

STATE OF MICHIGAN
COURT OF APPEALS

MITCHELL CORPORATION OF OWOSSO,

Plaintiff-Appellant,

v

DEPARTMENT OF CONSUMER AND
INDUSTRY SERVICES, BUREAU OF
WORKERS AND UNEMPLOYMENT
COMPENSATION,

Defendant-Appellee.

FOR PUBLICATION

August 12, 2004

9:00 a.m.

No. 248321

Court of Claims

LC No. 02-219-MZ

Official Reported Version

Before: Zahra, P.J., and Talbot and Wilder, JJ.

WILDER, J.

In this action arising out of a memorandum of understanding between the parties, plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Facts and Proceedings

In October 2002, Mitchell Corporation of Owosso (Mitchell) filed a complaint in the Court of Claims against the Department of Consumer and Industry Services, Bureau of Worker's and Unemployment Compensation, alleging breach of contract (count one), and "unlawful taking" (count two). Plaintiff alleged that in July 1990, it entered into a memorandum of understanding with defendant regarding plaintiff's status as a self-insured employer for the purpose of its worker's compensation liability. The memorandum of understanding detailed that in exchange for granting plaintiff self-insured status, defendant required plaintiff to post a \$400,000 security, which plaintiff satisfied by obtaining a letter credit in that amount.

Plaintiff further alleged that in April 1998, it obtained worker's disability compensation insurance with a private insurer, the Hartford Insurance Company. Subsequently, on October 4, 2000, plaintiff filed a petition for bankruptcy under chapter 11 of the Bankruptcy Code, 11 USC

1101 *et seq.*, rendering plaintiff insolvent for purposes of the Worker's Disability Compensation Act.¹ Plaintiff stated in its complaint that at the time of its insolvency, multiple worker's disability compensation claims were pending against plaintiff, some of which accrued during the period when plaintiff was self-insured. Plaintiff alleged that after it became insolvent, the Self-Insurers' Security Fund² defended and settled the worker's compensation claims that arose during the time that plaintiff was a self-insured employer, drawing on the proceeds of the letter of credit that secured plaintiff's self-insured status. After all pending claims were resolved, plaintiff requested that defendant return the excess letter-of-credit funds to plaintiff. Defendant denied plaintiff's request.

On the basis of these facts, plaintiff alleged in count one of the complaint that defendant's refusal to refund the excess letter-of-credit funds in the absence of a pending claim constituted a breach of the memorandum of understanding. In count two, plaintiff alleged that defendant's retention of the unused funds was not authorized by statute or other legislative authority and, therefore, constituted a wrongful taking of plaintiff's property.

In lieu of filing an answer, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendant argued that plaintiff failed to state a claim upon which relief could be granted because defendant did not have control over the disbursement of the excess funds, which were held in the "Mitchell Corporation of Owosso Workers' Compensation Trust." Because the director of the bureau is one of three trustees of the trust, defendant argued that plaintiff had not sought recourse against the proper party.

Defendant also requested summary disposition of count one on the basis of MCR 2.116(C)(10) because it has authority, pursuant to administrative law and the memorandum of understanding, to retain the excess funds in anticipation of future worker's compensation claims. Additionally, defendant asserted that no statutory or contractual provision required it to return the excess funds. Defendant also moved for summary disposition of count two on the basis of MCR 2.116(C)(10), arguing that plaintiff's claim was more properly characterized as a claim of conversion and that plaintiff failed to demonstrate any right to the letter-of-credit funds, in light of the fact that defendant is the only named payee.

Although plaintiff opposed defendant's motion, the trial court granted it, stating that defendant's retention of the letter-of-credit funds did not violate the memorandum of understanding. The trial court opined that because the funds may be needed in the future to pay claims that accrued during the period of self-insurance, defendant has the authority to keep the

¹ See MCL 418.502.

² The Self-Insurers' Security Fund, legislatively created in MCL 418.501, can provide payments to an entitled employee when the employee's self-insured employer becomes insolvent. MCL 418.537(1). After making such payments, the fund has "all of the rights of the injured employee as a creditor of the insolvent employer to the extent of the benefits it paid." MCL 418.553. The fund's trustees have the right and obligation to obtain reimbursement from the insolvent employer for any funds paid on the employer's behalf. *Id.*

excess funds for future use. The trial court did not specifically address on the record defendant's arguments that plaintiff did not sue the proper party and failed to state a genuine issue of material fact concerning count two, but nevertheless dismissed plaintiff's suit in its entirety. Although the trial court stated on the record that its decision was based on MCR 2.116(C)(8), its order dismissing plaintiff's claims cites MCR 2.116(C)(10) as the basis for dismissal.

This appeal followed.³

II. Standard of Review

This Court reviews de novo the trial court's grant of a motion for summary disposition, *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004), as well as the questions involved in interpreting statutes and administrative rules, *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003), and contracts, *Wilkie v Auto Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

Because the trial court considered facts outside the pleadings in deciding defendant's motion, we treat the dismissal of plaintiff's claim as having been based on MCR 2.116(C)(10). *Velmer v Baraga Area Schools*, 430 Mich 385, 389; 424 NW2d 770 (1988).

III. Analysis

Plaintiff first contends that the trial court erred by granting defendant's motion for summary disposition because the memorandum of understanding and relevant portions of the Administrative Code do not provide defendant the discretion to retain the letter-of-credit funds indefinitely. We disagree.

MCL 418.611(1)(a) provides that, upon granting an employer the authority to be self-insured, the director of the Bureau of Worker's Disability Compensation may require the employer to furnish a bond or other security in an amount determined by the director. A self-insured employer may satisfy this requirement by obtaining an irrevocable letter of credit or one of the other forms of security listed in the statute. *Id.*

If a self-insured employer chooses to secure its self-insured status with a letter of credit, the employer, pursuant to 1999 AC, R 408.43q(3), must provide a memorandum of understanding that affirms the employer's acceptance of certain requirements, including that

the irrevocable letter of credit . . . is being offered with the understanding that if the bureau receives notice that the letter of credit will not be renewed, then the bureau, in its discretion, may, after 30 days from the date of the receipt of the notice, call the proceeds of the letter of credit and deposit the proceeds in the state treasury. And further, if in the judgment of the bureau, the letter of credit is

³ On appeal, plaintiff does not address count two of its complaint, and we consider that claim abandoned.

needed to cover any worker's disability compensation claims, then the proceeds of the letter of credit shall be called immediately and deposited in the state treasury for such purpose. [Rule 408.43q(3)(d).]

Although the parties first executed a memorandum of understanding in 1990, the parties state that they periodically executed updated memoranda of understanding, including the memorandum of understanding on which plaintiff now relies, executed in October 1998. In the 1998 memorandum of understanding, the parties agree, among other things, that

4. If the Bureau is notified that the Letter of Credit will not be renewed and a new Letter of Credit acceptable to the Bureau is not filed, the Bureau may, at its discretion and thirty or more days after it received the notice, draw on the Letter of Credit.

5. The Bureau may, at its discretion, draw on the Letter of Credit at any time if needed to pay any Michigan workers' disability compensation liability which is the Employer's responsibility.

6. All proceeds resulting from the Bureau drawing on the Letter of Credit shall be deposited with the State Treasurer and shall only be used to pay Michigan workers' disability compensation liability which is the Employer's responsibility.

In addition to requiring the memorandum of understanding, Rule 408.43q provides that

[i]f it is necessary for the director, under statute and bureau rules, to call the bond or other security, then a trust shall be established with the funds, unless the provider of the bond or other security elects to handle the claims directly and the bureau approves. If a trust is established, the funds shall be deposited in the state treasury and the state treasurer, as provided by section 551(7) of the act, shall be the custodian of the trust. . . . [R 408.43q(5).]

Pursuant to this rule, after drawing on plaintiff's letter of credit, defendant established the "Mitchell Corporation of Owosso Workers' Disability Compensation Trust Agreement" to govern use of the letter-of-credit funds. The trust agreement provides that the trust will terminate when the trust funds have been expended "or upon an express determination by the Trustees that no further claims remain to be paid, and that it is not probable that any remaining claims will be filed against the Trust Fund, whichever occurs first."⁴

⁴ Plaintiff claims in its reply to defendant's brief that the trust does not serve only to pay plaintiff's worker's compensation claims because the trust provides that, after the trust is terminated, any excess funds will be paid into the Self-Insurers' Security Fund and any future claims that are plaintiff's responsibility will be paid by re-funding the trust with funds from the Self-Insurers' Security Fund. Plaintiff did not properly preserve this argument, and we decline to

(continued...)

Plaintiff asserts that neither the memorandum of understanding nor Rule 408.43q(3)(d) gives defendant the discretion to retain the presently unused letter-of-credit funds. Rather, plaintiff claims, defendant has authority to determine only *when* the letter-of-credit funds are needed. We disagree. Although the duration of defendant's retention of the funds is not explicitly addressed in the memorandum of understanding or relevant administrative rules, we conclude that inherent in defendant's authority to determine when the funds are needed is the authority to determine how long the need exists. The memorandum of understanding and Rule 408.43q give defendant broad discretion to determine what constitutes a need, when the need arises, and what portion of the letter-of-credit funds are needed.

As the trial court intimated, given the language of MCL 418.381, it is not possible to determine a date certain after which plaintiff will no longer be liable for worker's compensation claims. See *Colbert v Conybeare Law Office*, 239 Mich App 608, 614; 609 NW2d 208 (2000) (stating that "a claim for worker's compensation is not valid unless made within two years of the date of injury, the date disability manifests itself, or the last date of employment"); see also *Drouilliard v Stroh Brewery Co*, 199 Mich App 67, 71-72; 501 NW2d 229 (1993) (stating that MCL 418.381(2) acts as a bar on the payment of past benefits, but not as a statute of limitations). Accordingly, defendant's need for funds to pay claims that accrued while plaintiff was self-insured could extend well into the future. Notably, neither the memorandum of understanding nor Rule 408.43q limits the existence of a need to the presence of a pending claim. Therefore, defendant's retention of the funds does not constitute a breach of the memorandum of understanding.

Because we conclude that the memorandum of understanding grants defendant authority to retain the letter-of-credit funds for as long as it determines that a need exists, we need not address plaintiff's request that the Court insert terms in the memorandum of understanding restricting defendant to retaining the funds for only a reasonable time and retaining only that portion of the funds objectively determined to be sufficient to meet the risk of future claims.

Affirmed.

Talbot, J., concurred.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot

(...continued)

consider it on appeal. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).