from arbitrable claims because the claims arise out of defendants' actions to gain a competitive advantage over a competitor and are actions that tortiously interfere with plaintiffs' business. We are not persuaded that the tort claims fall outside the arbitration clause.

The facts underlying the tort claims are premised on information gained or actions taken under the Agreement in connection with the purchase of the supermarkets. Plaintiffs alleged in their complaint that defendants acquired the trade secrets under the guise of due diligence. Likewise, plaintiffs alleged that the interference with business relationships occurred during due diligence in conjunction with defendants' statements that plaintiffs' employees would have an opportunity to join the "new Vic's/Busch's Team," and that defendants would be "acquiring Vic's" and would be assuming operational control of the plaintiffs' two supermarkets in Novi and Bloomfield Hills. Additionally, plaintiffs alleged that defendants interfered with other crucial business relationships under the guise of due diligence and ostensibly as part of its acquisition of plaintiffs' stores. Plaintiffs' allegations leave little doubt that the tort claims fall under or relate to the terms of the Agreement or the breach thereof.

We find plaintiffs' remaining arguments without merit.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot