

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BANOTAI GREENHOUSE and
ZYWICKI GREENHOUSE, INC.,

Plaintiffs,

vs.

Case No. 2015-2025-CB

MICHAEL KANAKRY d/b/a M&M
GARDEN CENTER a/d/b/a M&M
FLOWERS, and MR. MIKE'S M&M
GARDEN CENTER, INC.,

Defendants.

OPINION AND ORDER

Plaintiffs have filed a motion for leave to amend their complaint. Defendants have filed a response and request that the motion be denied.

I. Facts and Procedural History

Plaintiff Banotai Green House ("Plaintiff Banotai") is an entity engaged in the growing and selling plants, bushes and flowers etc. Plaintiff Banotai allegedly entered into a contract with one or more of the Defendants for the purchase of flowers/plants ("Banotai Contract").

Plaintiff Zywicki Greenhouse, Inc. ("Plaintiff Zywicki") is also an entity which grows and sells plants, bushes, flowers etc. Plaintiff Zywicki allegedly entered into a contract with one or more of Defendants for the purchase of plants and gardening supplies ("Zywicki Contract").

On June 15, 2015, Plaintiffs filed their first amended complaint in this matter ("Complaint"). In their complaint, Plaintiffs state separate breach of contract claims in which they allege that Defendants breached the Banotai Contract [Count I] and the Zywicki Contract [Count II] (collectively, "Contracts"). The Complaint also includes a claim for unjust enrichment against Defendants [Count III].

On September 4, 2015, Plaintiffs filed their instant motion to amend the Complaint. On September 9, 2015, Defendants filed their response. On September 28, 2015, the Court held a hearing in connection with the motion and, after oral argument, took the matter under advisement.

II. Standard of Review

MCR 2.118(A)(2) provides that leave to amend a pleading shall be freely given when justice so requires. A motion to amend ordinarily should be granted, unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Delay alone does not justify denying a motion to amend, but a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Franchino v Franchino*, 263 Mich App 172, 191; 687 NW2d 620 (2004).

III. Arguments and Analysis

The proposed amended complaint seeks to add claims for fraudulent inducement (Count IV), conversion (Count V), and fraudulent misrepresentation (Count VI). In their

response, Defendants contend that the motion must be denied as the proposed claims are futile. While a trial court should freely grant leave to amend when justice so requires, leave should be denied where amending the complaint would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

Defendants' futility argument is based on the economic loss doctrine. Specifically, Defendants contend that the economic loss doctrine bars Plaintiff's proposed claims because the proposed claims are tort claims that arise out of the Contracts. The economic loss doctrine provides that "[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." *Neibarger v Universal Cooperatives, Inc.*, 439 Mich 512, 520; 486 NW2d 612 (1992). "The essence of the "economic loss" rule is that contract law and tort law are separate and distinct, and the courts should maintain that separation in the allowable remedies." *Huron Tool and Engineering Co v Precision Consulting Services, Inc.*, 209 Mich App 365, 371; 532 NW2d 541 (1995)(internal citation omitted). "There is a danger that tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions." *Id.* Once the contract has been made, the parties should be governed by it. *Id.*

The standard for determining whether tort claims are barred by the economic loss doctrine was addressed in *Gen Motors Corp v Alumi-Bunk, Inc.*, 482 Mich 1080; 757 NW2d 859 (2008), where the Michigan Supreme Court adopted the dissenting

opinion of the Michigan Court of Appeals written by Judge K.F. Kelly in *Gen Motors Cop v Alumi-Bunk, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 270430)(Kelly, J, dissenting). In that case, General Motors ("GM") submitted an offer to the defendants at a discount if the defendants agreed to "upfit" the vehicles before reselling them. GM's breach of contract claim alleged that defendants breached the contract by failing to "upfit" the vehicles. GM's fraud claim alleged that defendant fraudulently misrepresented that they would "upfit" the vehicles before selling them. After reviewing both claims, Judge Kelly concluded that "[c]learly, the fraud allegations are not extraneous to the contractual dispute as GM's allegations of fraud are so intertwined with its allegations of breach of contract to be indistinguishable." *Id.* at 5 (Kelly, J., dissenting.)

The facts and analysis are analogous to the facts presented in this case. In this case, Plaintiffs' breach of contract claims allege that Defendants breached the Contracts by failing to pay for the items purchased. Plaintiffs' fraud claim alleges that Defendants fraudulently misrepresented that they would pay for the items. Plaintiff's fraudulent inducement claim alleges that Defendants induced them into entering into the Contracts by falsely stating that they would pay for the items. Finally, Plaintiffs' conversion claim alleges that Defendants took the items without paying for them. Under the analysis utilized by Judge Kelly in *General Motors*, Plaintiffs' proposed claims are not extraneous to their breach of contract claims as the claims allege the same facts as the basis for each claim (that Defendants failed to make the payments they said they would). Accordingly, Plaintiffs' proposed claims barred by the economic loss doctrine.

Consequently, Plaintiffs' motion for leave to file an amended complaint must be denied on futility grounds.

IV. Conclusion

Based upon the reasons set forth above, Plaintiffs' motion for leave to file an amended complaint is DENIED. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: DEC 02 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge