STATE OF MICHIGAN

COURT OF APPEALS

ALL MAKES S-V, INC., Plaintiff-Appellant,	UNPUBLISHED August 21, 2001
V	No. 221188 Jackson Circuit Court
AMERITECH PUBLISHING, INC., Defendant-Appellee.	LC No. 99-091738-NI

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff sued defendant for breach of contract and negligence for failing to correctly print plaintiff's advertisement in the Yellow Pages section of defendant's telephone directory. Specifically, defendant placed an advertisement for sewing machines in both the sewing machine and vacuum cleaner sections and did not place a vacuum cleaner advertisement in the vacuum cleaner section. The negligence claim was dismissed pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted. The breach of contract claim was dismissed pursuant to MCR 2.116(C)(10) based on the liability clause contained in the agreement between plaintiff and defendant which limited any recovery by plaintiff to specified liquidated damages.[1] Plaintiff appeals as of right. We affirm.

[1] The liability clause, written on the back of the contract, read in part:

> If the publisher should be found liable for loss or damage due to a failure on the part of publisher or its directory, in any respect, regardless of whether customer's claim is based on contract, tort, strict liability or otherwise, the liability shall be limited to an amount equal to the contract price for the disputed advertisements, or that sum of money actually paid by customer toward the disputed advertisements, whichever sum shall be less, as liquidated damages and not as a penalty, and this liability shall be exclusive. In no event shall publisher be liable for any loss of customer's business, revenues, profits, the cost to customer of other advertisements or any other special, incidental, consequential or punitive damages of any nature, or for any claim against customer by any third party.

(continued…)

I

Plaintiff first contends that the trial court erred by granting defendant's motion for summary disposition with regard to the breach of contract claim pursuant to MCR 2.116(C)(10). We disagree.

A trial court's grant or denial of summary disposition will be reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition of all or part of a claim or defense may be granted under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek*, *supra*, at 337. When deciding a motion for summary disposition, this Court 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).

Plaintiff relies heavily on *Allen v Bell Telephone Co*, 18 Mich App 632; 171 NW2d 689 (1969) ["*Allen I*"], in support of his contention that the liquidated damage provision in the contract he entered into with defendant was unconscionable. In *Allen I*, the plaintiff, an insurance agent, signed a contract with the defendant, Michigan Bell Telephone Company, to place advertisements in the defendant's telephone directory. *Id*. at 634. At the time, the defendant was the sole provider of telephone directories in the area. *Id*. at 640. When the defendant failed to print the advertisements and the plaintiff subsequently sued, the defendant argued that a limitation of liability clause in the contract protected it from having to pay damages. *Id*. at 634. The defendant moved for and was granted summary disposition. *Id*.

On appeal, this Court found that the limitation of liability clause was substantively unreasonable, and therefore unenforceable. *Id*. at 640. In so finding, we held that in addition to examining the challenged term for its substantive reasonableness, "where goods and services can only be obtained from one source . . .[and] the choices of one who desires to purchase are limited to acceptance of the terms offered[,]. . . the relative bargaining power of the parties, their relative economic strength, [and] alternative sources of supply" should be examined to determine whether the contract is unconscionable. *Id*. at 637; see also *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998).

(…continued)

In addition, on the front of the contract, the following statement was included:

> I have read and understand the terms and conditions on the fact and reverse side. Particularly the paragraph which limits my remedies and publisher's liability in the event of any error or omission.

In *Michigan Ass'n of Psychotherapy Clinics v Blue Cross & Blue Shield of Michigan*, 101 Mich App 559, 574; 301 NW2d 33 (1980), modified 411 Mich 869; 306 NW2d 101 (1981), this Court clarified that the limitation of liability clause in *Allen I* was unconscionable because of the plaintiff's lack of options and bargaining power as compared to the defendant. This Court distinguished *Allen I* in part by noting that the plaintiff in *Allen I* could not obtain a comparable Yellow Pages listing, where the plaintiff in *Psychotherapy Clinics* enjoyed other options. *Id*. at 575. Further, in *St Paul Fire & Marine Ins Co v Guardian Alarm*, 115 Mich App 278, 283-284; 320 NW2d 244 (1982), this Court upheld the use of a limitation of liability clause in circumstances where both parties to a contract were corporations and had other options.

Similarly, in the instant case, plaintiff had advertising options that the plaintiff in *Allen I* did not enjoy because the defendant's monopoly over telephone directories, which limited advertising options, no longer exists. Accordingly, plaintiff's claim that the limitation of liability clause is unconscionable or that the agreement is an unenforceable contract of adhesion must fail. The trial court did not err by granting defendant's MCR 2.116(C)(10) motion for summary disposition because plaintiff failed to show sufficient facts to support a claim of unconscionability or adhesion.

II

Plaintiff next contends that the trial court erred by prematurely granting summary disposition and not allowing plaintiff to fully "pursue discovery." We disagree. Generally, a motion for summary disposition may be raised at any time, except that it is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

Here, the only evidence outside the pleadings that plaintiff was able to produce was a short affidavit in which Charles Mahoney, an officer and shareholder of plaintiff, stated that defendant's mistake was the reason for plaintiff's business woes. These allegations are devoid of any factual representations that would support a conclusion that another party's negligence caused plaintiff damages or that the liquidated damages clause was invalid under another theory. Because this affidavit contained mere conclusions and did not make allegations of fact, plaintiff has not shown that further discovery would stand a reasonable chance of uncovering factual support for either its negligence or breach of contract claims. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994); *Village of Diamondale*, *supra* at 566. Consequently, the trial court properly granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra