STATE OF MICHIGAN

COURT OF APPEALS

MITCH GAPPY and MIKE BACALL,

Plaintiffs-Appellants,

v

NORTH AMERICAN FUNDING GROUP, LLC, and RICK ADAMS, a/k/a ERIC A. ADAMS,

Defendants-Appellees.

UNPUBLISHED
November 17, 2009

No. 286892
Oakland Circuit Court
LC No. 2006-078139-CK

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order entering judgment for plaintiffs on one count and granting defendants' motion for summary disposition with regard to the remaining counts of plaintiff's complaint. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs and defendants[1] entered into an agreement under which defendants would obtain financing for plaintiffs' development project. Plaintiffs paid a $22,970 commitment fee. When defendants were unable to find satisfactory financing, plaintiffs sued in a ten-count complaint. Plaintiffs alleged: (I) fraud/misrepresentation, (II) silent fraud, (III) negligent misrepresentation, (IV) innocent misrepresentation, (V) unjust enrichment/quantum meruit, (VI) breach of contract, (VII) conversion, (VIII) violation of MCL 450.1345(3), (IX) fraudulent conveyance, and (X) piercing the corporate veil. The only injury specifically identified in the complaint is the lost commitment fee.

Plaintiffs moved for partial summary disposition under MCR 2.116(C)(10) regarding Count VI, breach of contract, arguing that defendant North American Funding Group (NAFG) failed to secure financing as required by the contract, but kept the commitment fee even though plaintiffs were not in breach. The trial court granted plaintiffs' motion. The court found the

[1] Adams is the sole owner of North American Funding Group, LLC.

contract language unambiguously provided that NAFG was to provide funding for the project either directly or indirectly through a third-party lender. The court noted that although the contract provided "retainer earned upon receipt," the loan proposal agreement stated that NAFG could keep the retainer only if NAFG successfully obtained financing and plaintiffs chose to go elsewhere for funding. Because NAFG failed to provide funding and came up with no more than another proposed brokerage arrangement, defendants were not entitled to retain the fee.

The trial court did not enter a judgment for plaintiffs at that time. Subsequently, plaintiffs sought summary disposition under MCR 2.119(C)(10) with regard to their remaining counts. They asserted that they lost the opportunity to purchase the real estate they planned to develop, lost their commitment fee of $22,970, and incurred attorney fees in the amount of $7,200. The trial court held:

> Having considered the parties' arguments and exhibits attached, the Court finds that both parties fail to present any evidence establishing that a question of fact exists regarding Plaintiffs' allegations. In a prior ruling, this Court granted summary disposition in favor of Plaintiffs on its Count VI for Breach of Contract. That ruling effectively gave Plaintiffs complete relief.
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> MCR 2.115(B) allows a Court, on its own initiative, to strike from a pleading, redundant, immaterial, impertinent, scandalous, or indecent matter, or all or part of a pleading not drawn in conformity with the Court Rules.
>
> Because neither party presents evidence that any remaining claims should be tried, this Court finds that the remainder of Plaintiffs' pleadings should be struck and a Final Judgment entered.
>
> IT IS SO ORDERED.
>
> This order resolves the last pending claim and closes this case.

However, a final judgment was not entered. Plaintiffs moved for reconsideration, pointing out to the trial court that although they supposedly won the return of their $22,970 commitment fee, they had no judgment to enforce. They provided a proposed order, which the court signed, entering judgment in the amount of $22,970 against NAFG, plus interest and $150 costs, and striking the remaining counts of plaintiffs' complaint and closing the case.

In this Court, plaintiffs argue that the trial court improperly struck their remaining claims and that they are entitled to summary disposition as a matter of law. Plaintiffs state that the trial court's decision seems to be based on the notion that plaintiffs have already received all the remedy they sought. However, plaintiffs assert that they are not seeking double recovery but rather additional damages for such things as loss of business expectations, actual and treble damages and attorney fees for losses due to conversion pursuant to MCL 600.2919a, and the right to judgment against Adams individually. They argue the trial court erred in sua sponte raising the issue of double recovery without giving notice to plaintiffs of this new ground and that plaintiffs are entitled to summary disposition on their claims because NAFG actively misrepresented that loan funds would be provided, and concealed its failure to perform in order to further perpetrate the fraud.

MCR 2.115(B) reads: "On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules." We review a trial court's decision regarding a motion to strike a pleading pursuant to MCR 2.115 for an abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). An abuse of discretion occurs "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *Maldanado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court's ruling, quoted above, is less than perfectly clear. However, it appears that the court found no factual support for plaintiffs' allegations regarding the remaining claims and that plaintiffs already had been granted their remedy. The trial court ruled in plaintiffs' favor on the breach of contract count. The proper measure of damages for a breach of contract is "the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Davidson v General Motors Corp*, 119 Mich App 730, 733; 326 NW2d 625 (1982), mod on other grounds on reh 136 Mich App 203 (1984). "Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Farm Credit Servs, PCA v Weldon*, 232 Mich App 662, 678; 591 NW2d 438 (1998). In *Schenburn v Lehner Associates, Inc*, 22 Mich App 534; 177 NW2d 699 (1970), this Court analyzed the difference between tort claims and contract claims in the context of which period of limitation applied to the plaintiff's suit. The *Schenburn* Court noted, "It appears from the complaint that plaintiff was indeed injured in his financial expectations rather than in his person." *Id*. at 538. The *Schenburn* Court stated:

> "[W]here the injury is to specific property or persons, the 3-year [tort] limitation controls. The 6-year period may be thought of as an exception applicable to such actions wherein the injury is occasioned by breach of some express contractual provision. On the other hand, in contracts of a commercial nature or where the breach injures one in his financial expectations and economic benefit rather than his person or specific property, then such actions may be brought within 6 years whether founded upon express or implied contract." [*Id*. at 539, quoting *Fries v Holland Hitch Co*, 12 Mich App 178, 185; 162 NW2d 672 (1968) (internal citations omitted).]

Thus, a breach of contract claim provides the appropriate remedy where a breach causes injuries to financial expectations or economic benefit.

Plaintiffs do not dispute that they won on their breach of contract claim, but they assert that they are seeking damages beyond the $22,970 commitment fee, including lost business expectations. However, they had the opportunity to prove lost business expectations when they litigated their breach of contract claim, and they do not now argue that the trial court's decision on that count was inadequate.

The only count which does not merely duplicate the remedies available to plaintiffs for breach of contract is 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." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). To support an action for conversion of money, the defendant "must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship" and "must have had an obligation to return the specific money entrusted to his care." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111-112; 593 NW2d 595 (1999) (internal citation and quotation marks omitted). There is no dispute that plaintiffs voluntarily paid the commitment fee as part of the contract. Only defendants' breach made retention of the money wrongful. Defendants did not have an obligation to return the "specific money entrusted to [their] care." *Id.*; see also *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 438; 683 NW2d 171 (2004), rev'd on other grounds 472 Mich 192; 694 NW2d 544 (2005). Thus, the trial court did not err in finding plaintiffs were not entitled to further relief.

Finally, this Court has noted the following standard for piercing the corporate veil: "First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994) (internal citation and quotation marks omitted). Plaintiffs provide no argument supporting their count for piercing the corporate veil, other than stating that NAFG is solely owned by Adams. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *People v Payne*, ___ Mich App ___; ___ NW2d ___ (Docket No. 280260, issued July 28, 2009), slip op at 6.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering