

STATE OF MICHIGAN
COURT OF APPEALS

SAM RASHED,

Plaintiff-Appellant,

V

WILLIAM J. CONLIN, GORDON R. MATHEWS,
and BOOKSTORE LIMITED PARTNERSHIP,

Defendants-Appellees.

UNPUBLISHED

May 22, 2001

No. 221592

Washtenaw Circuit Court

LC No. 98-009682-CK

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff sought damages for breach of contract, specifically an August 26, 1991 letter in which defendant William J. Conlin promised to pay plaintiff a three percent placement fee to "produce a loan of \$3.6 million on the Devonshire Square Center." The letter made the placement fee "contingent only upon you providing me with the people who provide the money and an interest rate not to exceed 10 % with a 30-year amortization," and that Conlin close the loan. Conlin was the general partner of Devonshire Square Associates Limited Partnership, which intended to develop a shopping center on an Ann Arbor parcel of commercial property that the partnership owned. Conlin never closed a loan for the Devonshire Square Center project, which failed to materialize because of financial difficulties.

In April 1993, the Devonshire Square Associates Limited Partnership transferred the property to a new partnership, the Bookstore Limited Partnership. In exchange for transferring the property, the Devonshire Square Associates Limited Partnership obtained a limited interest in the Bookstore Limited Partnership, and therefore could not bind the new partnership. With defendant Gordon R. Mathews as its general partner, Bookstore Limited Partnership eventually constructed a Barnes & Noble bookstore on the property.

Plaintiff first contends that defendants did not comply with MCR 2.116(B)(2) because they did not provide twenty-eight days notice between the filing of their cross motion for

summary disposition and the hearing on that motion,¹ and also that the motion was untimely filed according to the trial court's scheduling order. Plaintiff argues that in light of these irregularities the trial court erred in granting defendants' motion. We note, however, that this issue was not preserved for appeal. Although plaintiff's counsel raised the issue before the trial court, counsel abandoned any claim of error by immediately rejecting the trial court's offer to adjourn the hearing and insisting on proceeding with the hearing. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). Moreover, the trial court did not err in granting defendants' motion because MCR 2.116(I)(1) and (2) specifically authorize the trial court to proceed promptly and grant summary disposition to an opposing party when entitled to judgment.

Plaintiff next argues that factual disputes existed regarding modification of the August 26, 1991 letter that made summary disposition inappropriate. We review de novo a motion for summary disposition under MCR 2.116(C)(10) to determine whether any genuine issues of material fact exist to warrant trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

In this case, it is undisputed that no loan ever was secured by plaintiff or anyone else for Conlin or the Devonshire Square Associates Limited Partnership to develop the property as a shopping center. It also is undisputed that Devonshire Square Associates Limited Partnership transferred the property to the Bookstore Limited Partnership, in which Mathews was the managing partner and Devonshire Square Associates Limited Partnership's and Conlin's interests were limited. Plaintiff proffered no evidence tending to establish that privity of contract existed between him and Mathews or the Bookstore Limited Partnership, the entity that ultimately obtained funding for the Barnes & Noble bookstore project. *National Sand, Inc. v Nagel Construction, Inc.*, 182 Mich App 327, 331; 451 NW2d 618 (1990) (explaining that privity of contract, or a contractual relationship between the parties, is necessary to obtain damages for breach of a contract).

Plaintiff's argument that a factual dispute existed regarding modification of the August 26, 1991 letter also fails. Whether Conlin modified the terms of the August 26, 1991 letter regarding the amount or terms of the loan he sought to build the Devonshire Square Center project is not material to plaintiff's attempt to establish a contractual relationship with Mathews or the Bookstore Limited Partnership. Lastly, we note that while plaintiff's claim for a commission is premised on activity of Dean Gaugler of Prime Finance, Ltd., one of the financiers who helped Mathews search for financing for the Barnes & Noble bookstore project, Gaugler in

¹ Plaintiff incorrectly cites MCR 2.116(B)(2) as the applicable rule. MCR 2.116(G)(1) governs the generally mandatory time period between the filing of a motion for summary disposition and the time of the hearing, requiring service of the motion "at least 21 days before the time set for the hearing." MCR 2.116(G)(1)(a)(i).

his affidavit disclaimed any agency relationship with plaintiff and disavowed Prime Finance's claim to a commission for any of the bookstore project's loans that actually closed.

Affirmed.

/s/ Hilda R. Gage

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder