

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN E. DRAKSLER,

Plaintiff-Appellant,

v

STERLING HEIGHTS EMPLOYEES'
RETIREMENT SYSTEM,

Defendant-Appellee,

and

CITY OF STERLING HEIGHTS,

Intervening Defendant-Appellee.

UNPUBLISHED

January 24, 1997

No. 180924

LC No. 93-003498

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of summary disposition entered pursuant to MCR 2.116 (C)(7) and MCR 2.116(C)(10), in favor of defendant and intervening defendant. On appeal, plaintiff argues that the trial court erred in granting summary disposition, in granting intervening defendant's motion to intervene, and in denying plaintiff's motion for relief from judgment pursuant to MCR 2.612(C)(1)(f). We agree that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10); however, we disagree with plaintiff's other allegations of error. Therefore, we affirm in part, reverse in part and remand.

When a party moves for summary disposition pursuant to MCR 2.116(C)(7), the validity of the claim is tested by considering any affidavits, pleadings, depositions, admissions and documentary evidence filed or submitted before the trial court. If there are no facts in dispute, the question whether the claim is statutorily barred is one of law for the court. *Smith v Quality Construction Co*, 200 Mich App 297, 299; 503 NW2d 753 (1993). In reviewing a motion for summary disposition under MCR

* Circuit judge, sitting on the Court of Appeals by assignment.

2.116(C)(7), we must accept as true all of the plaintiff's well-pleaded allegations and construe them most favorably to the plaintiff, *Mollett v City of Taylor*, 197 Mich App 328, 332-333; 494 NW2d 832 (1992),

Where an administrative grievance procedure is provided, exhaustion of that remedy must precede circuit court review of the dispute. However, a plaintiff may seek judicial review of a nonfinal agency decision when a final decision or order would provide only an inadequate remedy, or if pursuing the administrative remedy would be an exercise in futility. *Michigan Supervisors Union OPEIU Local 512 v Department of Civil Service*, 209 Mich App 573, 577; 531 NW2d 790 (1995).

Following the trial court's first denial of defendant's motion for summary disposition, plaintiff's labor union forwarded correspondence to the parties opining that defendant had incorrectly interpreted the collective bargaining agreement and that pursuant thereto, the labor union was prepared to process plaintiff's grievance up to and including arbitration. Upon its grant of defendant's motion for reconsideration and rehearing of its motion for summary disposition, the trial court found that there was a genuine prospect that plaintiff's claim would be addressed in an administrative manner and granted summary disposition to defendant pursuant to MCR 2.116(C)(7).

Plaintiff alleged in her complaint that defendant is a separate and distinct legal entity from the City of Sterling Heights and that defendant is not a party to any collective bargaining agreement existing between the Michigan Association of Police and the City of Sterling Heights. In its answer, defendant admitted not having been a party to any collective bargaining agreement entered into between the City of Sterling Heights and the Michigan Association of Police. Moreover, defendant failed to present the trial court with evidence indicating that either plaintiff or defendant was subject to the grievance procedure mandated by the collective bargaining agreement in disputes related to the denial of pension benefits.

The trial court was required to accept plaintiff's allegation that defendant was not a party to the collective bargaining agreement entered into between the City of Sterling Heights and plaintiff's labor union. *Mollett, supra* at 332-333. Because there was no evidence presented showing that defendant was obligated to participate in the administrative remedy provided in the collective bargaining agreement, we conclude that the trial court erred in granting summary disposition for plaintiff's failure to exhaust administrative remedies prior to seeking relief in circuit court. MCR 2.116(C)(7).¹

We next turn to the trial court's order of summary disposition pursuant to MCR 2.116(C)(10). We review a trial court's order of summary disposition, pursuant to MCR 2.116(C)(10) de novo to determine, giving the benefit of doubt to the non-moving party, whether the movant was entitled to summary disposition as a matter of law. *Weisman v US Blades, Inc*, 217 Mich App 565, 566-567; ___ NW2d ___ (1996); *Lytle v Malady*, 209 Mich App 179, 183-184; 530 NW2d 135 (1995). Summary disposition pursuant to MCR 2.116(C)(10) may be granted where, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). In requesting summary disposition of a claim, the movant must specifically identify those matters which have no disputable issue of fact and then support its position

with documentary evidence. *Patterson, supra* at 432. The adverse party may not then rest upon mere allegations or denials of a pleading, but must set forth specific facts showing a genuine issue for trial, by way of affidavits or other appropriate means. *Id.* Moreover, pursuant to MCR 2.116(G)(3)(b), a movant for summary disposition under MCR 2.116(C)(10), must provide the court documentary evidence in support of the grounds asserted in its motion.

In support of its motion for summary disposition, defendant incorporated by reference the evidentiary materials attached to its Reply in Opposition to Plaintiff's Petition for Superintending Control/Mandamus which included a copy of a legal opinion letter wherein defendant's counsel opined that plaintiff was not entitled to any disability pension benefits because she failed to timely make application.² However, as evidence in support of its motion for reconsideration, defendant attached a copy of correspondence wherein plaintiff's labor union disagreed with defendant's interpretation of the collective bargaining agreement. Consequently, we conclude that by virtue of defendant's pleading submitted in support of its motions for summary judgment and reconsideration, a conflict existed with regard to the meaning of the applicable provisions of the collective bargaining agreement, as well as to whether plaintiff was entitled to disability and pension benefits. Therefore, we find that there existed a genuine issue of material fact for trial and defendant was not entitled to judgment as a matter of law. MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in granting the City of Sterling Heights' motion for permissive intervention pursuant to MCR 2.209(B)(2). We disagree.

We review a trial court's decision to grant a motion to intervene for an abuse of discretion. The rule authorizing intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented. *Black v Department of Social Services*, 212 Mich App 203, 204; 537 NW2d 456 (1995).

A trial court may grant permissive intervention if: (1) application is timely made, (2) the applicant's claim or defense and the main action have a common question of law or fact, and (3) no prejudice or delay to the original parties will result. MCR 2.209(B)(2); *Dean v. Department of Corrections*, 208 Mich App 144, 150; 527 NW2d 529 (1994). No time limits on the date of intervention are provided, however, an intervenor must be diligent, and any unreasonable delay following notice of the action will justify denial of intervention where no satisfactory excuse is shown for the delay. *Prudential Ins Co of America v Oak Park School Dist*, 142 Mich App 430, 434; 370 NW2d 20 (1985).

Plaintiff first initiated this litigation on July 21, 1993, and the City of Sterling Heights filed its motion to intervene on September 10, 1993. Therefore, the application for intervention was timely made. MCR 2.209(B)(2); *Dean, supra* at 150. Defendant and the City of Sterling Heights argued that plaintiff failed to comply with the grievance procedure in the collective bargaining agreement between the City of Sterling Heights and plaintiff's labor union. The ultimate resolution of this litigation will necessitate an interpretation of the provisions of that collective bargaining agreement; therefore, the City of Sterling Heights' defense and the main action have a common question of law or fact. MCR

2.209(B)(2); *Dean, supra* at 150. Finally, defendant's motion to intervene was filed prior to the initiation of material discovery or pre-trial motions, and therefore neither plaintiff nor defendant was at risk of suffering prejudice or delay as a result of intervention. Because MCR 2.009(B)(2) is to be liberally construed to allow intervention where the applicant's interests may be inadequately represented, *Black, supra* at 204, the trial court did not abuse its discretion in granting the City of Sterling Heights' petition.

We do address plaintiff's argument that, in the event that this Court affirms the trial court's order of intervention, the trial court would be similarly obligated to permit intervention by all other labor unions which are parties to collective bargaining agreements with the City of Sterling Heights. In light of the fact that this matter was initiated by plaintiff in 1993, subsequent interventions would be untimely and probably would result in prejudice and delay of the litigation. MCR 2.209(B)(2); *Dean, supra*, at 150.

Finally plaintiff argues that the trial court erred in denying her motion for relief from judgment pursuant to MCR 2.612(C)(1)(f). Because we have concluded that the trial court improperly granted defendant's motion for summary disposition, it is unnecessary for us to address plaintiff's argument regarding the trial court's failure to grant relief from judgment.

Affirmed in part, reversed in part and remanded.

/s/ Michael J. Smolenski

/s/ Michael J. Kelly

/s/ John R. Weber

¹ We note that documentary evidence may exist which impacts on whether plaintiff or defendant was bound by the collective bargaining agreement between the City of Sterling Heights and MAP. Had such evidence been provided to the trial court, we could have concluded that the grievance procedure was a necessary first step to filing a law suit. However, in light of the applicable standard of review, *Mollett, supra*, at 332-333, and in the absence of such documentary evidence, we may only conclude that neither plaintiff nor defendant were bound by the grievance procedure provided in the collective bargaining agreement in resolving this dispute.

² At oral argument before the Court of Appeals, defense counsel conceded that plaintiff is vested and is entitled to pension benefits when she comes of age. He then made the argument that plaintiff could not apply for a disability retirement benefit unless she was employed or had been employed within two years of the date of her disability. The lower court did not pass upon the applicability of such limitation period and we therefore have nothing to review. It is for the lower court to address whether she qualifies for disability retirement benefits in the first instance.