

STATE OF MICHIGAN
COURT OF APPEALS

I. B. MINI-MART II, INC.,

Plaintiff/Counter-Defendant-
Appellant,

v

JSC CORPORATION and ELSAYED KAZEM
SAFIEDINE,

Defendants/Counter-Plaintiffs-
Appellees.

UNPUBLISHED
April 14, 2011

No. 296982
Wayne Circuit Court
LC No. 09-030208-CZ

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

I.B. Mini-Mart, II, Inc. (“Mini-Mart”) challenges the dismissal of its complaint based on a “failure to state a claim on which relief can be granted.”¹ We reverse.

This action was premised on Mini-Mart’s contention that the parties had an oral agreement pertaining to the ongoing purchase of petroleum products from Sunoco for Mini-Mart’s gas station. Primarily, Mini-Mart asserted fraud by JSC Corporation (“JSC”) and Elsayed Kazem Safiedine in the inclusion of a one cent surcharge on each gallon of gasoline purchased. Allegedly, JSC and Safiedine had directed Sunoco to add the surcharge, which was ultimately remitted to JSC and Safiedine by Sunoco.

This dispute focuses on whether Mini-Mart’s amended complaint states a cause of action. The initial complaint filed by Mini-Mart was vague in its allegations and merely referenced conversion and fraud. JSC and Safiedine filed an answer, affirmative defenses and a motion for summary disposition premised on the inadequacy of this initial pleading to state a cause of action.² But, before the motion for summary disposition was heard, Mini-Mart filed an amended

¹ MCR 2.116(C)(8).

² MCR 2.116(C)(8).

complaint.³ The amended complaint superseded the original pleading, which was deemed abandoned and withdrawn.⁴ The motion for summary disposition submitted by JSC and Safiedine did not address the amended complaint and failed to identify specific deficiencies. The motion merely asserted the overall inadequacy of the pleadings to state a discernable cause of action and inferring that Mini-Mart’s claims might be precluded by applicable statutes of limitation. The trial court dismissed Mini-Mart’s complaint and denied reconsideration.⁵

A trial court’s ruling on a motion for summary disposition is reviewed de novo.⁶ Under the subrule specified by JSC and Safiedine, their motion asserted that Mini-Mart “has failed to state a claim on which relief can be granted.”⁷ Such a review is conducted by the trial court based solely on the pleadings, as documentary evidence cannot be considered⁸ with all factual allegations being accepted as true along with any reasonable inferences drawn from them in support of the claim.⁹ “Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery.”¹⁰

Michigan has been characterized as a “notice pleading environment.”¹¹ “A complaint must contain a statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the elements the adverse party is called on to defend.”¹² In other words, “the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.”¹³

The amended complaint included a specific allegation comprising common-law fraud, which is comprised of the following elements:

³ MCR 2.118(A)(1).

⁴ *Grzesick v Cepela*, 237 Mich App 554, 562; 603 NW2d 809 (1999).

⁵ We note that the trial court also dismissed the counter-complaint filed by JSC and Safiedine. Dismissal of the counter-complaint is not a subject of this appeal.

⁶ *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

⁷ MCR 2.116(C)(8).

⁸ *Rorke v Savoy Energy, LP*, 260 Mich App 251, 253; 677 NW2d 45 (2003).

⁹ *Stott v Wayne Co*, 224 Mich App 422, 426; 569 NW2d 633 (1997).

¹⁰ *Id.*

¹¹ *Dalley v Dykema Gosett*, 287 Mich App 296, 305; 788 NW2d 679 (2010) (citation omitted).

¹² *Id.*, citing MCR 2.116(B)(1).

¹³ *Id.*, citing *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993).

(1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation was false or made it recklessly as a positive assertion without knowledge of its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff was injured as a result of such reliance.¹⁴

The alleged misrepresentation must be based “on a statement of past or existing fact”¹⁵ and the circumstances constituting the fraud must be “stated with particularity.”¹⁶

Mini-Mart alleged that (1) JSC and Safiedine included the surcharge in its bills to Mini-Mart, which amounted to a representation that the surcharge was a valid, agreed-upon charge, (2) that the representation was false because Safiedine and JSC knew that the surcharge was not a valid, agreed-upon charge, (3) that JSC and Safiedine made the misrepresentation to induce Mini-Mart to pay the surcharge, (4) that Mini-Mart relied on the misrepresentation by paying invoices that included the surcharge, and (5) that Mini-Mart incurred damages by paying the unauthorized surcharge. These allegations are sufficiently specific to comply with the pleading requirements of the court rules.¹⁷

Mini-Mart also alleged conversion. “In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.”¹⁸ There is a common-law tort of conversion and a statutory tort of conversion.¹⁹ While JSC and Safiedine did not identify a particular deficiency with regard to this allegation in the lower court, on appeal they contend that a statutory conversion claim cannot be maintained against the person who has converted the property. Contrary to their assertion, the statute pertaining to conversion was amended²⁰ and the current version imposes liability on the person who steals, embezzles, or converts property to his own use.²¹ Because JSC and Safiedine do not challenge Mini-Mart’s contention that collecting the unauthorized surcharge amounted to conversion under the amended statute and their only argument is based on an earlier version of the statute, they have not established a right to judgment on this count.

¹⁴ *Hord v Environmental Research Institute of Mich (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000).

¹⁵ *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994).

¹⁶ MCR 2.112(B)(1).

¹⁷ *Id.*

¹⁸ *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

¹⁹ *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591-592; 683 NW2d 233 (2004).

²⁰ 2005 PA 44.

²¹ MCL 600.2919a(1)(a).

A claim for breach of contract was also contained in the amended complaint. A contract is “a bargained exchange of obligations entered into by choice” between parties who have mutually agreed to all essential terms.²² The elements of a breach of contract action are (1) the existence of a contract between the parties, (2) the terms of the contract require performance of a certain action by the defendant, (3) the defendant breached its obligation to perform, and (4) the plaintiff incurred damages as a result of the breach.²³ Mini-Mart asserts (1) that it had an oral agreement with JSC and Safiedine for the purchase of petroleum products that had JSC and Safiedine ordering the products and billing Mini-Mart, (2) that JSC and Safiedine breached the agreement by instructing Sunoco to add a surcharge without Mini-Mart’s knowledge or consent and collecting that surcharge from Sunoco, and (3) that Mini-Mart incurred damages in an amount equal to the surcharge collected. On their face, these allegations encompass all of the elements necessary for a breach of contract claim and to set forth the basic terms of the agreement. Although JSC and Safiedine, on appeal, contend that Mini-Mart failed to allege the date the contract was entered into and the manner in which the contract is to be fulfilled, these do not comprise elements that must be initially pleaded. Primarily, JSC and Safiedine allege that the oral contract is unenforceable under the statute of frauds.²⁴ But, the statute of frauds comprises an affirmative defense,²⁵ and as such has no bearing on whether a claim for relief has been stated. Rather, an affirmative defense actually “admits the establishment of the plaintiff’s prima facie case, but . . . denies that the plaintiff is entitled to recover on the claim for some reason not disclosed by the pleadings.” As a result, even if Mini-Mart’s breach of contract claim is ultimately barred by the statute of frauds²⁶, JSC and Safiedine are not entitled to summary disposition, at this juncture, in accordance with the cited court rule.²⁷

The last claim asserted by Mini-Mart in its amended complaint is for unjust enrichment. Unjust enrichment is the “process of imposing a contract-in-law.”²⁸ “The essential elements of such a claim are (1) receipt of a benefit by the defendant from the plaintiff and (2) which benefit it is inequitable that the defendant retain.”²⁹ Mini-Mart alleged that (1) JSC and Safiedine received a benefit from it in the form of the unauthorized surcharge, (2) it is inequitable for JSC and Safiedine to retain the surcharge, and (3) JSC and Safiedine were unjustly enriched by

²² *Ford Motor Co v Bruce Twp*, 264 Mich App 1, 12; 689 NW2d 764 (2004), rev’d on other grounds 475 Mich 425 (2006).

²³ *Synthes Spine Co, LP v Calvert*, 270 F Supp 2d 939, 942 (ED Mich, 2003).

²⁴ MCL 440.2201(1).

²⁵ MCR 2.111(F)(3)(a).

²⁶ MCL 440.2202(1).

²⁷ MCR 2.116(C)(8).

²⁸ *Hollowell v Career Decisions, Inc*, 100 Mich App 561, 570; 298 NW2d 915 (1980).

²⁹ *Id.*

collecting and retaining the surcharge. The allegations in support of this claim are sufficient as they include the necessary elements of receipt of a benefit that cannot be equitably retained.

JSC and Safiedine challenge this claim based only on their assertion that Mini-Mart cannot maintain a cause of action for unjust enrichment while simultaneously asserting the existence of an actual contract. Although a claim of unjust enrichment will not lie if there is an express contract³⁰ because “a contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties,”³¹ this does not preclude Mini-Mart from asserting inconsistent claims.³² At this point in the proceedings, Mini-Mart is not required to elect to proceed under one theory or the other but can seek recovery on the basis of either an express contract or an implied contract until the fact finder determines that an express contract does not exist or is unenforceable.³³

By reversing the grant of summary disposition, we wish to make clear that we do not rule or render any opinion on the actual or continued viability of any of Mini-Mart’s claims.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray

³⁰ *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992).

³¹ *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999).

³² MCR 2.111(A)(2)(b).

³³ *Cascade Electric Co v Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976).