STATE OF MICHIGAN

COURT OF APPEALS

MATTEO FOGLIA,

Plaintiff/Counterdefendant-Appellant,

v

KEITH EVOLA,

Defendant/Counterplaintiff-Appellee,

and

PHILIP J. GROSSO and PREMIER REAL ESTATE INVESTMENT CO., INC., d/b/a RED CARPET KEIM PREMIER REAL ESTATE,

Defendants-Appellees.

UNPUBLISHED
August 14, 2001

No. 221023
Macomb Circuit Court
LC No. 97-003873-CK

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff purchased a gas station business from defendant Evola. Defendant Grosso worked for defendant Premier Real Estate Investment Co. and acted as Evola's real estate agent for purposes of the sale. The business failed after plaintiff purchased it, and plaintiff sued Evola and Grosso, alleging numerous causes of action. The trial court granted summary disposition in favor of defendants on all counts. Plaintiff appeals as of right. We affirm.

Plaintiff first argues that Evola breached the implied covenant of good will attendant to the purchase contract, and summary disposition on that claim was inappropriate. The purchase agreement in this case was prepared by plaintiff and his representative. It indicated that the gas station business was being sold, along with fixtures, improvements, and numerous other items. Neither the purchase agreement nor the subsequent bill of sale specified customer lists or good will as items included in the sale. On the day of closing, Evola sent letters to his former customers advising them of the sale and of his plans to work as a mechanic at a garage five miles away from the gas station that was being sold. In his complaint, plaintiff alleged that the

solicitation violated an implied covenant of good will, which was part of the contract. We disagree.

First, we note that plaintiff failed to present any authority to support his position that, although the written agreement did not specifically address customer lists or good will, they should be considered part of the contract. Plaintiff's reliance on "common sense" to argue his position is insufficient. Where no supporting authority is cited, this Court need not look for it, and the issue is deemed abandoned. *Magee v Magee,* 218 Mich App 158, 161; 553 NW2d 363 (1996).

Moreover, plaintiff's argument on this issue is without merit. If a contract is clear and unambiguous, its meaning is a question of law. *UAW-GM Human Resource Center v KSL Recreation Corp,* 228 Mich App 486, 491; 579 NW2d 411 (1998). Contractual language must be construed according to its plain and ordinary meanings, and we are careful not to create ambiguity where there is none. *Id.* at 491-492. Here, the language of the contract is clear and unambiguous, and the sale did not include good will or customer lists. Because the contract is clear and unambiguous about what was included in the sale, plaintiff's argument that parol evidence should be considered to add to the terms of the purchase agreement fails.

Further, we note that the contract at issue contains a provision indicating that the only binding promises were those made in writing and signed by all of the parties. The use of parol evidence to explain a clear and unambiguous written contract is prohibited where there is an integration clause unless the contract is obviously incomplete on its face or where there is fraud. *Id.* at 494-495. In this case, the contract was a complete integration, and there is no evidence of fraud.

We agree with the trial court that there was no genuine issue of material fact about whether good will or customer lists were included in the sale. Because there is no question of fact that those items were not included in the sale, plaintiff could not have been in breach of any implied covenant that would have been created by the sale of such items, and summary disposition was appropriate.

Plaintiff next argues that his claims of fraud or misrepresentation against Evola and Grosso should not have been dismissed by way of summary disposition. We disagree. The trial court decided the motion pursuant to MCR 2.116(C)(10). For that reason, plaintiff is not entitled to rely only on his pleadings, taken as true, to defend the motion. *Graham v Ford,* 237 Mich App 670, 672-673; 604 NW2d 713 (1999). The mere fact that plaintiff may have pleaded the elements of the claim is insufficient, and plaintiff must present documentary evidence establishing the existence of a material factual dispute. *Id*. at 673.

Here, plaintiff claims that defendants perpetrated a fraud by claiming that the business was "high volume" and by misrepresenting the intention to solicit existing customers. To assert an action for fraud or misrepresentation, a plaintiff must allege that (1) the defendant made a material representation, (2) the representation was false, (3) when the defendant made the representation, it was known to be false, or was made recklessly, without any knowledge of its truth and was made as a positive assertion, (4) the defendant made the representation with the intention that it should be acted on by the plaintiff, (5) the plaintiff acted in reliance on it, and (6)

the plaintiff suffered damages as a result. *H J Tucker and Associates, Inc v Allied Chucker and Engineering Co,* 234 Mich App 550, 571-572; 595 NW2d 176 (1999).

In this case, summary disposition was appropriate for Evola because there was no evidence that he made a material representation that the business was "high volume." Plaintiff testified that Guy Ergones spoke to an unidentified person at the station who said the business was a good opportunity. This statement does not support that Evola made the representation about the volume of business at the station. Further, and more importantly, there was no testimony or evidence whatsoever that the station was not "high volume." Therefore, even if such a statement could be attributed to Evola, there is no evidence that it was a false statement.

Further, summary disposition was appropriate with respect to plaintiff's claim that Evola misrepresented that he would not solicit customers. Plaintiff did not offer any documents, affidavits, or other evidence to support his position that Evola made such a representation. Even if there was a question of fact on this issue, any promise Evola allegedly made in this regard was not actionable via a fraud claim. "A promise regarding the future cannot form the basis of a misrepresentation claim." *Forge v Smith,* 458 Mich 198, 212; 580 NW2d 876 (1998). An action for misrepresentation must be predicated on a statement relating to a past or existing fact. *Eerdmans v Maki,* 226 Mich App 360, 366; 573 NW2d 329 (1997). Future promises are contractual and cannot constitute actionable fraud. *Id.* The contract at issue did not contain any provision requiring Evola to refrain from soliciting his former customers.

In addition, the trial court did not err in granting summary disposition for Grosso on plaintiff's claims of fraud and misrepresentation. First, the only evidence that Grosso made a representation about the "high volume" at the gas station was clearly hearsay. Plaintiff testified that Guy Ergones told him that he spoke to the "real estate" about the station and the "real estate" made some representations. Plaintiff *believed* that Guy was referring to Grosso when he claimed to have spoken to the realtor and learned that the business had large sales and was "high volume." The trial court ruled that the evidence was hearsay, and plaintiff does not dispute this. Motions made under MCR 2.116(C)(10) are reviewed by considering "substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999). Here, without the hearsay evidence, there was no evidence that Grosso made a representation that the service station was a high volume one. As with the claim of fraud against Evola, even if the statement was attributable to Grosso, there is no evidence that such a representation was false. Further, there is no evidence that Grosso made representations that Evola would not solicit customers from the gas station. As noted above, a future promise cannot form the basis of a misrepresentation claim. *Forge, supra* at 212.

We also find no error in the trial court's conclusion that summary disposition was appropriate on plaintiff's claim of tortious inference with a business expectancy. The basic elements of tortious interference with a business relationship are (1) the existence of a valid business relation or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. *BPS Clinical Lab v Blue Cross and Blue Shield of Michigan (On Remand),* 217 Mich App 676, 698-699; 552 NW2d 919 (1996). Further, the interference must be improper in addition to being

intentional. *MI Podiatric Medical Ass'n v National Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989). "Improper means illegal, unethical, or fraudulent." *Id*. An act is not improper if the defendant is motivated by "legitimate business reasons." *BPS Clinical Lab, supra* at 699.

In this case, plaintiff argues that there was tortious interference with his valid business expectancy because he purchased the customer lists and good will. Plaintiff's valid expectancy cannot be based on his purchase of good will and customer lists because, as previously discussed, plaintiff did not purchase the customer lists and good will. Further, there was no covenant not to compete in this case. Therefore, plaintiff did not have a valid business expectancy that Evola would refrain from soliciting customers or competing. In addition, plaintiff failed to make any allegations of illegal, unethical, or fraudulent conduct. *MI Podiatric, supra* at 736.

Plaintiff also alleged claims against Evola and Grosso for rescission of the purchase agreement. The claims have no merit as a matter of law, and summary disposition was appropriate with regard to them. Rescission of a contract is permissible only for a substantial or material breach of contract or where a misrepresentation was made with intent to deceive or mislead. *Omnicom of MI v Gianetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997); *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991). Rescission is not appropriate where, as in this case, there was no breach of contract and where there is no genuine issue of material fact about whether misrepresentations were made with the intent to deceive or mislead.

Plaintiff's claims of negligence and negligent misrepresentation against Grosso and Premier are also without merit. A claim of negligence requires, among other elements, that the defendants owed plaintiff a duty. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Duty is "a question of whether the defendant is under any obligation for the benefit of a particular plaintiff." *Id.* at 449-450. Real estate brokers are agents for the seller and owe the seller fiduciary duties. *Andrie v Chrystal-Anderson*, 187 Mich App 333, 335; 466 NW2d 393 (1991). The relationship "between the seller's agent and the potential buyer is a commercially antagonistic one, with each side working his best advantage and not the benefit of the other." *Id.* at 337. Because the seller's agent is not working to benefit the buyer in any manner, there is no duty between the seller's agent, Grosso and Premier, and the buyer, plaintiff. *Id*. Summary disposition was appropriate on plaintiff's negligence claims.

Similarly, the tort of negligent misrepresentation requires, as a prerequisite, a duty of care. *Clark v Grover*, 132 Mich App 476, 484; 347 NW2d 748 (1984). As previously discussed, Grosso and Premier owed no duty to plaintiff. Therefore, plaintiff's claims of negligent misrepresentation were properly dismissed on summary disposition.

Finally, we disagree with plaintiff that the trial court improperly granted summary disposition of his claim against Evola and Grosso for civil conspiracy. The claim of civil conspiracy requires proof of a separate, actionable tort. *Early Detection Center, PC v Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). Because none of the causes of action alleged by plaintiff could survive motions for summary disposition and there is no evidence of wrongful, unlawful, or tortious conduct by Evola or Grosso, plaintiff's claim of civil conspiracy

fails as a matter of law.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder