STATE OF MICHIGAN

COURT OF APPEALS

T & K FIBERGLASS, INC., Plaintiff-Appellant,	UNPUBLISHED January 16, 2007
v AVALON & TAHOE, INC., d/b/a PLAYBUOY PONTOON MFG, INC., Defendant-Appellee.	No. 272051 Gratiot Circuit Court LC No. 06-009613-CK

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the Gratiot circuit court's order granting summary disposition to defendant. We affirm in part, reverse in part, and remand for further proceedings.

I. Breach of Contract

Plaintiff argues that the circuit court erred in dismissing its breach of contract claim because the parties had an enforceable agreement under the Uniform Commercial Code—Sales, MCL 440.2102 *et seq*. According to plaintiff, it agreed to retool and produce new molds for captain stands in exchange for defendant's promise to buy from plaintiff the captain stands it needed in its manufacturing process for three to five years after the new molds were produced.[1] Plaintiff further argued that the agreement was an exception to the writing requirement in MCL 440.2201 because the captain stands are specially manufactured goods.

We review de novo the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition should be granted under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "When

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[1] Defendant produces and sells recreational boats. The "captain stand" produced by plaintiff is a molded fiberglass piece used to hold the boat's steering wheel and throttle.

deciding a motion for summary disposition under [MCR 2.116(C)(10)], a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). The motion must be supported by documentary evidence, and "[a]ll reasonable inferences are to be drawn in favor of the nonmovant." *Id*.

The Uniform Commercial Code—Sales governs contracts involving the sale of goods. MCL 440.2102; *Sherman v Sea Ray Boats*, 251 Mich App 41, 47; 649 NW2d 783 (2002). "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." MCL 440.2204(1). This agreement generally must be in writing to be enforceable if the goods cost $1,000 or more. MCL 440.2201(1). However, an exception to this writing requirement exists for goods specially manufactured for the buyer:

> (3) A contract that does not satisfy the requirements of subsection (1) but is valid in other respects is enforceable . . . :
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> > (a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement. [MCL 440.2201(3)(a).]

MCL 440.2105(1) defines "goods" in relevant part to "mean[] all things (including specifically manufactured goods) which are movable at the time of identification to the contract for sale . . . ." MCL 440.2105(2) notes, "Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are 'future' goods. A purported present sale of future goods or of any interest therein operates as a contract to sell." The alleged contract in issue is a "contract to sell" future goods, i.e., the still-to-be-produced captain stands.

Nothing in the trial court record suggests that captain stands manufactured using the molds designed for defendant would be suitable for sale to anyone else. Further, considering the time and cost involved in creating a new mold, the creation of the molds constitutes a substantial beginning of the manufacturing process of producing the new stands. However, plaintiff has not presented evidence that defendant agreed to buy stands from plaintiff if it made the new molds. Under MCL 440.2204(1), "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Further, a contract for specially manufactured goods need not include a quantity term. MCL 440.2201(3)(a). However, there still must be an agreement to create a contract to sell. MCL 440.2105(2), MCL 440.2204(1). At best, plaintiff has shown that defendant stated an intention to keep plaintiff as a sole supplier. This does not amount to an enforceable agreement. Additionally, an ambiguous statement made by defendant's employee that plaintiff should not have a problem "getting a written agreement" from defendant's CEO does not amount to a promise that defendant would provide a written agreement. In fact, the course of dealing between the parties indicates that plaintiff would produce the captain stands after receiving a

purchase order from defendant. Although plaintiff may have hoped that defendant would order a substantial number of stands over a three-to-five-year period, plaintiff was provided no guarantee that defendant would order a specific number of stands, or any stands. Therefore, the trial court properly granted summary disposition for defendant on plaintiff's breach of contract claim.

II. Promissory Estoppel

Plaintiff argues that the circuit court erred when it dismissed its promissory estoppel claim. We disagree. Again, we review de novo the trial court's order granting summary disposition to defendant. *Maiden*, *supra* at 118.

> The elements of equitable or promissory estoppel are (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. [*Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993), citing *Schipani v Ford Motor Co*, 102 Mich App 606, 612-613; 302 NW2d 307 (1981).]

