

2010-CA-00137 Rt

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59 L.Ed. 1056 (1915) 1

The Fair v. Kohler Dye and Specialty Co., 228 U.S. 22, 33 S.Ct. 410,
57 L.Ed. 716 (1913) 1

Msc.

RESTATEMENT 2D CONTRACTS. 2

LAW AND ARGUMENT

The City's argument that the Thompson's breach of contract claim is immune from suit because it is, in reality, a tortuous breach of contract claim, is erroneous.

The City argues that the Thompson's breach of contract claim is essentially a tortuous breach of contract claim and, thus, is barred by the Mississippi Tort Claims Act. This argument is specious.

It is well settled that the plaintiff is the master of his complaint. *See Healy v. Sea Gulf Specialty Co.*, 237 U.S. 479, 480, 35 S.Ct. 658, 659, 59 L.Ed. 1056 (1915); *The Fair v. Kohler Dye and Specialty Co.*, 228 U.S. 22, 23, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913). In this case, the Thompsons have not sued for tortuous breach of contract but for simple breach of contract. Mississippi law is clear that the Mississippi Tort Claims Act does not apply to actions for breach of contract. *Estate of Spiegel v. Western Sur. Co.*, 908 So.2d 859, 864 (Miss.App. 2005). The trial court's grant of summary judgment contained no grounds for its opinion. To the extent that it dismissed the Thompson's claim for breach of contract based on the City's argument that the Thompson's claims were barred by the MTCA, the order was in error.

The fact that this involves a contract claim is admitted by the City. On page 7 of its Brief, the City argues that this is not an eminent domain case because the Thompsons agreed to execute a warranty deed to the property in consideration of \$55,425.00. This is a contract and to the extent the Thompson's claims arise under this contract, these claims are not barred by the MTCA.

Dismissal was also inappropriate on the grounds of misrepresentation. “ If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.” RESTATEMENT 2D CONTRACTS. In this case, the Thompsons allege that in signing the contract at issue here, they were induced to do so by fraudulent misrepresentations made by the City.

The City argues that the Thompsons conceded in their complaint that the MTCA applies. However, the mere fact that the Thompsons referenced the MTCA in its complaint was not an admission that the MTCA applied to all of their claims. The Thompsons also sued for negligence and gross negligence – both claims to which the MTCA would apply. Therefore, the mere fact that the Thompsons complied with the notice requirements of the MTCA and alluded to same in their complaint does not mean that they have conceded that the Act applies to all of their claims. Indeed, the MTCA would have no application to the Thompson’s Section 1983 claim.

In this case, the City of Canton was taking the Thompson’s property using funds obtained from a Hazard Mitigation Grant Program via the Mississippi Emergency Management Agency. Once the City exercised its discretion to decide to purchase the Thompson’s property using these grant funds, the carrying out of the agreement and disbursement of such funds was ministerial. The Thompsons alleged that the City did not use ordinary care in carrying out the agreement to purchase the Thompson’s property in various ways including misrepresentations as to whether the Thompsons could or could not move their house to another property and by having the Thompsons sign over their

property to the City and thereby waive their ability to get additional funds from the ICC. The Thompsons suffered damages in that their house was appraised at \$73,900.00 (CP. 119) but they received only \$55,425.00 and a bill for \$7,640.00.

Had the City exercised ordinary care, the Thompsons would have received all that there were entitled to under the Hazard Mitigation Grant Program including the ICC funds.

The City has admitted that there are factual disputes in this case; for instance the Thompson's allegation that the City told them they could move their home and then reversed its position to declare that the Thompsons could not move their home. CP. 120. The City's position is that these disputes are immaterial inasmuch as the Thompsons' claims are barred by the Tort Claims Act. However, the law is clear that the City is not entitled to sovereign immunity in a contract dispute. The existence, then, of material issues of fact means that the trial court erred in granting summary judgment to the City.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, E. Michael Marks , Attorney for Appellants, certify that I have this day served a copy of Appellants ' Rebuttal Brief by United States mail, first class postage prepaid, to:

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And mailed the original and three copies for filing (along with a copy on CD-ROM in PDF format) to the Clerk of the Mississippi Appellate Courts at P.O. Box 249, Jackson, MS 39205.

This, the 22d day of October, 2010.

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