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COUNTY CIRCUIT COURT -
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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

M&T BANK,

Plaintiff,

v.

TOMMY'S HOLDING COMPANY, LLC, et al., and MATTHEW BORISCH, jointly and severally,

Defendant,

_______________________________________/

Case No. 24-03177-CBB

Hon. Curt A. Benson

OPINION AND ORDER

INTRODUCTION

The Court convened on January 15, 2026, to hear three motions: (1) Plaintiff's motion for summary disposition; (2) Defendant's motion for summary disposition; and (3) Defendant's motion for leave to amend its answer and add a counterclaim.

As to motions (1) and (2), the Court denied Plaintiff's motion for summary disposition without prejudice and denied Defendant's motion with prejudice.

As to motion (3), the Court denied Defendant's request for leave to amend its answer and add a counterclaim with respect to proposed Counts I and III. With respect to proposed Count II, alleging fraudulent inducement, the Court permitted Defendant to seek leave to file an amended counterclaim by January 29, 2026, and directed Plaintiff to file any objection by February 5, 2026.

Defendant has now filed its motion for leave to file the amended counterclaim, and Plaintiff has timely filed its objection.

STANDARD OF REVIEW

A party may amend a pleading only by leave of the court and leave shall be freely given when justice so requires. MCR 2.118(A)(2).

The grant or denial of leave to amend pleadings is within the trial court's discretion. *PT Today, Inc. v. Comm'r of Office of Fin. & Ins. Servs.*, 270 Mich.App. 110, 142, 715 N.W.2d 398 (2006). A motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility. *PT Today, Inc.*, 270 Mich.App. at 143, 715 N.W.2d 398. The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile. *Id.* Amendment is generally a matter of right rather than grace. *Id.*

Here, the plaintiff objects to the motion seeking leave to file an amended counterclaim on the grounds that the proposed amendment is futile.

"The trial court need not give a party an opportunity to amend a pleading if the amendment would be futile." *Zwiker v. Lake Superior State Univ.,* 340 Mich. App. 448, 484, 986 N.W.2d 427, 446 (2022). 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., a Div. of Lake Odessa Mach. Prods.,* 184 Mich. App. 101, 103, 457 N.W.2d 68, 69 (1990). See also, *Liggett Restaurant Group, Inc v. Pontiac,* 260 Mich.App 127, 139; 676 NW2d 633 (2003).

FACTS

Plaintiff M&T Bank ("M&T") is a New York banking corporation which regularly provide financial services and loans to borrowers. Defendants in this case are customers and borrowers of M&T and are comprised of approximately 17 limited liability companies and 1 individual who can collectively be referred to as "borrowers". These borrowers are in the business of selling boats and engage with banks such as M&T to receive financing options to acquire their inventory.

The borrowers in this case executed a variety of loan documents with M&T which include: (1) a variable rate demand note ("Floor Plan Note"), (2) a revolving line note ("Revolving Note"), (3) a loan agreement (floor plan financing) ("Loan Agreement"), (4) a general security agreement ("Security Agreement"), and (4) a personal guarantee signed by defendant Matthew Borisch ("The Guarantee"). The aggregate maximum principle amount allowed under these documents totaled over $115,000,000.00.

A Chapter 11 bankruptcy proceeding was filed in Texas and stayed this case. The bankruptcy court stay was lifted and claims against individual defendant Matthew Borisch were again allowed to proceed in this Court.

The Guarantee

Borisch executed a continuing personal guarantee on May 17th, 2023. That guarantee is governed by New York State law. *See ¶ 13 of Guarantee*. The guarantee states that it is "irrevocable, absolute, continuing, unconditional, and general without any limitation." *See ¶ 2 of Guarantee*. Under the terms of the guarantee the guarantor waived "any setoff, defense or counterclaim of Borrower with respect to the obligations or otherwise arising, either directly or indirectly, in regard to the Obligations; or (xi) any other circumstance that might otherwise constitute a legal or equitable defense to Guarantor's obligations under this Guaranty." *See ¶ 3(a)(x)-(xi) of Guarantee*.

The specific relevant language of Section 9 of the guarantee reads as follows:

> This Guaranty is intended by Guarantor to be the final, complete and exclusive expression of the agreement between Guarantor and the Bank. [. . .] Guarantor expressly disclaims any reliance on any course of dealing or usage of trade or oral representation of the Bank including, without limitation, representations to make loans to Borrower or enter into any other agreement with Borrower or Guarantor. No course of dealing or other conduct, no oral agreement or representation made by the Bank or usage of trade shall operate as a waiver of any right or remedy of the Bank. No waiver or amendment of any right or remedy of the Bank or release by the Bank shall be effective unless made specifically in writing by the Bank.

The specific relevant language of Section 3 of the guarantee reads as follows:

> Guarantor's Waivers & Authorizations. (a) Guarantor's obligations shall not be released, impaired or affected in any way including by any of the following, all of which Guarantor hereby waives […] (ii) any new agreements or obligations of Borrower or any other party with the Bank; [...]; (viii) any refusal or failure of the Bank or any other person prior to the date hereof or hereafter to grant any additional loan or other credit accommodation to Borrower or the Bank's or any other party's receipt of notice of such refusal or failure; […] (x) any setoff, defense or counterclaim of Borrower with respect to the obligations or otherwise arising, either directly or indirectly, in regard to the Obligations; or (xi) any other circumstance that might otherwise constitute a legal or equitable defense to Guarantor's obligations under this Guaranty.

The proposed counterclaim

Borisch alleges that he agreed to the guaranty in reliance on M&T's representations that it would obtain a manufacturer repurchase agreement from Malibu (something he describes as "standard" when securing floor planning in the boat sale industry, see Proposed Counterclaim, ¶ 11) and that it would refinance the company's long-term debt after establishing the floor plan facility. According to Borisch, M&T failed to obtain the repurchase agreement and never intended to follow through on its refinancing promises.

Borisch further alleges that, as financial pressures mounted, M&T repeatedly assured him that refinancing was forthcoming and directed him to stabilize the business with his own funds in the interim. In reliance on those representations, he claims he injected approximately $29 million of personal capital into the business through loans, asset sales, and other measures. Despite the company achieving multiple "clean" audits, M&T did not refinance the debt, instead transferring the loans to its special assets group and ultimately suing for the full amount owed. The borrowers then filed for Chapter 11 bankruptcy.

Based on these allegations, Borisch asserts claims for fraudulent inducement, silent fraud, innocent misrepresentation, and promissory estoppel. He contends that M&T's misrepresentations induced both his execution of the personal guaranty and his subsequent personal investments, resulting in substantial financial losses, exposure on the guaranty, and related damages.

The counterclaim advances a consistent theme: M&T induced Borisch to assume substantial personal risk and contribute his own capital by making false assurances of refinancing and by disregarding its own loan agreements and standard industry practices by failing to enter into a repurchase agreement with Malibu. Having done so, M&T then refused to honor those assurances and instead enforced the debt after Borisch was fully exposed.

Despite the frequency of these alleged wrongs and misrepresentations, as well as what Borisch might describe as heavy handed tactics, the factual predicate for the counterclaim falls into two categories: M&T failed to enter into a market repurchase agreement with Malibu and M&T continuously (and falsely) promised refinancing.

LAW AND ANALYSIS

Fraud in the inducement - New York law in general – and the question presented

As one federal judge, applying New York law, once said, "[f]raudulent inducement and fraudulent concealment are familiar defenses to contractual performance." *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.,* 189 F. Supp. 2d 24, 26 (S.D.N.Y. 2002):

> Yet, New York law does not permit a contracting party to lightly evade its contractual obligations by simply crying "fraud." Thus, for example, under New York law, a claim for breach of contract cannot be converted into a fraud claim by simply alleging that the promisor intended not to perform its promise. Also, of particular relevance here, New York law will not permit a sophisticated party that, in negotiating a contract, has expressly disclaimed reliance on specific oral representations extrinsic to the contract to thereafter claim that the fraudulence of these representations is a defense to contractual performance.

Id.,(Citations omitted)

Repeating this quote, of course, does not end the inquiry. Under New York law, fraud in the inducement can render contract void ab initio. *Wedtech Corp. v. Fed. Ins. Co.,* 740 F. Supp. 214, 218 (S.D.N.Y. 1990)[1] For his cause of action, Borisch is claiming fraud in the inducement.

> For such a cause of action to be viable, it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged.

[1] In Michigan, "[f]raud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Custom Data Sols., Inc. v. Preferred Cap., Inc.,* 274 Mich. App. 239, 243, 733 N.W.2d 102, 105 (2006), quoting with approval, *Samuel D Begola Services, supra* at 640, 534 N.W.2d 217.

Perrotti v. Becker, Glynn, Melamed & Muffly LLP, 82 A.D.3d 495, 498–99, 918 N.Y.S.2d 423 (2011), see also, *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996).

The question presented is, accepting Borisch's allegations as true, whether he, as a matter of law, properly pled that he was justified in his reliance on the multiple misrepresentations made by M&T.

Borisch's reliance on certain representations he alleges M&T made were unreasonable and unjustified.

M&T argues that the language of the personal guarantee signed by Borisch makes his alleged reliance unreasonable and unjustified as a matter of law. The court agrees.

In *JPMorgan Chase Bank ex rel.*, cited above, the court addressed surety bonds issued to guarantee the obligations of several Enron-related entities. There, Enron misled the sureties by structuring a series of loans to appear as asset sales. Although the bond language provided that the sureties' obligations were "absolute and unconditional," the court held that such general disclaimer language was insufficient to bar a defense of fraudulent inducement. Rather, the court emphasized that a disclaimer must specifically address the particular representations at issue. As the court explained, "the touchstone is specificity." See also *Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 316 (2d Cir. 1993) (holding that, to preclude a fraudulent inducement defense, a guarantee must include explicit disclaimers of the specific representations underlying the claim).

Borisch confuses floor plan financing with a repurchase agreement.

Borisch alleges that M&T had a contractual obligation to enter into a separate repurchase agreement with Malibu. Borisch's reliance on this enforceable promise played a major role in his decision to sign the personal guarantee.

This allegation arises from a floor plan financing arrangement between the parties. In footnote 2 of the proposed counterclaim, Mr. Borisch describes "floorplan financing" in the following terms:

> Under such an arrangement, a dealer establishes a line of credit with a lender for the purchase of boat inventory from Malibu. When a dealer purchases and takes delivery of a boat pursuant to a floor plan financing arrangement, it draws against its line of credit, and its lender pays the invoice cost of the boat directly to Malibu. This amounts to a sale for Malibu. The majority of Malibu's dealers have floor plan financing arrangements with lenders in order for the dealers to fund the purchase of Malibu boats. Those arrangements provide liquidity to Malibu by financing dealer purchases of Malibu's products and minimizing the use of Malibu's working capital in the form of accounts receivable. The majority of Malibu Sales are financed under similar arrangements pursuant to which Malibu receives payment for the Sale within a few days of shipping a boat to a dealer.

See Proposed Counterclaim, ¶ 11, n.2.

This description is roughly in line with the way Michigan law views such arrangements:

> Under a floor plan financing arrangement, the creditor loans the debtor the necessary funds to purchase the inventory or finance the business's operating expenses. The inventory is then pledged as collateral to secure the loan. As inventory is sold, the debtor applies a set percentage of the purchase price to the floor plan in satisfaction of that account. See White & Summers, Uniform Commercial Code (West, 1972), § 22–1, p. 755.

Ladd v. Ford Consumer Fin. Co., 217 Mich. App. 119, 122, 550 N.W.2d 826, 828 (1996), rev'd, on other grounds, 458 Mich. 876, 586 N.W.2d 404 (1998), quoting with approval, *Yamaha Motor Corp., U.S.A. v. Tri-City Motors & Sports, Inc.*, 171 Mich. App. 260, 264, 429 N.W.2d 871, 873 (1988)

According to the proposed counterclaim, the borrowers entered into multiple loan agreements with M&T, including a floor plan note, revolving credit note, and loan agreement. ¶ 8. Borisch alleges that Section 4.1 of the Loan Agreement required M&T to obtain a manufacturer repurchase agreement. ¶¶ 8, 12. Borisch personally guaranteed the resulting obligations. He alleges that he did so in reliance on M&T's representation, reflected in the loan documents, that it would secure a repurchase agreement from Malibu. M&T allegedly failed to obtain that agreement, despite it being a standard and routinely granted protection in the industry. See Counterclaim, ¶¶ 8-11.

This is problematic for defendant. As plaintiff points out in its brief, Section 4.1 of the Loan Agreement does not say anything about "a market repurchase agreement from Malibu." *Id.*, at ¶ 10. Section 4.1 of the Loan Agreement says in relevant part as follows:

> The Bank has entered or will enter into an appropriate agreement with each Manufacturer which will provide for the Bank to pay to the Manufacturer the purchase price for the New Marine Inventory the Borrower purchases from the Manufacturer; provided, however, that the Loan for the New Marine Inventory shall not exceed the lesser of (i) the Manufacturer's invoice price for such New Marine Inventory or (ii) the Borrower's acquisition price for such New Marine Inventory as stated in the bill of sale/invoice. Such agreements may be subject to such monetary and other limitations and contain such other terms and conditions as the Bank may now or hereafter agree to and shall be subject to change or termination by the Bank at any time without notification to or consent by the Borrower.

See Loan Agreement, attached to verified complaint as Exhibit C.

The quoted provision fits within Mr. Borisch's description of floor plan financing in footnote 2 of his proposed counterclaim and the description found in the *Ladd* case. Section 4.1 reflects a typical floor plan financing arrangement. Like Borisch's description in his counterclaim, it provides that the Bank will pay the manufacturer directly for inventory purchased by the dealer, allowing the manufacturer to treat the transaction as an immediate sale and thereby ensuring prompt liquidity rather than carrying accounts receivable. At the same time, the provision characterizes each advance as a "Loan" tied to specific units of inventory and capped at the invoice or acquisition price, which is consistent with the second description's focus on inventory-based lending in which the financed goods serve as the practical borrowing base and collateral.

What Section 4.1 does *not* do is promise that M&T Bank will enter into a contract with Malibu to "repurchase" unsold inventory. Section 4.1 is *not* a market repurchase agreement as alleged in paragraph 8.

A market repurchase agreement, though often accompanying floor plan financing arrangements, is a separate contract. In floor plan financing, a market repurchase agreement is a contract between the lender and the manufacturer under which the manufacturer agrees, upon the dealer's default, to repurchase the financed inventory (or pay the lender) at a formula-based price. In fact, the bankruptcy judge in this very case, in discussing Tommy's lender before M&T Bank, aptly described the concept as follows:

> As was customary for floor plan financers, Fifth Third Bank required Malibu to enter into a repurchase agreement pursuant to which Malibu would be obligated, under specified terms and conditions, to repurchase any Malibu watercraft repossessed by Fifth Third Bank from Tommy's in the event of a loan default. To support its dealership relationship with Tommy's, Malibu agreed to enter into the repurchase agreement with Fifth Third Bank.

In re Tommy's Fort Worth, LLC, 671 B.R. 712, 722 (Bankr. N.D. Tex. 2025)

In short, Section 4.1 reflects standard floor planning financing, noting more. Even the most liberal reading of this contract, a reading most favorable to Mr. Borisch, cannot support his claim that M&T Bank agreed by written contract to enter into a market repurchase agreement with Malibu.

To the extent that Borisch relies on "industry standards," his reliance is misplaced.

Although the proposed counterclaim is less than clear on this point, at least arguably Borisch is alleging that he expected M&T to follow the standard in the industry and arrange a market repurchase agreement with Malibu. See ¶ 11. In other words, Borisch alleges that M&T failed to obtain a manufacturer repurchase agreement, which Defendant (and the Bankruptcy judge) characterizes as an industry-standard protection. To the extent this theory relies on course of dealing or usage of trade, it is foreclosed by the Guaranty, which expressly disclaims reliance on both. On this point, the guarantee is quite specific.

It was unreasonable for Borisch to rely on promises of refinancing.

The Guaranty contains both a broad integration clause and an express disclaimer of reliance. In Section 9, Defendant "expressly disclaims any reliance on any … oral representation of the Bank including, without limitation, representations to make loans to Borrower or enter into any other agreement." In addition, Section 3 includes sweeping waivers of defenses and counterclaims, including those arising from "any new agreements or obligations" and "any refusal or failure ... to grant any additional loan or other credit accommodation."

As noted above, New York law generally enforces such provisions. But as *JPMorgan Chase Bank ex rel.* points out, general disclaimer language is insufficient to bar a defense of fraudulent inducement. Rather, the court emphasized that a disclaimer must specifically address the particular representations at issue. "The touchstone is specificity." Where the disclaimer is sufficiently specific, a party cannot, as a matter of law, establish reasonable reliance.

Here, a substantial portion of Defendant's counterclaim is premised on alleged promises by Plaintiff to refinance Borrowers' long-term debt. Those allegations fall squarely within the Guaranty's express disclaimer of reliance on "representations to make loans" and within the waivers addressing any failure to extend additional credit. Refinancing is, in substance, an extension of credit. Defendant's attempt to recast such alleged promises as actionable fraud is unavailing in light of the Guaranty's clear and specific language. Accordingly, to the extent the counterclaim is based on alleged promises of future refinancing or other extensions of credit, it is barred as a matter of law.

The balance of Count I is also futile.

The remainder of Count I consists of a hodgepodge of legal theories, ("silent fraud, innocent misrepresentation, and/or promissory estoppel"), that Borisch makes little effort to meaningfully support.

To be sure,

> Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of "fraud"—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation. These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment.

Titan Ins. Co. v. Hyten, 491 Mich. 547, 555, 817 N.W.2d 562, 567 (2012).

But importantly, the doctrines of actionable fraud, innocent misrepresentation, and silent fraud each contain separate elements. *Id.*, at 557. Each element must be alleged with particularity. MCR 2.112(B)(1).

Alleging innocent misrepresentation, as Borisch does in paragraph 93, is no help because the elements of innocent misrepresentation include reliance, and the reliance must be reasonable. See, *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co.*, 280 Mich. App. 16, 39, 761 N.W.2d 151, 165 (2008)("Reasonable reliance also must exist to support claims of innocent misrepresentation.")

The court has already ruled that Borisch's reliance was unreasonable as a matter of law.

In paragraph 91 of his proposed counterclaim, Borisch invokes "silent fraud," yet pleads only the familiar elements of actionable fraud. The label is nominal; he makes no effort to allege or identify any legal or equitable duty of disclosure. *Titan*, supra, at 557. Nor does he specify what M&T Bank was purportedly obligated to disclose. At most, Borisch appears to contend that the Bank had a duty to disclose its own alleged fraud, effectively duplicating the same tort under a different name. Because the Court has already addressed the actionable fraud claim, nothing remains for further adjudication on this theory.

Finally, defendant alleges promissory estoppel. "Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract." *Gen. Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1042 (6th Cir. 1990).

The doctrine of promissory estoppel affords relief only where a party reasonably relies on a clear and definite promise. It does not apply, however, where an express written contract governs the same subject matter. See, e.g., *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991) (observing that "[a]n implied contract cannot be enforced where the parties have made an express contract covering the same subject matter"); *Zwiker v Lake Superior State Univ*, 340 Mich App 448, 482–483; 986 NW2d 427 (2022) (rejecting an implied-contract theory where written agreements controlled the same subject matter as the equitable claims).

Nowhere does Borisch challenge the existence or the general enforceability of the multiple contracts making up this complex financial arrangement. And as the court has already held, parties have made an express contract covering the same subject matter of the alleged misrepresentations.

Similarly, a promissory estoppel claim cannot be maintained where the alleged oral promise directly contradicts the terms of a binding written contract. *Zaremba Equip., Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008). Again, the court has already held that the alleged oral promise directly contradicts the terms of the personal guarantee Borisch executed.

In addition, promissory estoppel requires not only a promise that induces reliance, but also that such reliance be reasonable. *Aguirre v State of Michigan*, 315 Mich App 706, 713 n 2; 891 NW2d 516 (2016). Borisch's relance, as has been shown above, was unreasonable.

CONCLUSION

The motion to file an amended counterclaim is DENIED.

IT IS ORDERED.

This order does not resolve all pending matters before the court and does not resolve the case.

Dated: April 14, 2026
at Grand Rapids, Michigan.

Honorable Curt A. Benson