STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the ESTATE of ALBERT O. SWARTZENBERG, Deceased.

UNPUBLISHED

DENISE A SWARTZENBERG,

Plaintiff-Appellant,

v

No. 196677
Wayne Probate Court
LC No. 95-546752-IE

JANE E. SWARTZENBERG, Independent Personal Representative of the Estate of ALBERT O. SWARTZENBERG, Deceased, LINDA DUQUETTE, CAROL BOSKO and JANICE KENNEDY,

Defendants-Appellees.

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

MICHAEL J. KELLY (partial dissent).

I respectfully dissent as to part I of the majority opinion.

Defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10). In *Huff v Ford Motor Co*, 127 Mich App 287, 292-293; 338 NW2d 387 (1983), we held that when a party moves for summary disposition under both subsections, yet relies on a matter outside the pleadings to argue the motion, we review under MCR 2.116(C)(10) only. I believe that summary disposition was inappropriate before the completion of discovery on the disputed issue of whether or not the testator omitted the plaintiff by mistake. *Cf. Department of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989) (summary disposition for failure to establish genuine issue of material fact proper only where further discovery does not stand a fair chance of uncovering factual support for claim).

Plaintiff has specifically claimed that she was prevented from deposing the defendant and plaintiff's sisters, the decedent's other daughters. I am not convinced that further discovery does not stand a fair chance for uncovering factual support as to whether plaintiff's father, the deceased, had made special provisions for and specific promises to plaintiff, who allegedly suffered disabling mental and physical conditions.

I would remand for completion of discovery on plaintiff's claim that she is a pretermitted heir because her father's omission to provide for her in his will was an accident or mistake.

On all other issues I concur with the majority.

/s/ Michael J. Kelly