STATE OF MICHIGAN

COURT OF APPEALS

PAUL J. KELLEY,

Plaintiff-Appellant,

v

THOMPSON-MCCULLY COMPANY, LLC, OLDCASTLE MATERIALS GROUP, INC., ROBERT THOMPSON, AGGREGATE INDUSTRIES, PLC, and AGGREGATE INDUSTRIES MANAGEMENT, INC.,

Defendants-Appellees,

and

CRH, PLC,

Defendant.

UNPUBLISHED
July 27, 2004

No. 236229
Ottawa Circuit Court
LC No. 01-039806-CK

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

This action arises from a failed corporate buyout. Plaintiff is a shareholder and corporate officer of West Shore Construction Company, a Michigan corporation that was previously involved in the asphalt paving industry but is now in bankruptcy. In early 2000, before West Shore filed for bankruptcy, negotiations began between plaintiff and defendant Thompson-McCully Company, LLC, regarding the latter purchasing all outstanding shares of West Shore. A series of discussions ensued, culminating in a letter of intent being sent to plaintiff from Thompson-McCully's parent company, defendant Oldcastle Materials Group, Inc. Oldcastle is owned by CRH, PLC, an Irish Corporation. Oldcastle eventually rejected the terms of the proposed buyout. A second proposal was extended that included a reduced price for the shares of West Shore, but this proposal was rejected by West Shore.

Plaintiff filed suit in June 2001, alleging violations of the Michigan Antitrust Reform Act[1] (MARA), breach of contract, tortious interference with contract and prospective economic advantage, breach of the duty to negotiate in good faith, and promissory estoppel. Plaintiff also sought certification of a class action based on the alleged violations of the MARA. Defendants moved for summary disposition under MCR 2.116(C)(5) and (C)(8), and the trial court summarily dismissed each of plaintiff's claims. Plaintiff now appeals as of right. We affirm.

Plaintiff owns twenty percent of the common stock of West Shore and was president of West Shore at all times relevant to this action. There are four other shareholders of West Shore, none of whom is a party to this action.

In December 1999, plaintiff was contacted by Brent Cook, President of the Central Region of Aggregate Industries Management, Inc. (hereinafter "Aggregate Management") about a possible buyout of West Shore. Aggregate Management is owned by Aggregate Industries, PLC (hereinafter "Aggregate Industries"), an English corporation. Byron Thomas, Vice President of Thompson-McCully, contacted plaintiff in February 2000. It was decided that West Shore would pursue the offer extended by Thompson-McCully, and discussions ensued. Eventually, a letter outlining the buyout agreement was drafted. This letter, dated May 23, 2000, had plaintiff's name and that of Tom Hill, Oldcastle's Chief Executive, typed at the bottom. The May 23 letter purports to be signed by plaintiff and Hill, and had an agreement date of May 24, 2000, handwritten just above the signatures.

At this point, the buyout negotiations apparently stalled. Plaintiff alleges that this was due to CRH and Aggregate Industries implementing and pursuing a plan designed to divide and monopolize the asphalt market in southwest Michigan. Plaintiff alleges that the goals of the plan were to eliminate effective competition, as well as to "eliminat[e] and ruin [] West Shore." In furtherance of this goal, plaintiff alleges that the corporations and their subdivisions initiated a predatory pricing scheme that undermined West Shore. Specifically, plaintiff alleges that to stay competitive, it could not pass on to its customers increases in the price of asphalt cement, natural gas, or fuel.

Plaintiff alleges that after this plan was implemented, Oldcastle notified him that the purchase of West Shore would not be approved by the Oldcastle Board of Directors because the price was "too high." A subsequent reduced proposal was rejected by West Shore and its shareholders.

Plaintiff first contends that the trial court erred in dismissing his antitrust and class action claims on the basis that he lacked standing to pursue them. We conclude that the claims were properly dismissed. A trial court's decision whether to grant summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201(1998). This Court reviews the record in the same manner as the trial court to determine whether the moving party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Defendants' motions for summary disposition were brought under both

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[1] MCL 445.771 *et seq.*

MCR 2.116(C)(5) and (C)(8). The trial court did not specify under which subrule dismissal was based. MCR 2.116(C)(5) provides that summary disposition may be granted when "[t]he party asserting the claim lacks the legal capacity to sue." While the issue of capacity is related to the issues of real party in interest and standing, they are not coextensive doctrines. See *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992). Accordingly, we review the trial court's grant of summary disposition under MCR 2.116(C)(8). *Leite*, *supra.*

"MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

I. MARA

Section 8(2) of the MARA, MCL 445.778(2), provides:

> Any other person threatened with injury or injured directly or indirectly in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief against immediate irreparable harm, actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of 3 times the actual damages sustained by reason of a violation of this act.

The gravaman underlying counts 1 and 2 is the allegedly anticompetitive actions taken by the corporate defendants. But the "person"[2] directly injured by the alleged actions is West Shore, not plaintiff. Given the existence of the bankruptcy proceedings, West Shore's claim now belongs to the trustee in bankruptcy. 11 USC 541; 11 USC 704(1); *McClarty v Gudenau*, 176 BR 788, 790 (ED Mich, 1995). Accordingly, the bankruptcy trustee is the real party in interest with respect to the claims of alleged anticompetitive behavior.

Plaintiff's claim is a derivative shareholder suit. *Dean v Kellogg*, 294 Mich 200, 207; 292 NW 704 (1940). In general, a derivative shareholder suit is brought by one or more shareholders suing in a representative capacity. MCL 450.1492a(b).

MCR 2.201(B) states that "[a]n action must be prosecuted in the name of the real party interest," unless the party bringing suit falls into one of several listed categories. A shareholder

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[2] Section 1(a) of the MARA defines the term "person" to "mean[] an individual, corporation, business trust, partnership, association, or any other legal entity." MCL 445.771(1)(a).

suing on behalf of a corporation (a derivative suit) is not included in this list. MCR 2.201(B). Thus, West Shore should have been brought into the suit as a nominal defendant, because it is West Shore's claim that is being litigated. *Dean*, *supra* at 207 ("As to the defendants charged with defrauding it, the corporation is an indispensable party"). Further, "[w]here . . . a trustee in proceedings for reorganization has been appointed for a corporation, he is an indispensable party to a stockholders' derivative suit" and thus must also be joined. *In re Penn Central Securities Litigation*, 335 F Supp 1026, 1037-1038 (ED Pa, 1971). Plaintiff has failed to join either West Shore or the bankruptcy trustee in the case at hand.

There is also no indication that plaintiff presented either West Shore or the bankruptcy trustee with a written demand "to take suitable action" against defendants. MCL 450.1493a(a). Federal bankruptcy law also requires that before a shareholder can bring a derivative claim, the shareholder must make a demand on the trustee. FRCP 23.1; FRBP 7023.1; *In re Penn Central Securities Litigation, supra* at 1039. "If the Trustee refuse[s] to sue or if such demand would be futile, the stockholders are required to petition the Reorganization Court to either compel the Trustee to sue or authorize the stockholders to sue." *Id*. There is no indication that these procedures were followed in the case at hand.

In sum, plaintiff is not the real party in interest, has not alleged a direct injury, and has not satisfied the criteria to maintain a shareholder derivative suit on behalf of West Shore. Therefore, we conclude that the trial court correctly dismissed counts 1 and 2 of plaintiff's complaint.

II. Class Action

Count 3 of plaintiff's complaint also centers on alleged anticompetitive and monopolistic activity. In count 3, plaintiff sought to have the case certified as a class action, with himself authorized to pursue the action for the other members of the class. Specifically, plaintiff asked the court to certify "him as a member of a class of plaintiffs, namely competitors, consumers both direct and indirect and on behalf of affected taxpayers within the relevant market" and to authorize him "to pursue antitrust violations under" the MARA. We review a trial court's decision to certify a class to determine whether the trial court clearly erred. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 588; 654 NW2d 572 (2002).

The factors relevant to the certification of a class are set forth in MCR 3.501(A)(1):

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
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> (a) the class is so numerous that joinder of all members is impracticable;
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> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
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> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

It is unclear what the exact dimensions of plaintiff's proposed class are, or if there is actually more than one class being proposed. Plaintiff asked the trial court to certify "him as a member of *a* class of plaintiffs, namely competitors, consumers both direct and indirect and on behalf of affected taxpayers within the relevant market" (emphasis added). The indefinite article "a" signals that the class is singular, and is defined by the categories that immediately follow it, "namely competitors, consumers both direct and indirect and . . . affected taxpayers."

As defined in plaintiff's complaint, the category "competitor" consists of (1) "companies that own plants and produce . . . asphalt only for their own account and use," (2) companies that sell asphalt to "contractors who do not own plants," (3) those paving companies that do not own plants, and (4) producers of aggregate materials used in the production of asphalt. The category "consumers both direct and indirect" consists of consumers of "asphalt products and aggregate together with related services." Direct consumers consist primarily of "the State, county and municipalities" who purchase asphalt and related services for road maintenance. It would also seem to include competitors who purchase aggregate for asphalt production. Indirect consumers are private business owners and taxpayers. Thus, plaintiff identifies taxpayers as a subset of indirect consumers, which in turn is a subset of consumers.[3] Accordingly, in the singular, the proposed class would be comprised of two main categories: (1) competitors and (2) consumers. Each category is comprised of various subsets that can overlap with the other category, depending on how they are behaving in the market.

These characteristics seem to define a class comprised of members with widely divergent interests. While there is "'no requirement . . . that all questions necessary for ultimate resolution be common to the members of the class,'" *A & M Supply Co*, *supra* at 599, quoting *Grigg v Michigan Nat'l Bank*, 405 Mich 148, 184; 274 NW2d 752 (1979), the class representative must be able to adequately represent the interests of the class as a whole. MCR 3.501(A)(1)(d). Here, the interests of groups identified — and indeed the subgroups identified — would seem to often be widely divergent. Thus, a proposed class consisting of these entities would seem to have an internal and inherent conflict of interest that undermines certification of the class. MCR 3.501(A)(1)(e) (observing that "the maintenance of the action as a class action will be superior to other available methods of adjudication"). These same concerns implicate plaintiff's ability to "fairly and adequately assert and protect the interests of the class." MCR 3.501(A)(1)(d).

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[3] A significant difficulty with the single class paradigm is that its inverted classification scheme seems to defy reality. Specifically, while plaintiff identifies taxpayers as a subset of consumers, the dimensions of the taxpayer category actually envelop the competitors and consumers groupings. Perhaps this is why the attorneys for the corporate defendants and the trial court analyzed count 3 as a claim for certification of a taxpayer class action suit.

However, count 3 can also be read as identifying three potential classes: (1) competitors, (2) consumers, and (3) taxpayers. Viewed this way, the problem of an internal conflict of interest within the broader class is resolved.

A. Competitors

"The threshold question in any proposed class action is whether the proposed class representative is a member of the class." *A & M Supply Co*, *supra* at 580. The entities that comprise the class of competitors are the paving companies themselves. Thus, it is West Shore that is a member of the class of competitors, not plaintiff.[4] Therefore, because plaintiff cannot maintain the claim as an individual, he is not a member of the proposed class and cannot serve as its representative. Plaintiff's failure to satisfy this requirement means that the case cannot proceed as a class action. *Id.* at 597. Additionally, plaintiff has failed to establish that the class is so numerous that "joinder of all members is impracticable." MCR 3.501(A)(1)(a). "There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999). Here, the number of identified members of the class is five, with perhaps some additional smaller producers that could also be considered to be members. This number does not appear so large that common sense would dictate that joinder is impracticable.

Plaintiff also has not established that he can "fairly and adequately assert and protect the interests of the class" as a whole. MCR 3.501(A)(1)(d). Accord *Neal v James*, 252 Mich App 12, 22; 651 NW2d 181 (2002). As with the single class paradigm, this proposed class also has a problem with an internal conflict of interest. *Id.* at 23. For example, paving companies that do not produce their own asphalt and paving companies supplying asphalt have different market incentives. Conflicts also exist between businesses making asphalt and those supplying them with the aggregates they need. Additionally, potential conflicts are always present for those companies that sometimes operate as competitors and at other times as consumers. There is also a question whether plaintiff can fairly represent the proposed class if he himself is not a member of it. For these reasons, we conclude that the trial court did not clearly err in failing to certify this matter as class action with the proposed class consisting of competitors, as defined in plaintiff's complaint. *A & M Supply Co*, *supra* at 588.

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[4] Plaintiff does allege that West Shore is his "alter ego." "Alter ego" means "[a] corporation used by an individual in conducting personal business, the result being that a court may impose liability on the individual by piercing the corporate veil when fraud has been perpetrated on someone dealing with the corporation." Black's Law Dictionary 78 (7th ed, 1999). There is nothing in the record to indicate that West Shore was used by plaintiff to conduct plaintiff's personal business. Further, while plaintiff was apparently heavily involved in the running of West Shore, the record does not support a finding that there existed a complete unity of interest between plaintiff and the corporation. *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981). Plaintiff was neither the sole shareholder of West Shore, nor do the pleadings indicate that he exercised complete control over the corporation.

B. Consumers

Again, as defined by plaintiff, the class of "consumers both direct and indirect" of "asphalt products and aggregate together with related services" consists of government entities and competitors who purchase aggregate for asphalt production (direct consumers), and private business owners (indirect consumers). As with the competitor category, plaintiff cannot satisfy the threshold requirement that he is a member of the class. *Id.* at 580. He clearly is not a governmental entity or a purchaser of aggregate. West Shore may have purchased aggregate — although this is not clear from the pleadings — but plaintiff is not West Shore. Unlike the competitors class, however, the consumers class arguably satisfies the numerosity category. Plaintiff offers no specifics, but common sense instructs that the potential consumers contracting for paving services in southwest Michigan would be quite numerous. However, as with the competitors class, a question exists regarding whether plaintiff can fairly represent the proposed class if he is not a member of it himself. Additionally, plaintiff's motivation for bringing this claim does not coincide with the interests of the consumers class. Plaintiff's motivation stems from the failed buyout of West Shore and the effect the alleged anticompetitive behavior has had on the corporation's market position. The interests of the consumer class stem from the rising cost of paving services. Accordingly, the trial court did not clearly err in failing to certify this matter as class action with the proposed class consisting of consumers, as defined in plaintiff's claim. *Id.* at 588.

C. Taxpayers

"Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large." *Waterford School Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980). However, by statute and court rule a taxpayer has a right to maintain an action in his name, even though it is the public in general that is the real party in interest. MCL 600.2041 provides in pertinent part:

> Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action was brought, and further
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> (3) an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes, or in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside.

Similarly, MCR 2.201(B) provides in pertinent part:

> An action must be prosecuted in the name of the real party in interest, subject to the following provisions:

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> (4) An action to prevent illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure may be brought:
>
> (a) in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes; or
>
> (b) in the names of at least 5 residents of Michigan who own property assessed for direct taxation by the county where they reside.

Plaintiff's complaint does not allege that tax monies are being illegally spent or that any statute related to the action is unconstitutional. Plaintiff alleges only that "extraordinary costs for paving of streets and roads and for the paving of public projects" will result from the alleged anticompetitive activities. Such a claim is neither concrete nor particularized. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001); *Killeen v Wayne Co Civil Service Comm*, 108 Mich App 14, 19; 310 NW2d 257 (1981). Nor has the claim been brought in the names of at least five residents "who own property assessed for direct taxation by the county where they reside." Thus, plaintiff has failed to satisfy the requirements to qualify as a representative party permitted to bring an action on behalf of the public.

We also reject plaintiff's argument that he possesses a right to sue under § 8(2) of the MARA because he was indirectly injured. The statute provides that

> [a]ny other person threatened with injury or injured *directly or indirectly* in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief . . . . [Emphasis added.]

Plaintiff argues that the use of the term "indirectly" means that he is a real party in interest for purposes of this antitrust action. We disagree. As this Court observed in *A & M Supply Co, supra* at 583:

> In *Hanover Shoe, Inc v United Shoe Machinery Corp*[, 392 US 481; 88 S Ct 2224; 20 L Ed 2d 1231 (1968),] and *Illinois Brick Co v Illinois*, [431 US 720; 97 S Ct 2061; 52 L Ed 2d 707 (1977)], the United States Supreme Court barred indirect purchaser suits in federal courts. However, the Court did not foreclose states from allowing indirect purchaser actions. Accordingly, in 1984, the Michigan Legislature passed an *Illinois Brick* repealer law when it enacted MARA subsection 8(2) . . . . [Footnotes omitted.]

The Legislature did not intend to establish in § 8(2) an expansive gateway through which parties with attenuated and derivative claims of injury could file an antitrust action. Rather, the Legislature intended to create a limited cause of action for indirect purchasers. In the

circumstances of this case, plaintiff is not an indirect purchaser within the meaning of the MARA's *Illinois Brick* repealer.[5]

III. Equitable Relief

Next, plaintiff argues that the trial court erred in denying him equitable relief under § 8(2) of the MARA. Again, we disagree. While § 8(2) clearly provides for equitable remedies, it just as clearly directs that in order to bring a claim for equitable relief, a person must have been threatened or injured (1) directly or indirectly in his business or property by (2) a violation of the MARA. As we have already concluded, it is the trustee in bankruptcy (via West Shore) who is the real party in interest for purposes of the § 8(2) claims. Thus, it is the trustee in bankruptcy who is authorized to bring suit for any direct injury caused by the alleged anticompetitive actions, be it for damages or equitable relief. Further, plaintiff cannot maintain a cause of action under the MARA's *Illinois Brick* repealer.

IV. Tortious Interference

Plaintiff next argues that the trial court erroneously ruled that Robert Thompson was acting in his capacity as a principal and could not be held liable for damages stemming from his alleged tortious interference with a contract and a prospective economic advantage. "To maintain a cause of action for tortious interference, [a] plaintiff[] must establish that the defendant was a 'third party' to the contract or business relationship. . . . It is now settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993).

Plaintiff alleges that, acting on personal feelings of animus, Thompson misused Thompson-McCully in an attempt to prevent the payment of royalty payments due another corporate entity partially owned by plaintiff. However, plaintiff indicates that Thompson was unsuccessful in the alleged attempt to deny the royalties due. Thus, with respect to this asserted interference, plaintiff fails to allege any resulting damage. Plaintiff also alleges that Thompson damaged plaintiff's financial interests by urging Oldcastle to reject the negotiated buyout and substitute a reduced offer. However, plaintiff fails to allege that Thompson received any personal benefit from this action. If it is assumed that the benefit received was some sort of

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[5] To the extent that plaintiff argues that taxpayers are indirect purchasers harmed by the alleged antitrust activities, plaintiff's claim fails because he cannot satisfy the class action requirements. In any event, taxpayers other than those in the paving industry are not purchasers within the meaning of the *Illinois Brick* repealer. The purchaser is the governmental entity (e.g., a municipality) that indirectly purchases the paving products from an actor in the supply chain, not the taxpayers who fund the entity through the collection of taxes that have not been earmarked for such a purpose. See Herbert Hovenkamp, *commentary*, *The Indirect-purchaser Rule and Cost-plus Sales*, 103 Harv L R 1717 (1990) (defining indirect purchaser as "those who bought an illegally monopolized or cartelized product or service through the agency of a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation").

personal pleasure derived from settling a score with plaintiff, plaintiff has also failed to allege that Thompson-McCully did not also benefit from this action. Further, plaintiff asserts that Thompson's alleged animosity toward him stems from prior business dealings, i.e., "plaintiff's refusal to permit a hostile takeover . . . and for his enforcing contractual rights." Thus, because plaintiff specifically ties Thompson's behavior to these prior business dealings, Thompson's "motives . . . cannot be said to be strictly personal." *Reed*, *supra* at 13. Accordingly, the trial court did not err in dismissing Thompson from this lawsuit.

