

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES ZBORIL,

Plaintiff-Appellant,

v

GERALDINE FARKUS,

Defendant-Appellee.

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UNPUBLISHED

March 30, 1999

No. 207156

Oakland Circuit Court

LC No. 96-535946 CK

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff-appellant James Zboril (“Zboril”) appeals as of right the circuit court order granting summary disposition in favor of defendant-appellee Geraldine Farkus (“Farkus”) pursuant to MCR 2.116(C)(8), and denying Zboril’s motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for additional proceedings.

**I. Basic Facts And Procedural History**

Zboril was a dentist in private practice in the City of Rochester. Farkus was a sales representative for Patterson Dental Supply. Farkus, in her professional capacity, called on Zboril to purchase dental supplies on a number of occasions since 1986. A few years later, in March of 1990, the parties commenced a romance that lasted approximately two years.

In October of 1992, Zboril informed Farkus that her company, Patterson Dental Supply, was conducting an initial public offering of its stock, and that it would be offering its stock at a discounted price to current employees. The discounted stock price was \$15 per share, and Patterson Dental Supply made it clear that the discounted price was only available to its employees; no one outside the employment of Patterson Dental Supply could purchase the stock at the discounted rate.

In October of 1992, Zboril issued a check in the amount of \$15,000 to Farkus, and indicated that he wanted her to purchase 1,000 shares of the stock of Patterson Dental Supply. Farkus subsequently determined that the stock was going to be sold to employees for \$16 per share, not \$15, and Zboril issued a second check in the amount of \$1,000 to Farkus in late October of 1992, so she

could purchase the full 1,000 shares. The stock certificates of Patterson Dental Supply were issued in Farkus's name, and she had exclusive control over them.

In December of 1992, the romance between the parties ended; however, Zboril did not request the money or stocks back from Farkus at that time. Farkus continued to serve Zboril professionally as a sales representative, and the parties saw each other on a regular, bi-monthly basis until this dispute arose. Approximately four years after the initial stock purchase, Zboril requested that Farkus turn over the stock certificate, or its monetary value, to him,. Farkus explained that the stock had been sold, but offered to pay Zboril \$16,000 instead. Zboril refused the offer and subsequently filed a complaint asserting causes of action for claim and delivery and breach of fiduciary duty.

Thereafter, Zboril filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10), seeking judgment as a matter of law on the basis that the amount tendered to Farkus in the two checks was not a gift. In late June of 1997, the trial court heard arguments on Zboril's motion and inquired of defense counsel about her request for summary disposition, to which defense counsel responded that she intended to file a motion for summary disposition that week. In light of that fact, the trial court took Zboril's motion under advisement pending the filing of Farkus's motion for summary disposition. The trial court indicated that arguments and a ruling on both motions would occur simultaneously

In late July of 1997, Farkus filed her motion for summary disposition pursuant to MCR 2.116(C)(8), alleging that Zboril's complaint failed to plead facts sufficient to establish causes of action for claim and delivery and breach of fiduciary duty. In mid-September of 1997, the trial court heard oral arguments on Farkus's motion for summary disposition. In late September of 1997, the trial court issued an opinion and order on the parties' cross-motions for summary disposition. The trial court first concluded that although Farkus raised issues of Zboril's fraudulent intent in her motion for summary disposition, she failed to raise fraud as an affirmative defense and had, therefore, waived the defense. Nonetheless, the trial court noted that MCR 2.116(C)(8) does not have to be pleaded as an affirmative defense in the responsive pleading; hence, the trial court looked to the factual allegations of the complaint and inferences drawn therefrom. Based on the complaint, the trial court held that Zboril failed to state a claim upon which relief could be granted for both the claim and delivery and breach of fiduciary duty claims.

The trial court also found that Zboril implicitly admitted that he benefited from the discounted stock purchase, and that he could not have obtained title to or possession of the stock himself at the discounted price; hence, according to the trial court, he could not assert a claim and delivery action. Further, the trial court found that Zboril could not assert a breach of fiduciary duty claim because Farkus, unlike Zboril, had a legal right to purchase the stock at a discounted price. Indeed, according to the trial court, "any influence that was acquired, abused and betrayed was on [Zboril's] behalf." Therefore, the trial court granted Farkus's motion for summary disposition and denied Zboril's motion for summary disposition and in early October of 1997 issued an order for dismissal of Zboril's complaint based on the law and reasoning set forth in its September opinion and order. Thereafter, Zboril filed a motion for reconsideration challenging the trial court's ruling granting summary disposition to Farkus and denying his motion for summary disposition and in mid-October of 1997, the trial court

issued an opinion and order denying this motion for reconsideration. The trial court found that Zboril “failed to demonstrate a palpable error by which this Court and the parties have been misled.”

## II. Standard of Review

### A. Summary Disposition Under MCR 2.116(C)(10)

This Court reviews a trial court’s grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Zboril preserved this issue for appellate review by filing a motion for summary disposition and a motion for reconsideration challenging the trial court’s ruling.

### B. Summary Disposition Under MCR 2.116(C)(8)

This Court reviews a trial court’s grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(8) de novo. *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). Zboril preserved this issue for appellate review by opposing Farkus’s motion for summary disposition and by filing a motion for reconsideration of the trial court’s ruling.

### C. Constructive Trust And Unjust Enrichment

This Court reviews a trial court’s denial of a request to amend pleadings for an abuse of discretion. *Hakari v Ski Brule, Inc.*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Zboril attempted to amend his complaint to include claims for breach of constructive trust and unjust enrichment in his motion for summary disposition. The trial court considered the issue, but denied Zboril’s request at the hearing. Therefore, this issue has been preserved for appeal.

### D. Fraud Defense

This Court reviews the issue of whether a defendant waived fraud as a defense de novo. See *Hofmann v Auto Club Ins Ass’n*, 211 Mich App 55, 89-90; 535 NW2d 529 (1995). Farkus raised the fraud defense at oral argument on the parties’ cross-motions for summary disposition. In its order denying Zboril’s motion for summary disposition and granting Farkus’s motion for summary disposition, the trial court ruled that the defense had been waived because Farkus failed to raise or plead it in her responsive pleading.

### E. Fiduciary Duty

This Court reviews a trial court’s grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(8) de novo. *Horace, supra*. Zboril preserved this issue for appellate review by challenging the trial court’s opinion and order in a motion for reconsideration.

### F. Impermissible Findings And Erroneous Standards

This Court reviews a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(8) de novo. *Horace, supra*. Zboril challenged the trial court's ruling by filing a motion for reconsideration of its prior opinion and order. Therefore, the propriety of the trial court's ruling has been preserved for appellate review.

### III. Summary Disposition Under MCR 2.116(C)(10)

Zboril argues that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(10). He maintains that he alleged sufficient facts in his complaint that were supported by documentary evidence to warrant judgment as a matter of law in his favor. Specifically, he argues that there was clear and uncontroverted evidence, unrebutted by Farkus, that he did not intend to make a gift of the money in question to Farkus. He insists that the trial court's finding to the contrary was unsupported by the facts and evidence and warrants reversal. We disagree.

Summary disposition pursuant to MCR 2.116(C)(10) may be granted where, except as to damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. A MCR 2.116(C)(10) motion tests whether there is factual support for a claim. *Spiek, supra*. When ruling on a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, admissions and other documentary evidence available to it. *Id.* The benefit of reasonable doubt, as well as all reasonable inferences drawn from the evidence, must be given to the nonmoving party. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

In order for there to be a valid gift, three elements must be met: "(1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift." *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997). Here, the parties do not contest that delivery and acceptance of the money occurred. Therefore, the only disputed issue is whether Zboril intended to unconditionally transfer ownership and possession of the money to Farkus when he gave her the checks or whether he gave her the money to purchase the stock on his behalf, for his benefit, and with the intent to remain the sole owner of the stock and its proceeds.

We find that, when considering Zboril's complaint, motion for summary disposition, and affidavit, together with the other documentary evidence offered by Farkus, there was a genuine issue of material fact as to whether Zboril intended to make a gift of the money to Farkus at the time of the transaction. Both parties admit that there was never a verbal exchange or mutual understanding as to Zboril's intent when he gave Farkus the money. In addition, although Zboril adamantly insists that he intended to give Farkus the money only so she could purchase the stock on his behalf, Farkus, on the other hand, maintains that the money was a gift. However, Farkus's deposition testimony and affidavit do not unequivocally rebut Zboril's contention. To the contrary, Farkus's documentary evidence essentially establishes the existence of a factual dispute over Zboril's intent. Farkus admits that Zboril never explicitly stated that the money was a gift. She further concedes that Zboril gave her the money with the express condition that she purchase 1,000 shares of Patterson Dental Supply's stock with it.

Moreover, when asked why she believed the money was a gift, she merely responded, “why wouldn’t it be a gift for me” without any additional explanation to explain her position.

We find that the element of Zboril’s intent at the time of the transaction is a factual issue in dispute that should be resolved by a jury. Accordingly, we hold that summary disposition pursuant to MCR 2.116(C)(10) was properly denied to Zboril.

#### IV. Summary Disposition Under MCR 2.116(C)(8)

Zboril argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) to Farkus because the facts and circumstances alleged in his complaint, when accepted as true, were sufficient to establish a cause of action for claim and delivery.<sup>1</sup>

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone, and may not be supported by documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). All factual allegations in support of the claim are accepted as true, as are any reasonable inferences drawn from the facts. *Id.* The motion for summary disposition under MCR 2.116(C)(8) should only be granted where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *ABB Paint Finishing, Inc v Nat’l Union Fire Ins Co*, 223 Mich App 559, 561; 567 NW2d 456 (1997).

MCL 600.2920; MSA 27A.2920 states, in pertinent part:

(1) A civil action may be brought to recover possession of any goods or chattels which have been unlawfully taken or unlawfully detained and to recover damages sustained by the unlawful taking or unlawful detention, subject to the following conditions:

\* \* \*

(c) An action may not be maintained under this section by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained.

In accordance with the general principles governing MCR 2.116(C)(8) motions for summary disposition, we find that Zboril adequately pleaded a cause of action for claim and delivery. In particular, Zboril alleged in his complaint that he was notified by Farkus of an investment opportunity whereby Patterson Dental Supply was offering to sell their stock at a discounted price to current employees. Farkus indicated that she could not afford to take advantage of the opportunity, but if Zboril desired to do so, she would purchase the stock on his behalf. Zboril accepted Farkus’s proposition and gave her a total of \$16,000 to purchase 1,000 shares of stock. He denied that the transfer of money was a gift to Farkus and maintained that he remained the sole and rightful owner of the stock at all times. Given these allegations asserted in his complaint, we are not convinced that no factual development could justify a right of recovery for Zboril. Indeed, when these facts are accepted as true, without reference to other documentary evidence, we find that Zboril has stated a valid cause of

action for claim and delivery. Accordingly, we hold that summary disposition pursuant to MCR 2.116(C)(8) was improperly granted to Farkus.

#### V. Constructive Trust And Unjust Enrichment

Zboril argues that the trial court erred in dismissing his complaint without ruling on the claims for breach of constructive trust and unjust enrichment, or at least allowing him to amend his pleadings to remedy any deficiencies in his pleadings. Zboril contends that although he did not explicitly request the imposition of a constructive trust, the trial court was authorized to impose a trust, where appropriate, even absent a request from the party. In any event, Zboril submits that, at a minimum, he should have been entitled to amend his pleadings to include the constructive trust and unjust enrichment claims if the trial court deemed his complaint inadequate.

A constructive trust is an equitable remedy which a court may impose where the facts justify it, even in the absence of a request for such relief from the petitioner. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). This Court has defined a constructive trust as follows:

Constructive trusts are creatures of equity and their imposition makes the holders of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. They are distinguished from express and resulting trusts in that they do not arise by virtue of agreement or intention, but by operation of law. [*Id.* (citations omitted.)]

A constructive trust is an appropriate remedy to prevent unjust enrichment to the holder of the goods. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993); *In re Swantek Estate, supra* at 517. In addition, under a constructive trust, equity can follow the assets upon which the trust is based into whatever form they may be converted. *Swantek, supra* at 517-518. The burden of proof is on the party who seeks imposition of the trust. *Kammer, supra* at 188.

The elements of a claim for unjust enrichment are: “(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). To prevent such unjust enrichment, the law implies a contract. *Id.* However, a contract will only be implied if there is no express contract covering the same topic. *Id.*

Zboril’s argument for imposing a constructive trust on Farkus is that Farkus was holding the stock in trust for him from the time he gave her the money until he requested the stock or proceeds. He maintains that to dismiss his claim in its entirety, without employing equitable remedies, would result in extreme unjust enrichment for Farkus because he never intended for her to reap the benefits of this investment.

When we consider the trial court’s ruling granting summary disposition in favor of Farkus, and denying same to Zboril, in conjunction with the trial court’s failure to articulate its reason for not allowing

Zboril to amend his pleadings in response to Farkus's motion, we assume that the trial court found that the amendment would be futile based on the evidence before it. However, in light of our disposition of the foregoing issues—particularly, our finding that there was a factual dispute as to Zboril's intent at the time he transferred the money to Farkus, and that Zboril sufficiently pleaded a cause of action for claim and delivery—we hold that dismissal of Zboril's claims without opportunity to amend his pleadings to include the equitable theories of relief was improper. As we noted above, the issue of Zboril's intent should be submitted to a trier of fact. If the jury finds Zboril's testimony and evidence credible, then his intent was to maintain possession and control of the money and/or stock at all times; hence, a constructive trust may be an appropriate manner in which to resolve the dispute. Alternatively, if the jury finds that Zboril intended to make a gift of the money to Farkus, neither equitable nor legal remedies will be necessary.

