STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM T. LUTHER,

Plaintiff-Appellant,

v

SHANE THORSEN,

Defendant-Appellee.

UNPUBLISHED
May 9, 2000

No. 217418
Kent Circuit Court
LC No. 98-005636-CZ

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition, as well as the trial court order denying plaintiff's motion to set aside summary disposition. Plaintiff claimed that defendant owed him over $28,000 based on a loan allegedly made to defendant and Dave Rinzema, defendant's former partner. We affirm.

Plaintiff first contends that the trial court erred by granting defendant's motion for summary disposition. We review motions for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In defending against a summary disposition motion brought pursuant to MCR 2.116(C)(10), the nonmovant may not "rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (quoting MCR 2.116(G)(4)). If the proffered evidence does not establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

Plaintiff contends that there was a genuine issue of fact regarding whether defendant derived a "benefit from the $33,365.55 loan to the East Beltline Marathon Station in September of 1997." In his affidavit, however, defendant attested that he received no benefit from the money that plaintiff loaned to Dave Rinzema. Plaintiff offered no evidence to either refute defendant's denial or support an assertion that defendant directly or indirectly derived any benefit. Accordingly, the trial court correctly determined that there was no material question of fact regarding this issue.

Plaintiff also argued during the hearing that there was a factual issue created by the affidavits of defendant and Henry Grooters. Plaintiff claims that defendant's affidavit untruthfully asserted that "the Shawmut Hills Amoco Station [is] licensed in the name of [defendant]," and that the falsity of that assertion is shown by Grooters' affidavit wherein Grooters claimed that the lease to the Amoco station was not transferred to defendant because the transfer would have required Rinzema to pay a sales tax. Apparently, plaintiff means to suggest that because the Amoco station was not transferred to defendant, he and Rinzema were still partners and thus defendant was liable for the debts of the on-going partnership. However, both defendant and Grooters agreed that the partnership ended before Rinzema incurred the debt to plaintiff, and they also agreed that defendant owned and operated the Shawmut Hills Amoco Station. Plaintiff failed to "go beyond [his] pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). To the extent that there was a contradiction or factual question concerning whether Rinzema or defendant was the title owner of the Shawmut Hills station, we do not believe that this issue is material to a determination of whether defendant owes plaintiff money. Consequently, we conclude that defendant failed to demonstrate the existence of any issue of material fact.

Moreover, plaintiff's complaint does not set forth any legal theory supporting his assertion that defendant owes him money. Although plaintiff contends that Rinzema and defendant were partners at the time of the loan in 1997, the affidavits of defendant and Grooters indicate that the partnership ended in 1996. In other words, plaintiff offered no substantively admissible evidence beyond the allegations in his pleading to establish that defendant owed him money. *Maiden, supra* at 121.

Although not expressly stated on the record, plaintiff's allegations suggest that he relies on an implied contract theory. Generally, an implied contract may be found "where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation." *In re Lewis Estate,* 168 Mich App 70, 74; 423 NW2d 600 (1988). In his affidavit, defendant attested that he never received any benefit from the money that plaintiff loaned to Rinzema. As stated above, plaintiff did not present any evidence to rebut that assertion; therefore, we conclude that to the extent that plaintiff's pleadings suggest a theory of implied contract, defendant was entitled to judgment on that theory. Thus, we also conclude that the trial court did not err by granting defendant's motion for summary disposition or denying plaintiff's motion to set aside summary disposition.

Plaintiff further argues that the trial court should have imposed penalties or sanctions on defendant under the court rules for making a "false statement" in his affidavit. Specifically, plaintiff contends that the trial court should have imposed sanctions or penalties because defendant's affidavit stated that he "retained 100% ownership of the Shawmut Hills Amoco station," whereas the Grooters affidavit indicated that Rinzema did not transfer the Amoco lease for the Shawmut Hills Amoco station to defendant because Rinzema wanted to avoid a sales tax liability which would have accrued upon transfer. Plaintiff suggested during the hearing that defendant had committed perjury in making his statement. However, the trial court did not impose any sanctions or penalties upon defendant.

We review a trial court's decision regarding whether a party or attorney violated MCR 2.114(D) for clear error. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72,

91; 592 NW2d 112 (1999). A decision is "clearly erroneous," if the reviewing court is left "with a definite and firm conviction that a mistake has been made." *Jackson Co, supra* at 91-92.

Although plaintiff does not specify which subsection of MCR 2.114(D) defendant violated, we find subsection (2) to be the most applicable alternative because it states that the signature of a party to a document certifies that "to the best of his or her knowledge, information, and belief, formed after a reasonable inquiry, the document is well grounded in fact." No evidence was presented, however, suggesting that Rinzema's alleged title ownership of the lease for the station was relevant to whether defendant derived a benefit from plaintiff's loan to Rinzema. While we agree that the affidavit of Grooters weakens defendant's assertion that the Amoco station was licensed in his name, we do not find that this contradiction sufficiently demonstrates that defendant's affidavit was not "well grounded" in fact. In other words, we are not left with a "definite and firm conviction that a mistake has been made." *Jackson Co, supra* at 91-92. Therefore, we conclude that the trial court did not err in refusing to impose sanctions or penalties upon defendant under the court rules.

We note that plaintiff raised several legal theories in his brief on appeal that were not pleaded or argued below. These theories have not been preserved for appeal, *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), and we therefore decline to address them.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens