STATE OF MICHIGAN

COURT OF APPEALS

PATRICK MULLEAVY,

Plaintiff-Appellant,

v

BUS TRANSPORTATION CREDIT UNION a/k/a NORTHWOOD TRANSPORTATION CREDIT UNION,

Defendant-Appellee.

UNPUBLISHED
February 27, 1998

No. 190519
Oakland Circuit Court
LC No. 92-439527 CK

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This is a wrongful discharge case. Plaintiff filed suit alleging breach of oral representations and breach of written policies regarding just-cause employment. Defendant moved for summary disposition, which was denied. Defendant's motion for reconsideration was also denied. The parties proceeded to trial. After plaintiff's opening arguments, a mistrial was declared. Subsequently, the chief judge reassigned the case to another judge pursuant to MCR 8.110. Defendant renewed its original motion for summary disposition, which was granted by the second judge.

Plaintiff first argues that the second judge was without authority under MCR 2.613(B) to grant defendant's motion for summary disposition where the first judge had previously denied the motion. We disagree.

MCR 2.613(B) provides:

> Correction of Error by Other Judges. A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating

> or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

In *Totzkay v DuBois (After Remand)*, 140 Mich App 374; 364 NW2d 705 (1985), this Court had occasion to construe GCR 1963, 529.2, the predecessor to MCR 2.613(B), which provided as follows:

> "No judgment or order shall be set aside or vacated, and no proceeding under a judgment or order shall be stayed by any circuit judge except the one who made the judgment or order, unless he is absent or unable to act. If the circuit judge who made the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be made by any of the other judges of the circuit or any judge assigned to the circuit." [*Totzkay, supra* at 379-380 (quoting GCR 1963, 529.2).]

In *Totzkay*, this Court remanded the case to the circuit court where it was initially assigned to a pretrial judge. *Id*. at 378-379. The pretrial judge denied the defendant's motion for accelerated judgment. *Id*. at 379. The case was then reassigned to a second judge, who granted the plaintiff's motion for summary disposition on the issue of the defendant's liability. *Id*. The case was then reassigned to a trial judge for trial on the issue of damages. *Id*. At that time, the defendant renewed his motion for accelerated judgment, which was granted by the trial judge. *Id*. The plaintiff appealed, contending that the trial judge did not have the authority under GCR 1963, 529.2 to grant the motion in light of the fact that the pretrial judge had denied the same motion. *Id*. The defendant argued that the trial judge had the authority to grant the motion because, pursuant to a local court rule, the pretrial judge's authority ended when the case was assigned for trial. *Id*. at 380.

This Court held that the trial judge had acted outside its authority in granting the defendant's motion for accelerated judgment and that, therefore, the motion "now stands denied pursuant to the order of the pretrial judge." *Id*. at 381. This Court reasoned that the pretrial judge had not been "'absent or unable to act' as envisioned by GCR 1963, 529.2" because, even though the local court provided that the authority of a pretrial judge to decide preliminary matters ended when the trial began, the pretrial judge's authority to hear subsequent motions concerning preliminary matters continued until those matters were finally and fully resolved. *Id*. at 380. This Court also reasoned that "the reassignment of a case for trial purposes, in and of itself," did not "somehow work[] to make the pretrial judge 'absent or unable to act.'" *Id*. at 380-381. This Court further noted that no evidence has been presented that suggested the pretrial judge was absent or otherwise unavailable to fulfill his judicial duties. *Id*. at 381. Finally, this Court, citing *Berar Enterprises, Inc v Harmon*, 101 Mich App 216, 228-229; 300 NW2d 519 (1980), noted that the construction of GCR 1963, 529.2 urged by defendant would be contrary to the policy behind this rule. *Totzkay, supra*.[1]

However, a converse result was reached in *People v Watkins*, 178 Mich App 439; 444 NW2d 201 (1989), rev'd on another ground 438 Mich 627 (1991). In that case, the initial trial judge ordered that the trial of two of the five defendants be severed from the trial of the remaining defendants. *Id*. at 448. The chief judge then transferred the defendants' cases to another judge, who overruled the

severance order. *Id*. On appeal, one of the defendants argued that under MCR 2.613(B) only the initial trial judge could have overruled his severance order and that the case represented an example of "judge shopping."[2] *Watkins, supra*.

This Court held that the second judge did not violate MCR 2.613(B) by overruling the first judge's severance order. *Watkins, supra* at 449. This Court reasoned that the chief judge had the authority to reassign the defendants' cases pursuant to MCR 8.110 and MCR 8.111, and that there was no indication of "judge shopping" in the record." *Watkins, supra* at 448-449.

We conclude that *Watkins* presents the better construction of MCR 2.613(B) for the resolution of this issue. Here, the chief judge had the authority to assign the case to another judge pursuant to MCR 8.110.[3] Thus, the original judge was no longer available to hear the case. Moreover, pursuant to MCR 2.116(E)(3), a party may file more than one summary disposition motion as long as it is not done in bad faith. Plaintiff does not argue that the motion was renewed in bad faith. As well, pursuant to MCR 1.105, the court rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties. To this end, we find that the purpose of reassigning cases for a more efficient court system would be defeated if only the original judge was allowed to dispose of a case. Thus, we find that the trial court did not violate MCR 2.613(B) by ruling on the motion.

Plaintiff also argues that the trial court erred in granting defendant's summary disposition motion because he raised genuine issues of material fact regarding the existence of a just-cause employment. We disagree.

As explained in *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995):

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial.

A trial court may not assess credibility or determine facts on a motion for summary judgment. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Summary disposition is reviewed de novo, because this Court must review the record to determine whether the moving party was entitled to judgment as a matter of law." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

It appears that plaintiff is first arguing that defendant breached its written policies of just-cause employment because the 1961 seniority policy stated that seniority rights would be lost if an employee was discharged for cause, among other reasons. We do not find that this wording clearly and

unambiguously created a just-cause employment policy sufficient to state a cause of action for breach of contract. *Rood v General Dynamics Corp*, 444 Mich 107, 137; 507 NW2d 591 (1993). Moreover, plaintiff offered no proof beyond his mere allegations that the 1961 policies were in effect when he was terminated. Plaintiff contends that he did not need to do so because defendant did not assert that the policies were inapplicable to his termination. In its original summary disposition motion, defendant specifically stated that the 1961 written policies were not in effect when plaintiff was terminated. It included affidavits from employees to support that fact. Plaintiff failed to provide any proof to the contrary. Furthermore, contrary to plaintiff's contention, defendant's production of the 1961 policies pursuant to plaintiff's discovery request for all applicable policy manuals did not amount to an admission that the policy was applicable to plaintiff.

Plaintiff further argues that his and Janet Morrison's sworn testimony evidenced that the 1961 written policies were in effect.[4] However, we do not find this testimony in the lower court record and this Court's review is limited to the record presented below. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

Finally, plaintiff argues that the trial court erred in determining that an express contract did not exist between defendant and himself. Plaintiff contends that he had an express contract because it was his understanding that he would not be terminated as long as he did his job. However, the statements made were similar to those made in *Rowe v Montgomery Ward*, 437 Mich 627; 473 NW2d 268 (1991) and *Rood*, *supra*. Thus, we find that there was not an intent on the part of defendant to form a just-cause employment contract. *Rowe*, *supra* at 645. The statements were not so clear and unequivocal as to overcome the presumption of an at-will employment policy. *Rood*, *supra* at 119. Accordingly, we find that the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] In *Berar*, this Court explained the policy behind GCR 1963, 529.2:

> The policy behind GCR 529.2 is that "[i]f a judgment or order is to be set aside, vacated or stayed, it should normally be done only by the judge who made the judgment or order, since he is best qualified to pass upon the matter, and since it would obviously detract from the dignity and stability of judicial action if a dissatisfied litigant could run about seeking to have it upset by other trial judges." [*Berar*, *supra* at 228 (quoting 3 Honigman & Hawkins, Michigan Court Rules Annotated [2d ed], p 230).]

[2] See note 2, *supra*.

[3] Plaintiff's brief on appeal indicates that the case was reassigned to another judge as part of a docket reduction program.

[4] Janet Morrison was defendant's office manager. She was fired at the same time as plaintiff and also brought wrongful discharge suit against defendant. The trial court subsequently granted defendant's motion for a directed verdict and entered a judgment of no cause of action in favor of defendant. This Court affirmed. See *Morrison v Northwood Transportation Credit Union*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 1997 (Docket No. 181679). Morrison has submitted a delayed application for leave to appeal to our Supreme Court. See *Morrison v Northwood Transportation Credit Union* (Supreme Court Docket No. 110853).