

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

P.A.G., INC.; and WEST MICHIGAN
LANDSCAPING & CONSTRUCTION,

Plaintiffs,

Case No. 12-11927-CKB

vs.

HON. CHRISTOPHER P. YATES

JOHN C. BUCHANAN, JR.,

Defendant.

OPINION AND ORDER GRANTING IN PART, AND DENYING IN PART,
DEFENDANT'S RENEWED MOTION FOR SUMMARY DISPOSITION

Although the hullabaloo over Hangar 42 has finally subsided in West Michigan, this lawsuit spawned by that failed project continues to grind forward. On January 2, 2015, the Court issued a comprehensive opinion resolving the defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). That opinion left only two plaintiffs standing and limited those two plaintiffs to two theories – fraudulent misrepresentation and innocent misrepresentation. On March 6, 2015, the lone remaining defendant – John C. Buchanan, Jr. (“Jack Jr.”) – filed a renewed motion seeking summary disposition under MCR 2.116(C)(10), contending that the remaining claims of Plaintiff P.A.G., Inc. (“PAG”) lack sufficient factual support to justify resolution by trial.¹ Upon review, the Court finds that PAG cannot maintain its claim against Jack Jr. for innocent misrepresentation, so the Court shall grant summary disposition to Jack Jr. on that claim. But the Court concludes that PAG's claim for fraudulent misrepresentation must be resolved at trial, albeit on a difficult theory.

¹ The Court has searched in vain for any reference in Defendant Jack Jr.'s motion and brief to the other remaining plaintiff, West Michigan Landscaping and Construction. Nevertheless, the Court's rulings on PAG's claims seem to apply with equal force to that other plaintiff's claims.

I. Factual Background

Defendant Jack Jr.'s motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." Maiden v Rozwood, 461 Mich 109, 120 (1999). Thus, the Court should consider "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." Id. (citation omitted). Our Court of Appeals has already described the factual background of this dispute in a closely related case. PAG, Inc v Alpinist Endeavors, LLC, No 309253 (Mich App June 26, 2014) (unpublished decision). Therefore, the Court shall present the factual background of this dispute by relying largely upon the decision from our Court of Appeals.

Defendant Jack Jr. and his father, John C. Buchanan, Sr. ("Jack Sr."), formed an entity called Alpinist Endeavors, LLC ("Alpinist") to engage in real-estate development. In 2006, Alpinist bought the former Lear Corporation plant in Walker and transformed the plant into industrial condominium units. In 2009, Jack Jr. started negotiating with his father to buy out the interest of Jack Sr.'s trust in Alpinist. The buy-out plan included the construction of a "motion picture/movie studio" in two industrial condominium units. Jack Jr. claimed that he had obtained approval for \$10 million in film tax credits to fund the project. But before Jack Jr. could sell the industrial condominium units to a studio group, Jack Jr. had to make some improvements to the two units.

To carry out his plan to improve and sell the two industrial condominium units, Defendant Jack Jr. enlisted the plaintiffs to perform various tasks. By all accounts, each plaintiff supplied labor and materials for the project, but the State of Michigan never issued the film tax credits and none of the plaintiffs received payment for their work. The plaintiffs filed construction liens on the two industrial condominium units, and ultimately filed suit to foreclose on the construction liens and to

recover damages. But the plaintiffs recovered nothing in their initial suit because the trial court ruled that a bank had a mortgage with priority over the construction liens and none of the defendants had any obligation to compensate the plaintiffs on any claim. Left with no other options, the plaintiffs chose to press on against Jack Jr.

On December 27, 2012, the plaintiffs filed a complaint asserting claims against Jack Jr. and his trust for breach of contract, fraud, innocent misrepresentation, and unjust enrichment. The Court waited patiently while the plaintiffs went forward with their appeal in the closely related case. But as soon as our Court of Appeals released an unpublished decision affirming *in toto* the dismissal of the plaintiffs' claims in the related case, see PAG, Inc, No 309253 (Mich App June 26, 2014), the dispute shifted in earnest to the instant case. Although the Court has already resolved a motion for summary disposition under MCR 2.116(C)(10), Jack Jr. has returned with a second motion seeking that very same relief with respect to the two remaining claims of Plaintiff PAG.

II. Legal Analysis

Because Defendant Jack Jr. seeks summary disposition under MCR 2.116(C)(10), the Court must “consider ‘the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party,’” Rambin v Allstate Ins Co, 495 Mich 316, 325 (2014), and award summary disposition “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” Id. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” West v General Motors Corp, 469 Mich 177, 183 (2003). Applying these standards, the Court must decide whether Jack Jr. should face PAG’s claims at trial.

A. Fraudulent Misrepresentation.

In Count Two, Plaintiff PAG alleges that Defendant Jack Jr. committed fraud in convincing PAG that it would be paid for its work, that money for film tax credits existed, and that he had the ability to pay for the work on the industrial condominium units. This fraud claim requires proof of a fraudulent misrepresentation, which “entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result.” Barclae v Zarb, 300 Mich App 455, 476 (2013). John Beck – the principal of PAG – testified that Jack Jr. repeatedly promised him: “you guys are gonna get paid, you are gonna get paid, you are gonna get paid.” See Deposition of G. John Beck at 76. Viewing these promises in the context of Jack Jr.’s ongoing endeavor to get PAG to finish its work on the industrial condominium units, a rational trier of fact could conclude that Jack Jr. made promises of payment with reckless disregard for the accuracy of those promises in light of the speculative nature of the tax credits that Jack Jr. hoped to use to fund the work.

Defendant Jack Jr. characterizes his repeated promises to Plaintiff PAG that “you are going to get paid” as nothing more than assurances of his future performance, which cannot support PAG’s claim for fraudulent misrepresentation. As a general rule, “an action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim for fraud.” Cummins v Robinson Township, 283 Mich App 677, 696 (2009). But a viable claim for “fraudulent misrepresentation may be based on a promise made in bad faith without intent to perform.” Jim-Bob, Inc v Mehling, 178 Mich App 71, 90 (1989). To be sure, “this ‘bad faith’ exception” is narrow, but the record here could bring PAG’s claim for fraudulent

misrepresentation within that very narrow exception to the general rule that actionable fraud must be predicated upon a false statement relating to a past or an existing fact.² Thus, the Court must deny Jack Jr.’s request for summary disposition on PAG’s fraudulent-misrepresentation claim.³

B. Innocent Misrepresentation.

In Count Three, Plaintiff PAG presents a claim for innocent misrepresentation that requires PAG to prove that it “‘justifiably relied to [its] detriment on information prepared without reasonable care by one who owed [PAG] a duty of care.’” Barclae, 300 Mich App at 476. Specifically, PAG asserts that Defendant Jack Jr. induced it to work on the industrial condominium units by assuring PAG that it would be paid, that money for film tax credits was available to pay it, and that Jack Jr. could cover the costs of the work. As the Court has already explained, John Beck – the principal of PAG – testified that Jack Jr. repeatedly told him: “you guys are gonna get paid, you are gonna get paid, you are gonna get paid.” See Deposition of G. John Beck at 76. PAG kept working on the project, thereby justifiably relying to its detriment on information from Jack Jr. divulged “‘without reasonable care by one who owed the relying party a duty of care.’” Barclae, 300 Mich App at 476. Thus, PAG insists that its innocent-misrepresentation claim is viable.

² The promises cited by Plaintiff PAG seem most compatible with fraud in the inducement, which “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.” See Samuel D Begola Services, Inc v Wild Brothers, 210 Mich App 636, 639 (1995). That theory affords no succor to PAG because fraud in the inducement simply renders a “contract voidable at the option of the defrauded party.” Id. at 640. PAG has no contract with Jack Jr. to void, and fraudulent inducement cannot be pleaded as a freestanding claim, so fraudulent inducement has no role to play here.

³ In allowing that claim to proceed, the Court notes that Plaintiff PAG has also referred to an alternative theory of silent fraud, which is similar to fraudulent misrepresentation see Roberts, 280 Mich App at 403-404, but requires proof that Defendant Jack Jr. made “some type of representation by words or actions that was false or misleading and was intended to deceive.” Id. at 404.

But Defendant Jack Jr. argues that the innocent-misrepresentation claim is fatally flawed in that it fails to establish Jack Jr. received a benefit from the innocent misrepresentation. Our Supreme Court has noted that, “[u]nder the innocent misrepresentation rule, the victim must not only suffer an injury but also the injury must inure to the benefit of the other.” See US Fidelity & Guaranty Co v Black, 412 Mich 99, 118 (1981). Thus, Plaintiff PAG must “show that not only does the victim suffer, but also the injury must inure to the misrepresenter’s benefit.” Id.; accord Roberts v Saffell, 280 Mich App 397, 404 (2008), citing Forge v Smith, 458 Mich 198, 211-212 (1998). Here, PAG has offered no evidence to show that Jack Jr. received a benefit from his innocent misrepresentation. To the contrary, the record reveals that the corporate entities that owned the site obtained the benefit of PAG’s work on the industrial condominiums. Therefore, the Court must grant Jack Jr.’s motion for summary disposition under MCR 2.116(C)(10) on the innocent-misrepresentation claim.

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall grant summary disposition to Defendant Jack Jr. on Plaintiff PAG’s claim for innocent misrepresentation, but the Court shall leave the fraudulent-misrepresentation claim for resolution at trial, where the plaintiffs must establish that Jack Jr. acted in bad faith with no intent to perform his promise to compensate the plaintiffs.

IT IS SO ORDERED.

Dated: May 20, 2015



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge