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STATE OF MICHIGAN

COURT OF APPEALS

KEN GAZIAN and PIERRE INVESTMENTS, INC.,

Plaintiffs-Appellants,

v

REMAX RESULTS, INC. and HUNTINGTON NATIONAL BANK,

Defendants-Appellees.

UNPUBLISHED
December 14, 2023

No. 362197
Bay Circuit Court
LC No. 21-003119-CH

Before: REDFORD, P.J., and SHAPIRO and YATES, JJ.

PER CURIAM.

Plaintiffs, Ken Gazian and Pierre Investments, Inc., appeal as of right the trial court's order granting summary disposition in favor of defendants Remax Results, Inc., ("Remax") and Huntington National Bank ("HNB"). For the reasons set forth in this opinion, we affirm.

I. FACTUAL BACKGROUND

Plaintiffs sought to purchase property located at 400 North Madison Avenue in Bay City, Michigan formerly owned by Chemical Bank, a predecessor in interest to TCF Bank, which later merged with HNB.[1] Gazian is the sole owner of Pierre Investments, an investment company that holds several other companies. On June 3, 2019, Gazian, who is of Armenian descent and lives in Texas, contacted Jean DeShano, a real estate salesperson for ReMax, to inquire about purchasing the subject property listed for sale. DeShano allegedly advised Gazian that the listing was active,

[1] Plaintiffs originally filed this action against TCF Bank, a predecessor in interest to HNB. On March 25, 2022, the trial court entered an order providing that "as a result of The Huntington National Bank's succession by merger with TCF Bank, the name of Defendant TCF Bank in this action is hereby changed to The Huntington National Bank; and that all future pleadings identifying Defendant TCF Bank shall instead identify Defendant The Huntington National Bank." Therefore, all references to TCF Bank in this opinion should be understood as also referring to HNB.

but her client, TCF Bank, would not accept an offer because it had already accepted another offer. Gazian then decided to deal directly with TCF Bank. He was directed to Randolph French, a sales manager and officer for TCF Bank, who informed Gazian that the property remained for sale. Gazian and French exchanged a series of e-mails respecting terms that French found acceptable, including a sales price of $130,000, but they never fully executed a purchase agreement. On June 6, 2019, when Gazian sent French a signed purchase offer consistent with the terms they had discussed, French advised Gazian that the bank had another purchaser for the property and that Gazian's offer would be held as a backup offer. According to Gazian, French inquired about Gazian's interest in the property and where he was from, at which point Gazian mentioned that he lived in Texas and was from Armenia. Although plaintiffs alleged that French promised to forward an executed purchase agreement, that never happened.

On December 2, 2020, plaintiffs filed this action against Remax and HNB's predecessor, TCF Bank. Relevant to this appeal, plaintiffs' first amended complaint asserted claims for ethnicity discrimination in a real estate transaction in violation of the Elliot Larsen Civil Rights Act "(ELCRA"), MCL 37.2101 *et seq*. (Count 1), promissory estoppel, which alleged that defendants were estopped from denying the existence of a purchase agreement between Gazian and TCF Bank (Count 2), breach of the purchase agreement (Count 3), and tortious interference with business expectancy or contract, which alleged that DeShano tortiously interfered with a contractual agreement or business expectancy between TCF Bank and Gazian (Count IV).

During the litigation, plaintiffs claimed that defendants failed to preserve and provide all electronically stored information ("ESI") requested in discovery and moved to compel discovery and for sanctions. Plaintiffs also moved to extend discovery to enable them to depose defendants' information technology employees to investigate what efforts were made to preserve and locate ESI. After holding several hearings and requiring defendants to submit affidavits documenting their record-retention policies and efforts to preserve and locate any relevant ESI, the trial court denied plaintiffs' motions. The court also denied plaintiffs' motion for leave to file a second amended complaint to add claims for fraud and misrepresentation. Lastly, the court granted defendants' motions for summary disposition and dismissed all of plaintiffs' claims. This appeal followed.

II. DISCOVERY SANCTIONS

Plaintiffs first argue that the trial court erred by denying their motion to compel discovery and declining to impose sanctions against defendants for failing to preserve and provide all requested ESI. We disagree.

We review for an abuse of discretion a trial court's decision whether to impose discovery sanctions. *In re Gregory Hall Trust*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket Nos. 361528; 362467); slip op at 2-3. A trial court abuses its discretion when its decision falls outside the range of reasonable outcomes. *Id*. We review de novo a trial court's application and interpretation of court rules. *Webb v Holzheuer*, 259 Mich App 389, 391; 674 NW2d 395 (2003).

Plaintiffs argue that they were entitled to sanctions under MCR 2.313 because defendants failed to preserve and provide requested ESI. MCR 2.313 states, in pertinent part:

(B) Failure to Comply With Order.

* * *

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:

* * *

In lieu of or in addition to the foregoing orders, the court may require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * *

(D) Failure to Preserve ESI. If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may order appropriate remedies, including:

(a) a presumption that the lost information was unfavorable to the party;

(b) a jury instruction directing that the jury may or must presume the information was unfavorable to the party; or

(c) dismissal of the action or entry of a default judgment.

Similarly, MCR 2.504(B)(1) provides:

If a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims.

MCR 2.313(B)(2) grants the trial court discretionary authority to order sanctions that it deems just after first determining that a party has failed to comply with an order to provide

discovery. In the present case, the trial court did not find that either defendant failed to comply with a discovery order. Rather, after conducting several hearings and requiring defendants to provide sworn statements documenting their efforts to search for and locate ESI, it determined that both defendants had duly provided the records in their possession and found no evidence that they intentionally destroyed or failed to preserve ESI.

Plaintiffs principally argue that defendants, through their agents, employees, and representatives, did not take reasonable steps to preserve ESI in anticipation of litigation. See MCR 2.313(D). Under MCR 2.313, if the trial court determines that a party acted with the intent to deprive another party of the use of information in the litigation by not preserving ESI, the court has discretion to order an appropriate remedy, such as an instruction that it may be presumed that the information was unfavorable to the party withholding discovery, or a default judgment against the noncompliant party. MCR 2.313(D)(2). In this case, however, the trial court, after reviewing the affidavits of TCF Bank employees, which detailed the bank's efforts to search for and secure ESI, concluded that the bank had complied with the discovery requests and had not failed to preserve ESI.

The trial court explored this matter over the course of three hearings held between January and March 2022. At the hearing on January 13, 2022, defense counsel represented that he had searched French's computer hard drive himself, which contained nine e-mails relevant to this action and the portion of French's drive pertaining to the United States Department of Agriculture, which acquired an interest in the subject property following a foreclosure. Defense counsel further represented that TCF Bank did everything it could to search for the information that plaintiffs requested. The trial court adjourned that hearing and directed defense counsel to continue searching for the requested information and to provide documentation of the efforts to locate the information. At the next hearing on January 27, 2022, defense counsel represented that TCF Bank's entire server was searched. The trial court was unwilling to accept defense counsel's blanket assertions, so it required counsel to produce sworn affidavits from TCF Bank employees confirming exactly what was searched and the scope of the search conducted, and to produce a log detailing any documents that were not produced because they were subject to the attorney-client privilege. At the final hearing on March 24, 2022, after considering the affidavits submitted from TCF employees, the trial court found no ground for concluding that TCF Bank withheld ESI or failed to make necessary efforts to locate requested e-mails. The trial court also implicitly determined that TCF Bank did not act intentionally to withhold information from plaintiffs nor failed to preserve ESI. These findings are supported by the record.

French testified in his deposition that he generated several e-mails relating to the subject property, which he brought to his deposition. French also testified that, following a conversation with his superior, Larry Czekaj, in March 2021, regarding the potential for litigation, he preserved all of his e-mails, text messages, and other documentation he had regarding the sale and marketing of the subject property. French also stated that he and another TCF employee, Catherine Plichta, were the only employees at TCF Bank who would have possessed any e-mails related to the property, and that his file did not contain any e-mails other than what he had already produced. Regarding e-mails between himself and DeShano, French stated, "I have none. I don't save emails." French further explained that it was not "standard practice" within the bank for e-mails to be saved as part of an REO file. Any e-mails that French had written would be on the HNB server, and French searched the server in March 2020 for any e-mails between himself and Gazian,

but because a lot of e-mails were lost in the bank's merger, his search did not produce anything further. French initially denied having any text messages on his personal cell phone between himself and DeShano, but later conceded that he discovered one text message that he sent to DeShano, which he forwarded to HNB's counsel. French denied that he deleted or extracted any material from his laptop computer before leaving his employment with TCF Bank.

DeShano testified that she did not personally maintain the file for the subject property for Remax, which she believed would include the offers to purchase, the listing documents, and the closing documents. DeShano testified that it is not common practice at Remax for her e-mails to be included in the file for each property. DeShano also explained that she did not communicate with French by e-mail because they would talk over the phone, but in any event, she did not have any e-mails for the relevant time period in 2019 because her iPad was hacked and, at some point in 2020, before this action was filed, she deleted all of her e-mails, except for one year, "so anything from 2019 is gone."

In sum, the record establishes that defendants provided plaintiffs with many e-mail communications requested in discovery, but that some e-mails may not have been preserved before plaintiffs filed this action in December 2020, either because they were deleted under TCF Bank's 90-day retention policy, or because of circumstances related to the merger with HNB. The record indicates that DeShano, before becoming aware of this action, deleted all of her e-mails after her iPad was hacked. The trial court carefully considered the matter at three separate hearings. It explored the scope of discovery already provided and required defendants to utilize IT staff to determine whether any additional information related to this action could be located or recovered, and it required defendants to document the efforts by IT staff to search and locate any additional records that had not already been produced. The affidavits and other evidence submitted to the court factually support the trial court's findings that (1) no evidence established that ESI should have but failed to preserve evidence in anticipation of litigation or lost such because a party failed to take reasonable steps to preserve it, (2) defendants provided all available ESI requested in discovery, and (3) defendants, their agents, and employees, did not act with the intention to destroy or withhold ESI from plaintiffs. Accordingly, the trial court did not abuse its discretion by denying plaintiffs' motion to compel further discovery or by declining to impose sanctions.

III. LIMITATIONS ON DISCOVERY AND DISCOVERY DEADLINE

Plaintiffs also argue that the trial court erred by denying their motions for additional discovery and to extend the discovery deadline. We disagree.

We review for an abuse of discretion a trial court's decision regarding discovery matters, including whether to extend discovery. *Decker v Trux R Us, Inc*, 307 Mich App 472, 478; 861 NW2d 59 (2014). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. MCR 2.301(B)(1) provides that "the time for completion of discovery shall be set by an order entered under MCR 2.401(B)." MCR 2.301(B)(2) specifies that "[i]n an action in which discovery is available only on leave of the court or by stipulation, the order or stipulation shall set a time for completion of discovery." Additionally, MCR 2.301(C) provides that the trial court "may control the scope, order, and amount of discovery, consistent with these rules."

Plaintiffs argue that the trial court abused its discretion (1) by not extending the 90-day discovery period that it previously ordered, and (2) by not allowing for additional discovery where HNB did not timely identify and produce its IT employees, preventing plaintiffs from deposing them, and where HNB withheld ESI in the form of e-mails between French and DeShano. As an initial matter, French testified that he produced all e-mails that he had in his file for the property, and he denied that there were any e-mails between him and DeShano because they conducted their business over the telephone. As discussed earlier, the trial court did not abuse its discretion by finding that defendants did not fail to comply with discovery by failing to diligently search for and produce requested ESI. Therefore, we reject any argument by plaintiffs that they were entitled to additional discovery because French acted to obfuscate and withhold discovery.

Similarly, while plaintiffs criticize HNB for not disclosing the names of their IT workers earlier in the 90-day discovery period, it is undisputed that none of these individuals had personal knowledge of any facts related to this case. They became relevant only after plaintiffs filed their motion to compel discovery and the trial court requested that HNB produce affidavits from employees documenting their efforts to locate the requested ESI. Because none of these individuals had personal knowledge of any facts relevant to plaintiffs' claims, the trial court had discretion to only require them to document in an affidavit where and how they searched for any additional ESI to permit the court to determine whether defendants duly complied with plaintiffs' requested discovery. While plaintiffs argue that they should be given the opportunity to cross-examine the IT staff, considering the scope of their affidavits in describing and detailing their efforts to locate requested ESI, the trial court had a sufficient factual record and principled basis for determining whether HNB engaged in the efforts necessary to satisfy plaintiffs' discovery requests. The court had the authority under MCR 2.301(C) to control and limit the scope of discovery. Considering the record developed on this issue and the detailed nature of the information in the affidavits, the trial court's decision not to allow additional time for further discovery fell soundly within the range of reasonable and principled outcomes. Accordingly, the trial court did not abuse its discretion by denying plaintiffs' motion.

IV. AMENDMENT OF FIRST AMENDED COMPLAINT

Plaintiffs next argue that the trial court erred by denying their motion for leave to file a second amended complaint to add claims for fraud against defendants. We disagree.

We review for an abuse of discretion a trial court's decision whether to allow a party to amend a complaint. *Sanders v Perfecting Church*, 303 Mich App 1, 8-9; 840 NW2d 401 (2013). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Decker*, 307 Mich App at 478.

Plaintiffs requested leave to amend their complaint under MCR 2.118(A)(2). The rule provides that "[l]eave shall be freely given when justice so requires." Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). MCR 2.116(I)(5) provides that "[i]f the grounds [for summary disposition] asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." See also *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). An amendment is not justified if it would be futile. *Id*.

Plaintiffs sought to add a claim for fraud. In *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012), our Supreme Court explained that, to prove actionable fraud, a plaintiff must be able to prove the following elements:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Candler v Heigho*, 208 Mich 115, 121;175 NW 141 (1919), overruled in part on other grounds by *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116 n 8; 313 NW2d 77 (1981) (citation and quotation marks omitted).]

In Michigan, a party must prove fraud by clear and convincing evidence and fraud may never be presumed. *Deschane v Klug*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 360677); slip op at 3. "Future promises, which are usually considered contractual, cannot be the basis of an action for fraud because the fraudulent statements must relate to past or existing facts." *Id*. (quotation marks and citation omitted).

Plaintiffs' proposed second amended complaint sought to allege a claim for fraud based on the allegation that DeShano falsely represented to Gazian that an offer on the property had been made and accepted, when she knew that the other offer had expired and that TCF Bank's counteroffer awaited acceptance. Plaintiffs further alleged that French misrepresented that a purchase agreement would be posted online for Gazian's signature, but that did not happen. Plaintiffs also accused DeShano and French of acting "in concert to prevent the execution of [p]laintiffs' offer to purchase while they pursued the finalization of [another person's] offer instead."

The trial court did not abuse its discretion by denying plaintiffs' motion to amend. Even accepting as true plaintiffs' assertion that DeShano falsely told Gazian that an offer on the property had already been accepted, the undisputed evidence established that Gazian did not rely on this alleged misrepresentation. He instead decided to deal with TCF Bank directly, which led him to French. Accordingly, any amendment to pursue a claim of fraud based on the alleged misrepresentation by DeShano would be futile.

Similarly, Gazian and French both testified that, when Gazian contacted French, they discussed that TCF Bank had already received an offer on the property, which had been accepted, and that any offer that Gazian made would be secondary. Accordingly, the evidence did not support a finding that French made a material misrepresentation on which he intended Gazian to rely. Moreover, to the extent that plaintiffs assert that French told Gazian that an offer to purchase would be posted online for his signature and this did not occur, this alleged statement involved a future promise, rather than a past or existing fact, and therefore, could not form the basis for a claim of fraud or misrepresentation. Therefore, the trial court did not err by determining that any amendment to allege fraud by French would also be futile. Accordingly, the trial court did not abuse its discretion by denying plaintiffs' motion to amend their first amended complaint.

V. SUMMARY DISPOSITION

In their final argument, plaintiffs contend that the trial court erred by granting defendants' renewed motions for summary disposition and dismissing all of plaintiffs' claims. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Summary disposition may be granted under MCR 2.116(C)(7) if "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of [the] statute of frauds[.]" In *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010), this Court explained:

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

"Whether a contract exists is a question of law to be reviewed de novo." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 212; 933 NW2d 363 (2019).

In *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019), our Supreme Court explained the standards for reviewing motions under MCR 2.116(C)(8) and (10):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).
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> A motion under MCR 2.116(C)(10), on the other hand, tests the factual sufficiency of a claim. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record

leaves open an issue upon which reasonable minds might differ." *Johnson*, 502 Mich at 761 (quotation marks, citation, and brackets omitted).

The trial court did not err by granting defendants' motions for summary disposition under MCR 2.116(C)(10) because plaintiffs failed to demonstrate the existence of genuine issues of material fact to support their claims for breach of contract, promissory estoppel, tortious interference with a contractual relationship or business expectancy, and violation of the ELCRA. First, the trial court did not err by holding that the evidence did not establish a genuine issue of material fact regarding plaintiffs' breach-of-contract claim. A claim for breach of contract requires a plaintiff to establish the following elements: (1) a contract, (2) a breach of that contract, and (3) damages inuring to the party who did not breach the contract. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016).

As the trial court observed, while French and Gazian did exchange several e-mails discussing Gazian's intention to make an offer on the property, the evidence did not support a finding that a contract to purchase the property ever arose. The evidence established that on June 5, 2019, French sent a copy of TCF Bank's standard purchase agreement to Gazian. On June 5, 2019, Gazian provided French a copy of the agreement that he was willing to sign, offering to purchase the property for $85,000, and advised French that if he agreed "to everything," French should sign the proposed agreement and return it to Gazian. French, however, advised Gazian that the parties were "far apart on the price." Gazian responded that he based his offer on "current value and liabilities." Gazian then offered a higher price, stating, "Ok, let's do $135k," but he wanted the bank to pay all associated taxes and followed up with another copy of a purchase agreement at that price. French ultimately agreed on a price of $130,000 and responded on June 6, 2019, that his listing agent, DeShano, would post the purchase agreement on "Dot-Loop" for everyone to sign. Although the parties continued to correspond regarding the purchase agreement, exchanging revised copies, they never entered into a final agreement signed by both Gazian and French. Further negotiations broke down on June 6, 2019, when French sent Gazian correspondence informing him that TCF Bank had another offer for the property. At that point, French informed Gazian that any offer Gazian made would be secondary until the end of the two-week inspection period for the primary offer.

Contract formation requires an offer and acceptance, and mutual acceptance by both parties as to all key terms. *Bodnar*, 327 Mich App at 213. Additionally, under Michigan's statute of frauds,[2] a contract for the sale of land must "be in writing and set forth the terms of the agreement with sufficient certainty and definiteness, specifying the identities of the parties and their mutual

[2] Michigan's statute of frauds, MCL 566.106, states:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

assent, the property which is the subject of the contract, the price of such property, and the consideration." *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999). The record in this case reflects that multiple drafts of a purchase agreement were submitted by Gazian, but a writing specifying the parties' mutual assent was never established and executed. We disagree with plaintiffs' argument that an e-mail sent by French on June 6, 2019, establishes a valid contract that satisfies the statute of frauds. Although the e-mail documented proposed terms that French and Gazian had discussed, and referenced a proposed purchase agreement, it also provided that it remained contingent upon the proposed agreement being fully executed. That never happened. The e-mail, therefore, does not satisfy the statute of frauds because it does not demonstrate the parties' mutual assent absent a fully executed purchase agreement. Evidence in this case did not establish the existence of a contract. Accordingly, the trial court did not err by dismissing plaintiffs' breach-of-contract claim.

To establish a claim of promissory estoppel, a plaintiff must present proof of the following elements:

> (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, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. [*Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC,* 330 Mich App 679, 713; 950 NW2d 502 (2019) (quotation marks and citation omitted).]

Promissory estoppel can bar application of the statute of frauds if applying it would be inequitable. *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 548; 619 NW2d 66 (2000). The bedrock principle underlying a claim for promissory estoppel is a clear and definite promise. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1983).

The thrust of plaintiffs' claim in their first amended complaint is that French, on behalf of TCF Bank, agreed in his June 6, 2019 e-mail that Gazian could purchase the property, and Gazian relied on this alleged promise such that it must be enforced to avoid an injustice. We disagree.

As explained in the analysis of plaintiffs' breach-of-contract claim, French never promised to sell the property to Gazian without a fully executed purchase agreement, which never came to fruition. Further, French advised Gazian that any offer would remain secondary to the primary offer to purchase made by another person. Because plaintiffs cannot establish that French made a clear and definite promise to Gazian that he could purchase the property without a fully executed purchase agreement, the trial court did not err by dismissing plaintiffs' claim for promissory estoppel.

To establish a prima facie claim of tortious interference with a business relationship or expectancy, a plaintiff must establish the following elements:

> (1) the existence of a valid business relationship 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. [*Hope*

Network Rehab Servs v Mich Catastrophic Claims Ass'n, 342 Mich App 236, 245-246; 994 NW2d 873 (2022) (quotation marks and citations omitted).]

In this case, plaintiffs alleged that DeShano "intentionally and improperly interfered" with the contractual agreement between TCF Bank and Gazian. DeShano testified that she told Gazian that TCF Bank had already received another offer for the property, which Gazian acknowledged in his deposition testimony. Gazian then decided to contact TCF Bank directly. While French and DeShano were thereafter involved in discussions about the property, there is no evidence that DeShano interfered with Gazian's alleged business relationship with TCF Bank or his expectancy in making an offer to purchase the property. Therefore, the trial court did not err by dismissing plaintiffs' tortious-interference claim.