In any event, in view of the liberal application of the court rule governing amendment of pleadings, MCR 2.116(I)(5), and the policy encouraging amendments, particularly upon a motion for summary disposition, we find that the trial court abused its discretion in denying Zboril's request. See *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Blair v Checker Cab Co*, 219 Mich App 667, 677; 558 NW2d 439 (1996); *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 299; 517 NW2d 319 (1994). A motion to amend should ordinarily be granted absent particularized reasons stated on the record. *Weymers, supra* at 658. "If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision." *Id.* at 659. The trial court's failure to do so in this case further supports our decision to reverse. Moreover, Farkus will not suffer prejudice as a result of the amendment to Zboril's complaint because she had notice of Zboril's claims and the relief sought at the motion. See *id.* at 659. Finally, because a constructive trust may be imposed by the trial court to avoid unjust enrichment where appropriate, even in the absence of a specific request, summary disposition was inappropriate even if Zboril had not specifically requested such relief in his complaint. *In re Swantek Estate, supra* at 517.

## VI. Fraud Defense

Zboril argues that the trial court erred in considering Farkus's fraud defense when ruling on her motion for summary disposition. He contends that, in addition to the fact that there is no merit to Farkus's allegation that he engaged in fraudulent conduct, Farkus had failed to raise the affirmative defense in her first responsive pleading; hence, it should have been deemed waived. However, contrary to Zboril's contention, the trial court recognized that the defense was not timely raised and declined to rule on the merits of that claim. In its opinion and order, the trial court stated:

In her Motion, Farkus has raised issues of fraudulent intent by Zboril upon Patterson. Zboril correctly points out that Farkus did not raise fraud as an affirmative defense, and therefore, has waived it.

Therefore, given that Zboril is not an aggrieved party on this issue, we decline to address it. *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).

## VII. Fiduciary Duty

Zboril argues that the trial court erred in dismissing his breach of fiduciary duty claim and granting summary disposition under MCR 2.116(C)(8) to Farkus. Zboril asserts that Farkus was acting as his agent when she purchased the stock on his behalf, and that she violated his trust and confidence when she refused to turn over the stock or its proceeds to him upon request.

A fiduciary relationship arises when one person reposes faith, confidence, and trust in another's judgment and advice. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 515; 309 NW2d 645 (1981). "Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable." *Id.*

Upon review of the allegations comprising Zboril's complaint, we are not convinced that he successfully pleaded a cause of action for breach of fiduciary duty. Zboril did not set forth any facts alleging that Farkus was in a position of trust, repose or confidence to him at the time he gave her the money. There is no indication that he relied on her judgment or advice in seeking to buy the stock. While he alleges that Farkus assured him that she would purchase the stock for him, the record demonstrates that she did, in fact, purchase the stock pursuant to his request. The dispute focuses on Zboril's intent at the time of the transaction. Therefore, we are not convinced that Zboril has stated a valid cause of action for breach of fiduciary duty. Accordingly, we hold that summary disposition in favor of Farkus was appropriate on this claim.

#### VIII. Impermissible Findings And Erroneous Standards

Zboril argues that the trial court made impermissible findings and applied erroneous standards in ruling on the parties' respective motions for summary disposition. We agree that the trial court's reliance on facts or allegations contained in Zboril's motion for summary disposition was improper when ruling on the motion. Indeed, a motion for summary disposition is not a pleading and the substance of the motion may not be considered when ruling on a MCR 2.116(C)(8) motion. *Jordan v Jarvis*, 200 Mich App 445, 452; 505 NW2d 279 (1993). However, upon review of the pleadings, we find that the same general facts and allegations included in Zboril's complaint were reiterated in his motion for summary disposition; hence, the trial court did not actually rely upon additional evidence. In any event, in light of the conclusions we reach above—particularly that summary disposition in favor of Farkus on the claim and delivery cause of action was erroneous—further resolution of this claim is unnecessary because remand for a trial on the merits of that claim is necessary.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff  
/s/ Michael R. Smolenski  
/s/ William C. Whitbeck



<sup>1</sup> The cause of action commonly referred to as replevin is now known as the action of claim and delivery. See MCR 3.105.