V. Breach of Contract

Regarding the breach of contract claim, plaintiff argues that the trial court improperly dismissed this claim based on the erroneous conclusion that the May 23, 2000, letter of intent did not constitute a valid contract. We disagree. The May 23 letter states that implementation of the agreement is predicated in part on "CRH plc board of directors approval." Despite the letter's observation that it is "outlin[ing] the major terms of [Oldcastle's] . . . *offer* to purchase all of the outstanding shares of West Shore," the retention of "the power to close the deal is a compelling indication that the proposal is not an offer." Farnsworth, Contracts (2d ed), § 3.10, p 139 (emphasis added). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent . . . will conclude it." Restatement Contracts, 2d, § 24. The retention by the CRH board of directors of the right to approve the agreement means that the letter did not create in plaintiff the power to enter into a contract by accepting the terms set forth. See *Eerdmans v Maki*, 226 Mich App 360, 365; 573 NW2d 329 (1997). This reservation of power "prevents the proposal from being an offer." Farnsworth, *supra*, § 3.10, p 140. Therefore, the trial court correctly concluded that because no contract had been formed, plaintiff's claim of breach of contract should be dismissed.[6]

VI. Breach of Duty to Negotiate in Good Faith

Finally, we conclude that the trial court did not err in concluding that a claim for breach of the duty to negotiate in good faith is not recognized in Michigan. In support of his argument, plaintiff cites *Hubbard Chevrolet Co v General Motors Corp*, 873 F2d 873 (CA 5, 1989), which involved a dealership agreement between the plaintiff and the defendant. The defendant had repeatedly denied the plaintiff's requests to relocate its dealership. *Id.* at 874-875. The plaintiff brought suit, alleging in part that the defendant had "breached an implied covenant of good faith and fair dealing." *Id.* at 875. Under the terms of the dealership agreement, Michigan common law controlled resolution of the issue. *Id.* at 876. The *Hubbard Chevrolet* court observed that

> Michigan common law . . . recognizes an implied covenant of good faith and fair dealing *that applies to the performance and enforcement of contracts*. . . . The implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when *their contract defers decision on a particular term, omits terms or provides ambiguous terms*. [*Id.* at 876-877 (emphasis added).]

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[6] We also note that plaintiff failed to produce any evidence that the shareholders consented to the stock purchase.

In other words, *Hubbard Chevrolet* identified a cause of action based on a duty that applied to the performance and enforcement of a contract that had already been formed. Although, this is a correct summation of Michigan law, the rule of *Hubbard Chevrolet* does not apply in this case because no contract was ever formed.[7]

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

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[7] The cases cited in *Hubbard Chevrolet* also do not support plaintiff's position. *Hubbard Chevrolet* cites *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238; 357 NW2d 669 (1984), and *Burkhardt v City National Bank of Detroit,* 57 Mich App 649; 226 NW2d 678 (1975). *Ferrell* involved contracts between the plaintiffs and the defendant health club. *Ferrell, supra* at 241. *Burkhardt* involved mortgage contracts and an accounting method employed by the defendant to estimate the sum needed to be paid into an escrow account to cover taxes and insurance premiums. *Burkhardt*, *supra* at 650-652. *Burkhardt* observes that "[w]here a party to a contact makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Id.* at 652. *Ferrell* relies on this statement of the applicable law. *Ferrell*, *supra* at 243. The case at bar does not involve a situation where performance under an existing contract is controlled by one party. Oldcastle did maintain a great deal of control under the May 23 letter of intent but its control was exercised in terms of the formation of a contract, not performance thereunder.