Finally, plaintiffs argue that the trial court erred by dismissing their claim for ethnicity discrimination in a real estate transaction under the ELCRA. We disagree.

MCL 37.2502 provides, in pertinent part:

> (1) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of religion, race, color, national origin, age, sex, familial status, or marital status of a person or a person residing with that person:
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> (a) Refuse to engage in a real estate transaction with a person.
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> (b) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection with a real estate transaction.
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> (c) Refuse to receive from a person or transmit to a person a bona fide offer to engage in a real estate transaction.
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> (d) Refuse to negotiate for a real estate transaction with a person.
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> (e) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or knowingly fail to bring a property listing to a person's attention, or refuse to permit a person to inspect real property, or otherwise make unavailable or deny real property to a person.
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> (f) Make, print, circulate, post, mail, or otherwise cause to be made or published a statement, advertisement, notice, or sign, or use a form of application for a real estate transaction, or make a record of inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a preference, limitation, specification, or discrimination with respect to the real estate transaction.
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> (g) Offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith.

(h) Discriminate against a person in the brokering or appraising of real property.

The United States Court of Appeals for the Sixth Circuit considered the proper analysis of a claim under MCL 37.2502 in *Mencer v Princeton Square Apartments*, 228 F3d 631, 634-635 (CA 6, 2000), stating:

> Michigan has enacted an analogous fair housing provision, the [ELCRA], on which plaintiffs rely. In interpreting Michigan's fair housing law, we refer to its federal counterpart for guidance. In this Circuit, the same analysis applies to all federal fair housing violations claimed in this case. All turn on the three-part evidentiary standard first developed in the employment discrimination context by *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Courts have adapted this test to fair housing claims by requiring the plaintiff to first establish a prima facie case of discrimination. Then, in response, the defendant must offer a legitimate nondiscriminatory reason for the housing decision made. Finally, the plaintiff must show that the proffered reason is a pretext that masks discrimination.
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> A prima facie housing discrimination case is shown when the plaintiff proves: (1) that he or she is a member of a racial minority, (2) that he or she applied for and was qualified to rent or purchase certain property or housing, (3) that he or she was rejected, and (4) that the housing or rental property remained available thereafter. [Quotation marks and citations omitted.]

We find this analysis persuasive. Thus, to establish a prima facie claim of housing discrimination based on a person's national origin, plaintiffs were required to demonstrate the following elements: (1) Gazian was a member of a protected class, (2) Gazian applied for and was qualified to purchase the subject real estate, (3) regarding that real estate transaction, the defendants engaged in any of the conduct prohibited by MCL 37.2502(1)(a)-(h), and (4) the subject property remained available thereafter.

Plaintiffs do not dispute that the evidence established that French negotiated with Gazian and that the two eventually agreed on terms. The evidence further indicates that parties understood that acceptance required execution of a purchase agreement by the parties. Plaintiffs do not dispute that, before the parties executed a purchase agreement, French informed Gazian that the property was no longer available because the bank had another purchaser. This was a legitimate nondiscriminatory reason for not accepting Gazian's last offer. Plaintiffs argue that they established a genuine issue of material fact regarding whether this proffered reason served as a pretext for discrimination because they proffered evidence that French asked Gazian where he was from. French acknowledged in his deposition that at one point during his interactions with Gazian, he asked Gazian where he lived, and reminded him that the property was located in Michigan. At that point, Gazian shared that he lived in Texas and came originally from Armenia. Gazian agreed that French's questions were mostly directed at asking about Gazian's interest in the property when he was not from Michigan. More significantly, the evidence established that this conversation did

not occur until *after* French had informed Gazian that the property was no longer available because another purchaser existed with a pending primary interest in purchasing the property making plaintiffs' purchase interest secondary to it. Although plaintiffs suggest that French would have also noticed Gazian's strong Armenian accent in their earlier discussions, no evidence establishes that French expressed reluctance to discuss a potential transaction with Gazian after hearing his accent. On the contrary, evidence establishes that French continued to openly negotiate with Gazian, verbally and by way of e-mail. Considering this evidence, the trial court did not err by granting defendants' motion for summary disposition of plaintiffs' ELCRA claim under MCR 2.116(C)(10).

Affirmed.

/s/ James Robert Redford
/s/ Douglas B. Shapiro
/s/ Christopher P. Yates