"The doctrine of promissory estoppel is cautiously applied. The sine qua non of promissory estoppel is a promise that is definite and clear." *Id*. (citations omitted). "In determining whether a requisite promise existed, [this Court must] objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). This doctrine should only be applied "where the facts are unquestionable and the wrong to be prevented undoubted." *Id.*

"A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment had been made." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). Statements of an opinion or mere predictions of future events are not promises under the doctrine of promissory estoppel. *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134 n 2; 506 NW2d 556 (1993).

Plaintiff has only identified two statements by defendant's agents potentially creating liability to defendant through the doctrine of promissory estoppel. First, in a letter dated September 23, 2003, defendant indicated to plaintiff its "present intent" to retain plaintiff as its sole supplier of captain stands. Second, defendant's vice president of operations stated that plaintiff should not have a problem "getting a written agreement" from defendant's CEO. Neither statement advances a definite and clear promise by defendant that it will continue using plaintiff as its sole supplier of captain stands for the next three to five years. In particular, the letter did not provide timetables and carefully presented defendant's position as a statement of "present intent." Thus, the information in the letter is not even a prediction of future events, let alone a promise to act in a specified manner. Similarly, the statement by defendant's employee is merely a prediction (indeed, an inaccurate one) that plaintiff should not have a problem getting a written agreement from defendant; it is not a promise that plaintiff will continue as defendant's supplier of captain stands. Thus, because defendant did not provide a definite and clear promise

to plaintiff that it would be the sole supplier of captain stands to defendant for the next three to five years, plaintiff's claim of promissory estoppel fails. *Marrero*, *supra* at 442.

III. Fraudulent Misrepresentation

Plaintiff argues that the circuit court erred when it summarily dismissed its fraudulent misrepresentation claim. We agree. We review this issue de novo. *Maiden*, *supra* at 118. Plaintiff asserts that, when defendant told plaintiff that it intended to continue using plaintiff as sole supplier of captain stands, defendant had already planned to switch to another supplier. Plaintiff argues that defendant's actions constituted fraudulent misrepresentation and that it relied on this misrepresentation to its detriment. Alternatively, plaintiff argues, a question of fact exists regarding whether defendant deliberately misrepresented its intentions to plaintiff.

> The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. [*Novak*, *supra* at 688.]

"[A]n action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

> An exception to this rule exists, however, if a promise is made in bad faith without the intention to perform it. *Hi-Way Motor*, *supra* at 337-338. "[E]vidence of fraudulent intent, to come within the exception, must relate to conduct of the actor 'at the very time of making the representations, or almost immediately thereafter.'" *Id.* at 338-339, quoting *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930). Plaintiffs, therefore, must demonstrate that at the time defendants made promises to them, defendants did not intend to fulfill the promises. See *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 490; 559 NW2d 379 (1996) (O'Connell, J., dissenting), citing Pappas & Steiger, Michigan Business Torts (ICLE, 1991), § 6.7, p 84. [*Derderian v Genesys Health Care Sys*, 263 Mich App 364, 378-379; 689 NW2d 145 (2004).]

In addition, "a claim of fraud lies 'where although no proof of the promisor's intent exists, the facts of the case compel the inference that the promise was but a device to perpetrate a fraud.'" *Foreman v Foreman*, 266 Mich App 132, 147; 701 NW2d 167 (2005), citing *Hi-Way Motor*, *supra* at 339.

A plaintiff's reliance on false statements must also be reasonable. *Novak*, *supra* at 690. "A plaintiff's subjective misunderstanding of information that is not objectively false or misleading cannot mean that a defendant has committed the tort of fraudulent

misrepresentation." *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 411; 617 NW2d 543 (2000).

If defendant wrote that its "present intent" was to keep plaintiff as its sole supplier of captain stands after it began planning to switch suppliers, then defendant's assurance to plaintiff would satisfy the first three elements of a fraudulent misrepresentation claim. Evidence included in the trial court record indicates that defendant began talking with Bonar Plastics about supplying captain stands two weeks before it wrote the September 23, 2003, letter to plaintiff. Further, a March 5, 2004, email indicates that defendant was concerned that, if plaintiff knew that it was planning on switching suppliers, plaintiff might shut down production of captain stands for defendant before the new supplier was ready. This evidence indicates that defendant began planning to switch suppliers before it wrote the September 23, 2003, letter. This evidence permits a reasonable factfinder to infer that the decision to switch suppliers was already made when defendant represented its "present intent" to plaintiff in the September 23 letter. Of course, a reasonable factfinder could also conclude that the contacts with Bonar Plastics were merely exploratory and that defendant had not yet decided to cease using plaintiff as its only supplier of captain stands when it drafted and sent the letter. Accordingly, questions of fact exist regarding whether defendant made a false material representation and whether it made this representation knowing that it was false.

Further, the parties do not dispute that plaintiff retooled to produce new-model stands for defendant. Given plaintiff's claim that the cost of retooling was typically factored into the per unit price charged to defendant over the three-to-five-year new-model cycle, and given plaintiff's assertions concerning how the parties conducted business over the years, sufficient evidence exists to permit a factfinder to conclude that it was not unreasonable for plaintiff to believe that the status quo between the parties would continue. Thus, a factfinder could reasonably infer that plaintiff only retooled and continued production of the captain stands in reliance on defendant's statement of "present intent." However, this retooling was only followed by a one-year period of sales, rather than the three-to-five-year period that plaintiff allegedly required to recoup its costs and make a profit.

Therefore, because plaintiff presented sufficient evidence to create a question of fact for each element of a claim of fraudulent misrepresentation, the trial court erred when it granted defendant's motion for summary disposition on this claim.

IV. Innocent Misrepresentation

Plaintiff argues that the circuit court erroneously dismissed its innocent misrepresentation claim. We disagree. Again, we review this issue de novo. *Maiden*, *supra* at 118. "A claim of innocent misrepresentation is shown if a party to a contract detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *Novak*, *supra* at 688. Plaintiff alleges that, during internal discussions, defendant's agents decided to drop plaintiff as its sole supplier of captain stands. If defendant's agents made this decision and defendant's CEO did not know about it at the time he wrote the September 23, 2003, letter to plaintiff, he *should* have known about the decision because he was a corporate officer of this small company and was responsible for officially communicating defendant's corporate intentions to plaintiff. Thus, even if the statement in the September 23, 2003, letter was innocent on his part, it was fraudulent with respect to the

company as a whole. Similarly, if the CEO knew that his statement of intent to retain plaintiff as the sole provider of captain stands was false, plaintiff could only establish a claim for fraudulent, not innocent, misrepresentation.

V. Unjust Enrichment

We also reject plaintiff's argument that the circuit court erroneously dismissed its claim for unjust enrichment. We review the trial court's grant of summary disposition of this claim de novo. *Maiden*, *supra* at 118.

> [U]njust enrichment is "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." When unjust enrichment exists, 'the law operates to imply a contract in order to prevent" it. However, a contract will be implied only if there is no express contract covering the same subject matter. [*Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327-328; 657 NW2d 759 (2002), citing *Barber v SMH (US)*, 202 Mich App 366, 375; 509 NW2d 791 (1993).]

We concluded *supra* that the circuit court did not err when it found that plaintiff failed to establish that a contract existed requiring defendant to buy captain stands from plaintiff for the following three to five years and dismissed its breach of contract claim. However, plaintiff and defendant executed individual purchase orders for the captain stands sold to defendant for a year after plaintiff retooled. Although these orders did not specifically include costs related to the retooling, they implicitly included a pro rata share of that cost. Thus, these purchase orders covered the same subject matter as the retooling. *Id*. Further, the molds remain plaintiff's property. Therefore, beyond the benefit of buying parts produced from those molds, which are covered by the existing purchase orders, plaintiff's creation of these molds has not "enriched" defendant. Accordingly, summary disposition in favor of defendant regarding plaintiff's unjust enrichment claim was appropriate.[2]

IV. Venue

Finally, plaintiff argues that the trial court erroneously concluded that venue in Tuscola County was improper and inappropriately granted defendant's request to change venue to Gratiot County. We disagree. We review a trial court's ruling regarding a motion for a change of venue for clear error. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). "Clear error exists when the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id*.

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[2] Although the trial court record indicates that the trial court granted summary disposition to defendant under MCR 2.116(C)(10) before discovery was complete, we do not believe that further discovery would yield support for plaintiff's unjust enrichment claim. *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006), citing *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003).

MCL 600.1621 states:

[V]enue is determined as follows:

> (a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.
>
> (b) If none of the defendants meet 1 or more of the criteria in subdivision (a), the county in which a plaintiff resides or has a place of business, or in which the registered office of a plaintiff corporation is located, is a proper county in which to commence and try an action.

"Under § 1621, venue is appropriate where a defendant has systematic and continuous dealings inside the county or conducts its 'usual and customary business' within the county, or where a defendant has a place of business or has its registered office." *Miller v Allied Signal, Inc*, 235 Mich App 710, 719; 599 NW2d 110 (1999) (citation omitted). Venue is not proper in a county because a defendant's products are merely sold there. *Id*.

In *DesJardin v Lynn*, 6 Mich App 439; 149 NW2d 228 (1967), this Court considered whether venue was established when the defendant partnership had previously done business with the plaintiff in the county in which the plaintiff's action subsequently commenced, if the defendant partnership had dissolved (and, hence, was no longer doing business in that county) by the time the plaintiff filed suit. The *DesJardin* Court noted that the statutory terms establishing venue were written in the present tense.[3] *Id.* at 442. The Court noted that the statute "is couched

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[3] The version of MCL 600.1621 in effect at the time of the *DesJardin* Court's ruling was as follows:

> [T]he county in which any defendant is established, or if no defendant is established in the state, the county in which the plaintiff is established, is a proper county in which to commence and try an action.

MCL 600.6125 defined "established" as follows:

> For purposes of all matters pertaining to venue
>
> (a) a person is established in any county in which he (i) has a dwelling place but not at his transient or temporary lodging, (ii) has a place of business if a plaintiff is established therein, or (iii) is doing business if a plaintiff is established therein;
>
> (b) both domestic and foreign corporations are established in any county in which the corporation (i) has its principal place of business, (ii) has its registered office, (iii) has a place of business if a plaintiff is established therein, or (iv) is doing business if a plaintiff is established therein;

(continued…)

in terms of the 'now' rather than the 'past.'" *Id.* at 443. Relying on this present-tense language, the *DesJardin* Court concluded that venue is established at the time a suit is commenced, not at the time a cause of action arises. *Id.* at 442-443. Because the defendant partnership was not doing business in the county in which the plaintiff filed suit at the time the plaintiff filed his complaint, the Court concluded that venue in this county was inappropriate. *Id.* at 443.

Similarly, MCL 600.1621 uses the present tense to indicate the time when proper venue must be determined. We find the reasoning of the *DesJardin* Court persuasive, and conclude that MCL 600.1621 requires that proper venue must be established at the time a suit is commenced. *Id.* See also *Brown v Hillsdale Co Rd Comm*, 126 Mich App 72, 76; 337 NW2d 318 (1983). The parties do not dispute that, at the time plaintiff filed its complaint, defendant had ceased doing business with plaintiff. Further, the trial court record does not indicate that defendant had a place of business or a registered office in Tuscola County or conducted business in Tuscola County at the time plaintiff filed its complaint. Accordingly, venue in Tuscola County was improper, and the trial court did not err when it transferred this case to Gratiot County, where defendant had its principal place of business.

Summary disposition dismissing plaintiff's claims of breach of contract, promissory estoppel, innocent misrepresentation, and unjust enrichment is affirmed. The transfer of venue to Gratiot County is affirmed. Summary disposition dismissing plaintiff's claim of fraudulent misrepresentation is reversed and remanded to the Gratiot Circuit Court. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

(…continued)

(c) partnerships, limited partnerships, partnership associations, and unincorporated voluntary associations, composed of residents, nonresidents, or both, are established in any county in which they (i) have their principal place of business, (ii) have a place of business if a plaintiff is established therein, or (iii) are doing business if a plaintiff is established therein[.]