STATE OF MICHIGAN

COURT OF APPEALS

ABRAHAM HUGHES,

Plaintiff-Appellee,

v

LISA NOCERINI and CITY OF WAYNE,

Defendants-Appellants.

UNPUBLISHED
February 15, 2024

Nos. 363019; 363288
Wayne Circuit Court
LC No. 22-002632-NZ

Before: CAVANAGH, P.J., and RICK and PATEL, JJ.

PER CURIAM.

These consolidated interlocutory appeals arise from an employment dispute. In Docket No. 363019, defendants, Lisa Nocerini and the City of Wayne (the city), appeal by right the trial court's order denying defendants' motion for summary disposition on the basis of governmental immunity under MCR 2.116(C)(7). In Docket No. 363288, defendants appeal by leave granted the same order, which denied defendants' motion for summary disposition on plaintiff's breach-of-implied-contract claim pursuant to MCR 2.116(C)(8).[1] We reverse and remand for further proceedings.

I. BACKGROUND

This case arises from the city's process for hiring a new police chief in 2019. Under the city's charter, the police chief was an administrative officer of the city. As the city manager, Nocerini was responsible to appoint all administrative officers of the city, except city attorney, to an indefinite term, and the appointments were subject to confirmation by the city council. But the charter did not authorize the city manager to enter into a contract on behalf of the city; only the city council could execute contracts.

[1] This Court entered a single order granting the application for leave to appeal and consolidating the appeals in Docket Nos. 363019 and 363288. *Hughes v Nocerini*, unpublished order of the Court of Appeals, entered March 10, 2023 (Docket No. 363288).

Plaintiff joined the city's police department in 2002, and was promoted to the rank of sergeant in 2017. In 2018, the police chief resigned and Ryan Strong, a member of the police department, was named acting police chief. In early December 2018, the city agreed to hire the next police chief from within the department. Thereafter, Nocerini told plaintiff that she was dissatisfied with Strong's performance and did not plan to appoint Strong as police chief. Plaintiff and Strong were the only applicants for the police chief position. At a January 15, 2019 city council meeting, Nocerini told the city council that she did not have any experience hiring a police chief. Nocerini recommended that the city hire a third party, Empco, Inc., to evaluate the candidates and recommend a new police chief. At the same meeting, the city council approved the hiring of Empco for that purpose. Empco was tasked with administering an objective test to the candidates and recommending the candidate with the higher test score for the police-chief position, without taking any subjective criteria into consideration.

On February 26, 2019, plaintiff and Strong attended an orientation with Empco regarding the hiring process. Empco employees told plaintiff and Strong that only objective test results would be used to recommend a new police chief. On March 7, 2019, plaintiff and Strong completed the testing with Empco. Strong received a score of 89.62, and plaintiff received a score of 87.48. On March 13, 2019, Nocerini told plaintiff that Strong received a higher test score and thus Strong was being appointed police chief. The next day, "a third-party" told plaintiff that plaintiff had actually received the higher score on the Empco testing. On April 3, 2019, plaintiff met with an Empco employee at the Empco office, and that employee told plaintiff that Nocerini had changed the scoring criteria between the orientation and testing to include subjective components determined by her. According to the Empco employee, plaintiff would have been the higher-scoring candidate but for the criteria changes.

In 2021, plaintiff filed suit against the Wayne City Council, Nocerini, and other city employees in federal district court alleging both federal constitutional claims and state-law claims. The district court granted summary judgment in favor of the individual defendants and the city on plaintiff's federal-law claims. Although the district court denied summary judgment on plaintiff's state-law claims, the district court declined to exercise supplemental jurisdiction to adjudicate the state-law claims after all federal-law claims had been dismissed and thus dismissed the state court claims without prejudice.

On March 7, 2022, plaintiff filed a two-count complaint in this case alleging a claim of tortious interference with a business relationship against Nocerini and a breach of implied contract against the city. Plaintiff asserted that he had a business relationship with the city that included a "probability of promotion to higher ranks[,]" up to and including chief of police. Plaintiff contended that Nocerini interfered with his business relationship by changing the criteria for hiring a police chief as part of a quid-pro-quo agreement Nocerini made with Strong. Plaintiff alleged Strong was promoted to the police-chief position in exchange for arresting and recommending criminal charges against a citizen, Mark Blackwell ("Blackwell"), who criticized Nocerini's job performance at city council meetings and other public forums. Nocerini had allegedly tried to persuade the former police chief to arrest Blackwell for stalking and harassment, but the former police chief declined. On February 13, 2019, a warrant for the arrest of Blackwell was submitted to the Wayne County Prosecutor's Office. Plaintiff alleged that acting-chief Strong personally interceded on Nocerini's behalf to obtain the arrest warrant. Plaintiff asserted that Nocerini interfered in his business relationship with the city for her own personal gain and, as a result, he

was deprived of a position he had earned under the objective hiring process established by the city. Plaintiff further alleged that there was an implied contract between him and the city wherein plaintiff agreed to enter into the city's hiring process in exchange for the city's promise to confirm as police chief only the candidate who scored higher on the objective criteria of the Empco testing. Plaintiff alleged that the city breached the implied contract by allowing the hiring process to be corrupted and hiring the candidate who scored lower on the objective testing.

In lieu of filing an answer to plaintiff's complaint, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (8). Defendants argued that Nocerini was entitled to absolute immunity under MCL 691.1407(5) because she was acting within the scope of her authority as the highest-appointed executive official for the city when she appointed a police chief. Defendants further argued that plaintiff could not successfully plead a claim for tortious interference because he could not establish a valid business expectancy to a discretionary appointment to police chief and Nocerini's appointment of Strong was not wrongful per se or done with malice. Defendants also argued that plaintiff could not successfully plead a claim of breach of implied-contract against the city because the city manager is granted the discretion to appoint a police chief and thus any alleged contract that was contrary to this discretionary authority must be express, not implied. Finally, defendants argued that plaintiff was collaterally estopped from bringing a contractual claim against the city because the federal district court held that plaintiff could not establish that he had a right to be appointed police chief.

In response, plaintiff argued that Nocerini was not immune from the tortious-interference claim because engaging in the quid-pro-quo appointment of a police chief to silence a political opponent fell outside the scope of the city manager's duties. Plaintiff further argued that he had successfully pleaded an implied-contract claim because there was an agreement that he would undergo the hiring process in exchange for being considered for the police-chief position under the objective criteria of the Empco testing. Plaintiff asserted that he could establish that the city breached that contract when it approved the hiring of the candidate who achieved the lower score in the Empco testing. Plaintiff also argued that he could not be collaterally estopped from bringing his state-law contractual claim against the city because those claims were never decided by the federal district court. Plaintiff maintained the district court ruled that plaintiff could not establish a constitutional right to the police-chief position, which is a different standard than the one used to determine whether a contract has been breached.

The trial court dispensed with oral argument and issued an opinion and order denying defendants' motion for summary disposition. Notably, the trial court did not differentiate between plaintiff's claim against Nocerini and plaintiff's claim against the city. The court concluded that it was premature to grant summary disposition in favor of defendants on the pleadings because factual development could show that Nocerini exceeded the scope of her authority, that plaintiff had an expectancy to the police-chief position based on the terms of the hiring process, and that the city breached the terms it set for the hiring process. These appeals followed.

After plaintiff filed his appeals in this case, the United States Court of Appeals for the Sixth Circuit affirmed the trial court's dismissal of plaintiff's federal due-process claims. *Hughes v City of Wayne*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued April 26, 2023 (Case No. 22-1178). The Sixth Circuit concluded that plaintiff had not pleaded

that either Nocerini or the city made any promise to plaintiff regarding the hiring process that would vest in plaintiff a property right to the police-chief position. *Id*. at 10.

II. STANDARDS OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). We also review de novo questions of government immunity. *Petersen Fin LLC v Kentwood*, 326 Mich App 433, 441; 928 NW2d 245 (2018).

Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred because of immunity granted under the law. *Moraccini v City of Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). We consider all documentary evidence in a light most favorable to the nonmoving party under MCR 2.116(C)(7). *Id*. "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Id*. (cleaned up). "But when a relevant factual dispute does exist, summary disposition is not appropriate." *Id*.

"A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint." *El-Khalil*, 504 Mich at 159. We must accept all factual allegations as true and review the matter on the pleadings alone. *Id*. at 160. The grant of a motion under MCR 2.116(C)(8) is only appropriate "when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*.

III. DOCKET NO. 363109

A. THE CITY

Defendants argue that the city is immune from a claim of tortious interference with a business expectancy. We agree.

The governmental tort liability act, (GTLA), MCL 691.1401 et seq., grants a governmental agency immunity from tort liability if the agency was engaged in the exercise or discharge of a governmental function, subject to certain enumerated exceptions. MCL 691.1407(1); *Bernardoni v City of Saginaw*, 499 Mich 470, 473; 886 NW2d 109 (2016). A city is a governmental entity for purposes of the GTLA. *Moraccini*, 296 Mich App at 389. A governmental entity's hiring decisions are a governmental function. *Booth Newspapers Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 225; 507 NW2d 422 (1993). Because the city was a governmental entity engaged in a governmental function, plaintiff must show that an exception to governmental immunity applies to the facts of this case to recover from the city in tort.

The GTLA has six exceptions to governmental immunity for governmental entities: "the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Odom v Wayne Cty*, 482 Mich 459, 478 n 62; 760 NW2d 217. It is undisputed that none of these statutory exceptions apply to plaintiff's claim for tortious

interference with a business expectancy, which is an intentional tort. See *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010).

The trial court's opinion and order denying defendants' motion for summary disposition creates some confusion regarding this claim because the trial court referred to the tortious interference with a business expectancy claim as having been brought against defendants. But plaintiff did not bring a claim of tortious interference with a business expectancy against the city; he brought the claim against Nocerini only. The city cannot be held liable for Nocerini's tortious actions. See *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995) (holding that a governmental entity "cannot be held liable for the intentional torts of its employees."). Accordingly, the city is immune from a claim of tortious interference with a business expectancy.

B. NOCERINI

Next, defendants argue that Nocerini has absolute immunity from plaintiff's tortious-interference-with-a-business-expectancy claim.[2] We agree.

In general, governmental employees are immune from civil tort liability with limited exceptions. MCL 691.1407(2). Under MCL 691.1407(3), one such exception is that governmental employees cannot claim governmental immunity from intentional tort claims under most circumstances. *Odom*, 482 Mich at 470. But MCL 691.1407(5) provides absolute immunity from tort liability to certain governmental employees acting within the scope of their authority:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

To show entitlement to absolute immunity from tort liability, a governmental employee must establish "(1) that he or she is a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) that he or she acted within the scope of his or her judicial, legislative, or executive authority." *Petipren v Jaskowski*, 494 Mich 190, 204; 833 NW2d 247 (2013).

[2] Defendants moved for summary disposition on plaintiff's tortious-interference-with-a-business-expectancy claim pursuant to both MCR 2.116(C)(7) and MCR 2.116(C)(8). The trial court denied defendants' motion under both subrules, but defendants have not appealed the trial court's order denying Nocerini summary disposition on plaintiff's tortious-interference-with-a-business-expectancy claim under MCR 2.116(C)(8). In Docket No. 363019, defendants appeal by right the trial court's order denying Nocerini summary disposition under MCR 2.116(C)(7), only. And in Docket No. 363388, defendants appeal by leave granted the trial court's order denying the city summary disposition on plaintiff's implied-contract claim pursuant to MCR 2.116(C)(8). Accordingly, the only issue before this Court regarding the claim against Nocerini is whether she absolute immunity.

Governmental officials bear the burden of establishing entitlement to absolute immunity. *Id*. at 204. It is undisputed that Nocerini, as the city manager, is the highest appointive executive official. But "the GTLA does not define what it means to 'act[] within the scope of his or her . . . executive authority.' " *Id*. at 205. Our Supreme Court has identified an unexhaustive list of factors to consider in determining whether an act was within the scope of an official's executive authority, "including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." *Id*. at 206 (cleaned up). "This objective inquiry does not include analysis of the actor's subjective state of mind. An official's motive or intent has no bearing on the scope of his or her executive authority." *Id*. (citation omitted). Whether an official acts with "improper motive and purpose" or an "unlawful intent" is "meaningless." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 594; 640 NW2d 321 (2001).

In this case, the city's charter gives the city manager the authority to appoint all administrative officers, except for the city attorney. According to the city charter, the police chief is an administrative officer of the city. Therefore, Nocerini established that the appointment of a police chief is an action that falls within the scope of her authority as the city manager. Plaintiff alleges that Nocerini acted outside the scope of her authority when appointing Strong for the position of police chief because Strong's appointment was the product of a quid-pro-quo arrangement between Nocerini and Strong. But whether Nocerini acted with "improper motive and purpose" or an "unlawful intent" is "meaningless." *Armstrong*, 248 Mich App 594. As our Supreme Court held in *American Transmissions Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997), the plain language of MCL 691.1407(5) does not contain a "malevolent-heart" exception to the broad grant of absolute immunity. While our Supreme Court has instructed that a number of factors must be considered to determine whether an official is acting with the scope of his or her executive authority, none of those factors include motive or an inquiry into the official's subjective state of mind. *Id*. Accordingly, the trial court erred by denying defendants' motion for summary disposition on plaintiff's tortious-interference-with-a-business-expectancy claim against Nocerini.

IV. DOCKET NO. 363288

Defendants argue that plaintiff cannot state a claim of breach of implied contract against the city. We agree.

Although governmental entities are immune from tort liability, "the GTLA does not bar a properly pleaded contract claim." *In re Bradley Estate*, 494 Mich 367, 387; 835 NW2d 545 (2013). "Courts recognize implied contracts where parties assume obligations by their conduct." *Williams v Litton Sys, Inc*, 433 Mich 755, 758; 449 NW2d 669 (1989). As our Supreme Court has explained, "[t]here are two kinds of implied contracts; one implied in fact and the other implied in law." *Detroit v Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949).

"A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended." *In re McKim Estate*, 238 Mich App 453, 458; 606 NW2d 30 (1999) (cleaned up). "A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is

inequitable, absent reasonable compensation." *Id*. (cleaned up). An implied-in-law contract "does not require a meeting of minds." *Highland Park v State Land Bank Auth*, 340 Mich App 593, 604; 986 NW2d 638 (2022). Generally, a cause of action based on a contract implied in law is referred to as a claim for unjust enrichment. See *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1994) (holding "the law operates to imply a contract in order to prevent unjust enrichment.").

An implied-in-fact contract exists when "the intention as to [the contract] is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." *Erickson v Goodell Oil Co*, 384 Mich 207, 212; 180 NW2d 798 (1970). Although the existence of an implied-in-fact contract is generally a question of fact, it can be a question of law when no essential facts are in dispute. *Id*.

In this case, plaintiff has simply pleaded a claim for breach of implied contract, without specifying whether the contract was implied in law or implied in fact. "[R]egardless of how a claim is labeled, courts must consider the entire claim, including the available damages, to determine the nature of the liability imposed. *In re Bradley Estate*, 494 Mich at 388. Plaintiff has not alleged that he provided the city with an uncompensated benefit that it would be inequitable to allow the city to keep, which would indicate an implied-in-law contract. Rather, plaintiff has alleged that there was an implied contract between plaintiff and the city under which the city was obligated to act upon the results of the Empco testing and that the city did not honor that contract. Accordingly, plaintiff's claim is based on an implied-in-fact contract.

Initially, we note that defendants primarily rely on the city charter, city council meeting minutes, and a contract between the city and Empco to support their argument that the trial court erred by denying defendants' motion for summary disposition under MCR 2.116(C)(8) on plaintiff's claim against the city for breach of implied contract. Defendants contend that the city charter, the meeting minutes, and the contract approved by council are public documents referenced in the complaint and thus are part of the pleadings pursuant to MCR 2.113(C)(1)(a), (b), and (2). Although plaintiff referenced these documents in his complaint, none were *attached* to the complaint or any other pleading.[3] And the limited exception outlined in MCR 2.113(C)(2) is inapplicable here because plaintiff's implied contract claim is not based on a written instrument, such as a contract.[4] See *Bodnar v St John Providence, Inc*, 327 Mich App 203, 212, 933 NW2d 363 (2019) ("[W]hen an action is premised on a written contract, the contract generally must be attached to the complaint and thus becomes part of the pleadings."). Moreover, defendants urge us to consider the documents as substantive evidence that contradicts plaintiff's factual allegations in his complaint. But our Supreme Court has instructed that documentary evidence referenced in

[3] While the documents were attached to defendants' motion for summary disposition, a motion for summary disposition is not a pleading. See MCR 2.110(A) (defining a pleading as either a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to one of those pleadings, or a reply to an answer.)

[4] Subrules (C)(1)(a) and (b) apply only when a "claim or defense is based on a written instrument[.]"

a complaint should not be considered as "substantive evidence sufficient to dismiss plaintiff[s'] claim[s] under MCR 2.116(C)(8)." *El-Khalil*, 504 Mich at 160. Accordingly, we will not consider these documents in evaluating plaintiff's breach of implied contract claim.

Like any other contract, an implied contract must satisfy the following elements: (1) parties competent to contract; (2) a proper subject matter; (3) consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). "An essential element of a contract is legal consideration." *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000). "In order for consideration to exist, there must be a bargained-for exchange—a benefit on one side, or a detriment suffered, or service done on the other." *Bank of America NA v First American Title Ins Co*, 499 Mich 74, 101; 878 NW2d 816 (2016). "The essence of consideration . . . is legal detriment that has been bargained for and exchanged for the promise. The two parties must have agreed and intended that the benefits each derived be the consideration for a contract." *Higgins v Monroe Evening News*, 404 Mich 1, 20-21; 272 NW2d 537 (1978) (MOODY, J. joined by WILLIAMS AND COLEMAN, JJ.) (citation omitted).

In this case, we believe that plaintiff has failed to state a claim upon which relief can be granted because plaintiff cannot establish the element of consideration. The police chief position was open to internal candidates within the police department, and plaintiff was an internal candidate. Plaintiff alleges that the city entered into an implied contract to promote the candidate with the highest "score-and-score-only evaluation conducted by Empco" to police chief. But plaintiff's candidacy did not offer any legally cognizable value to the city. Plaintiff alleges that he brought valuable consideration into the transaction because he brought integrity to the process by providing the city with an additional candidate "and the opportunity for the City to benefit substantially from Plaintiff's experience, skill level and reputation . . . ." This is not valid consideration. Plaintiff cannot establish consideration on the basis of his own belief that he was the most qualified candidate for the position. There was no bargained-for exchange. Because plaintiff cannot establish the element of consideration, his breach of implied-contract claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery and thus the trial court erred by denying defendants' motion for summary disposition under MCR 2.116(C)(8). See *El-Khalil*, 504 Mich at 160.[5]

Finally, plaintiff argues for the first time on appeal that he should be allowed to amend his complaint to cure any deficiencies. "MCR 2.116(I)(5) requires that if summary disposition is appropriate under MCR 2.116(C)(8), as is the case here, plaintiffs shall be given the opportunity to amend their pleadings, unless the amendment would be futile." *Ghanam v Does*, 303 Mich App 522, 543; 845 NW2d 128 (2014). "An amendment is futile if, among other things, it is legally insufficient on its face." *Wolfenbarger v Wright*, 336 Mich App 1, 21; 969 NW2d 518 (2021). Amendment would be futile in this case because plaintiff cannot overcome the fact that the alleged implied contract lacked consideration.

[5] The city also argues that plaintiff is collaterally estopped from bringing a claim for breach of implied contract against the city based on the outcome of plaintiff's federal law claims. Because we conclude that plaintiff cannot state a claim for breach of implied contract upon which relief can be granted, it is not necessary for us to address this argument.

V. CONCLUSION

The trial court erred when it denied defendants' motion for summary disposition. Nocerini is entitled to summary disposition under MCR 2.116(C)(7) on the basis of absolute immunity, and the city is entitled to summary disposition under MCR 2.116(C)(8) because plaintiff cannot state a claim for breach of implied contract upon which relief can be granted.

Docket Nos. 363019 and 363288 are reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michelle M. Rick
/s/ Sima G. Patel