

STATE OF MICHIGAN  
COURT OF APPEALS

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TOWN & COUNTRY STERLING HEIGHTS,  
d/b/a CENTURY 21 TOWN & COUNTRY,

UNPUBLISHED  
March 29, 2002

Plaintiff-Appellant,

v

MICHAEL MENTZ, a/k/a MIKE MENTZ, and  
TURN KEY ENTERPRISES,

No. 226841  
Macomb Circuit Court  
LC No. 99-000451-CK

Defendants-Appellees.

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Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff argues that the trial court improperly granted defendants' motion for summary disposition, erroneously finding that the agreement between plaintiff and defendants for payment of a commission upon the completion of a construction project was covered by the statute of frauds. We agree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim and permits summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). In presenting a motion for summary disposition, the moving party has the burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence, and then the burden shifts to the opposing party to establish that a genuine issue of material fact exists. If the opposing party fails to present admissible documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Graham v Ford*, 237 Mich App 670, 672-673; 604 NW2d 713 (1999).

The oral contract alleged by plaintiff for which the commission was to be paid was not, as the trial court found, a contract for the sale of a building. Rather, the deposition testimony of Ms. Phillips, when viewed in a light most favorable to plaintiff, shows that the contract was for a commission to be paid if defendant was a successful bidder for a construction contract. The record evidence indicates that plaintiff was entitled to a commission upon the purchasers'

acceptance of a construction bid by defendants and was to receive it upon the completion of the construction of a commercial building on the property. Therefore, purported agreement to pay commission was not an agreement “to pay a commission for or upon the sale of an interest in real estate,” subject to MCL 566.132(1)(e).<sup>1</sup> As such, this alleged oral contract for payment of commission with respect to a successful construction bid, and not for the sale of an interest in real estate, was not covered by the statute of frauds. See *Mitchell-Morris & Co, Inc v Samaras*, 325 Mich 425, 427-428; 38 NW2d 904 (1949). Accordingly, the trial court erred in granting defendants’ motion for summary disposition.

Defendants urge various alternative grounds for affirming the trial court, arguing, for example, that there was insufficient consideration for the contract to pay commission and that conditions precedent for payment of the commission, such as the issuance by the township of a certificate of occupancy, had not been met. This Court may affirm a trial court’s decision on alternate grounds, *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998), but in this case, we think it inappropriate to do so because the trial court did not take the opportunity to rule on these issues when originally raised by defendants in their motion for summary disposition.<sup>2</sup> Plaintiff also asks that summary disposition be entered in its favor, but we decline to do so for the same reason. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Finally, we note that plaintiff argues that the trial court had no authority to enter summary disposition in this case, as it had entered an order setting a date for trial before the summary disposition motions were filed, and the conditions of MCR 2.612(C) for relief from an order were not met. This argument is misplaced. The requirements of MCR 2.612(C) apply to relief from final judgments and similar orders entered by a trial court, not to case management and other interim orders. The order at issue here was a routine case management order, and not a final judgment from which relief could be obtained only upon following special procedures. Thus, the provisions of MCR 2.612(C) had no application to it.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood  
/s/ Hilda R. Gage  
/s/ Christopher M. Murray

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<sup>1</sup> We note that this section is to be strictly construed. *Summers v Hoffman*, 341 Mich 686, 694; 69 NW2d 198 (1956).

<sup>2</sup> Defendants never raised the statute of frauds defense in the trial court. Rather, the trial court raised the issue *sua sponte*, and thus, failed to address the issues actually raised by the parties.