STATE OF MICHIGAN

COURT OF APPEALS

PONTIAC GENERAL HOSPITAL d/b/a NORTH OAKLAND MEDICAL CENTERS,

Plaintiff/Counterdefendant-Appellant,

v

CHUBB CORPORATION a/k/a CHUBB GROUP OF INSURANCE COMPANIES,

Defendant,

and

FEDERAL INSURANCE COMPANY,

Defendant/Counterplaintiff,

and

SEA LTD.,

Defendant-Appellee,

and

CHUBB & SON, NATIONAL CITY INSURANCE GROUP, INC., and CHARLES LOUIS KREITL,

Defendants.

UNPUBLISHED
July 18, 2006

No. 267234
Oakland Circuit Court
LC No. 2005-065408-CK

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant SEA Ltd. ("defendant").[1] We affirm but remand for consideration of plaintiff's request to amend the pleadings.

Plaintiff purchased a policy of insurance from defendants Chubb Corporation, Federal Insurance Company, Chubb & Son, and National City Insurance Group (collectively "insurance defendants"). Among other things, the policy insured against property loss and the loss of business income. In August 2003, plaintiff experienced a power outage, losing all electrical power. Plaintiff's emergency generator failed during the outage, necessitating an evacuation of plaintiff's hospital facility. According to plaintiff, the power outage and generator failure resulted in a substantial loss of property and business income. Plaintiff filed a claim with insurance defendants seeking compensation for these losses.

Insurance defendants retained defendant, a forensic engineering firm, to investigate the failure of plaintiff's emergency generator. Defendant erroneously reported to insurance defendants that plaintiff had evacuated its hospital facility *before* the failure of the emergency generator. On the basis of this erroneous report, insurance defendants initially declined to pay plaintiff for its losses. Insurance defendants later learned that defendant's initial report had been incorrect, and that the evacuation had occurred only *after* the emergency generator failed. Insurance defendants ultimately paid plaintiff's claim.

Plaintiff asserted that defendant had intentionally failed to investigate the emergency generator, resulting in transmission of the erroneous report to insurance defendants. According to plaintiff, although defendant had represented that it would examine the generator and electrical equipment, it never examined the generator or physical equipment at all. Instead, plaintiff contended that defendant merely interviewed certain low-level hospital employees and based its report to insurance defendants solely on the statements of these individuals.

Plaintiff contended that defendant had tortiously interfered with the insurance contract. Plaintiff asserted that defendant had induced insurance defendants to delay payment of plaintiff's legitimate claim, and thus to breach the contract. Plaintiff also argued that defendant had fraudulently misrepresented its intentions with respect to its investigation activities. Plaintiff argued that contrary to defendant's representations, defendant had never intended to examine the generator or electrical equipment in good faith. The trial court dismissed plaintiff's tortious interference and fraudulent misrepresentation claims pursuant to MCR 2.116(C)(8).

We review de novo a trial court's decision on a motion for summary disposition. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When deciding such a motion, a court considers only the pleadings, accepts all well-pleaded factual allegations as true, and construes the allegations in a light most favorable to the

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[1] Only defendant SEA Ltd. is a party to this appeal. The claims against all other defendants were dismissed by stipulation of the parties. Defendant Federal Insurance Company's counterclaim was dismissed by stipulation as well.

nonmoving party. *Id.* Summary disposition is proper under (C)(8) only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

Plaintiff argues that the trial court erred in dismissing its claim of tortious interference with a contract. We disagree. "The elements of tortious interference with a contract are: '(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant.'" *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 382; 689 NW2d 145 (2004), quoting *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). The third element requires a plaintiff to show "'the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights . . . of another.'" *CMI Int'l Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI Int'l, supra* at 131.

Here, the complaint sets forth the first two elements of a tortious interference claim. First, the complaint sufficiently alleges the existence of an insurance contract between plaintiff and insurance defendants. Indeed, it is undisputed that the insurance contract was in full force and effect at the time of the incident underlying this case. Second, the complaint alleges that the delay in timely paying plaintiff's claim constituted a breach of the insurance contract.

However, the complaint does not sufficiently allege that defendant acted with the requisite intent or purpose of interfering with the insurance contract. The complaint does not indicate any specific intentional or deliberate wrongful act committed by defendant. *Id.* Nor does the complaint suggest that defendant acted with malice or for the particular purpose of invading plaintiff's contractual rights. *Id.* The complaint states merely that defendant

> intentionally and improperly interfered with [plaintiff's] insurance contract with the Insurance Defendants by inducing or causing the Insurance Defendants to breach the insurance contract with [plaintiff]. Specifically, [defendant] (a) deceived [plaintiff] about its purpose in visiting [plaintiff's hospital facility]; (b) failed to inspect and/or otherwise investigate the breakdown of the emergency generator; (c) failed to question appropriate senior level executives and, instead, relied upon statements that were improperly elicited from persons not present during the power outage and/or that had no decision making authority; and (d) reached an unwarranted and false conclusion that [plaintiff] evacuated the Main Facility prior to the breakdown of the emergency generator.

Such conclusory allegations, while suggestive that defendant performed its investigation negligently, simply do not establish the intent level required to state a legally cognizable claim of tortious interference with a contract.

We note that discovery was not complete at the time of the trial court's ruling in this case. Because a motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings rather than the factual sufficiency of the claim, it is axiomatic that a plaintiff is not required to present all necessary factual proof to survive a (C)(8) motion. However, "[t]he mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action." *NuVision, Inc v Dunscombe*, 163 Mich App 674, 681; 415

NW2d 234 (1987), citing *Koebke v La Buda*, 339 Mich 569, 573; 64 NW2d 914 (1954); see also *Pursell v Wolverine-Pentronix, Inc*, 44 Mich App 416, 422; 205 NW2d 504 (1973). Indeed, all complaints must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). Here, plaintiff asserted that defendant had "intentionally and improperly interfered with [plaintiff's] insurance contract," but failed to put forth any facts to substantiate the allegedly intentional, purposeful, or deliberate nature of defendant's conduct. Because plaintiff's complaint was legally insufficient to state a claim for tortious interference with a contract, we affirm the trial court's grant of summary disposition on this issue.[2]

Plaintiff also argues that the trial court erred in granting summary disposition on its claim of fraudulent misrepresentation. We disagree. The elements of fraudulent misrepresentation are:

> (1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. [*Campbell v Sullins*, 257 Mich App 179, 195; 667 NW2d 887 (2003).]

According to plaintiff, defendant represented that it would be investigating only the emergency generator and electrical equipment. Plaintiff asserts that it relied on this representation by allowing defendant to access the hospital facility. However, plaintiff was under a pre-existing contractual duty to allow defendant access to the facility. The contract of insurance specifically imposed on plaintiff the duties to "[c]ooperate with us in the investigation, settlement or handling of any claim," to "[a]uthorize us to obtain records or reports necessary for our investigation," and to "[a]s often as may be reasonably required, permit us to inspect the property . . . ." Therefore, plaintiff was already obligated to allow insurance defendants and their investigators to enter the hospital and gather information concerning the claim. Accordingly, plaintiff's act of granting defendant access to the hospital facilities cannot be used to establish reliance on defendant's representations.

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[2] We note that a plaintiff who is party to a contract cannot maintain a cause of action for tortious interference against another party to the same contract. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). Thus, if defendant was acting as the agent of insurance defendants, plaintiff's tortious interference claim must fail. *Id.* However, in light of our resolution above, we need not address this issue. Similarly, we decline to address whether defendant had a legitimate business interest in relying on the statements of plaintiff's low-level employees and in declining to fully investigate the emergency generator and electrical equipment. See *Wood v Herndon & Herndon Investigations, Inc*, 186 Mich App 495, 500; 465 NW2d 5 (1990) (holding that a party is not liable for tortious interference with a contract when that party's allegedly wrongful actions are motivated by legitimate business interests).

Finally, plaintiff argues that it should have been granted the opportunity to amend its complaint. "If a court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); see also MCR 2.116(I)(5) (providing that the trial 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"). The record does not indicate whether the trial court considered plaintiff's request to amend the complaint. Nor does the record conclusively indicate that amendment of the pleadings would necessarily be futile. We therefore remand to the trial court for consideration of whether plaintiff should be permitted to amend the complaint pursuant to MCR 2.116(I)(5) and MCR 2.118.

Affirmed but remanded for consideration of plaintiff's request to amend. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood