STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of KURT E. BUNDE, a/k/a Kurt A. Bunde, Deceased.

LOIS L. SMITH,

Plaintiff-Appellant,

v

OLD KENT BANK, Successor Trustee to the Kurt A. Bunde Trust,

Defendant-Appellee.

UNPUBLISHED
April 23, 2002

No. 225410
Allegan Probate Court
LC No. 99-050929-CZ

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting defendant's motion for summary disposition. We affirm.

Plaintiff's complaint alleged that Kurt E. Bunde made three promises to her during his lifetime, which induced plaintiff to move in with Bunde and work with him in his bakery:

> (1) We will be partners and work together in the bakery.
>
> (2) You will never have to worry about having enough money to take care of yourself.
>
> (3) I am going to live forever. But, if I die first, you will have this home (at 370 Blue Star Highway) forever.

Plaintiff lived with Bunde until his death in January 1999 and worked in the bakery with him until 1996, when it was sold. Plaintiff argues that these promises formed an enforceable contract to which Bunde's estate should be held.

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A trial court

properly grants a motion for summary disposition pursuant to MCR 2.116(C)(10) where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing such a motion, all affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties are viewed "in the light most favorable to the party opposing the motion." *Id*.

First, this Court must address the terms of the agreement. Plaintiff has stated that the agreement is comprised of three promises Bunde made. However, this Court finds that plaintiff has abandoned enforcement of the first promise, "We will be partners and work together in the bakery." Plaintiff clearly testified in her deposition that this is no longer a promise she seeks to have fulfilled. Additionally, plaintiff testified that at no time did she expect to be paid for her work in the bakery. When the bakery was sold in 1996, plaintiff was present at the closing sale. Plaintiff made no claim to the proceeds and did not expect to receive any portion. Therefore, we conclude that only the second and third promises are part of the alleged contract and accordingly limit our analysis.

Plaintiff argues that the agreement between plaintiff and Bunde was not a contract to make a will, but rather an enforceable, express oral contract or, alternatively, a contract implied in fact. We disagree.

Plaintiff contends that the money discovered in Bunde's house after his death is money which Bunde had been accumulating since plaintiff moved in and was intended to be used to fulfill Bunde's promise that plaintiff would always be taken care of financially, i.e., the money to fulfill this promise was not intended to come from a devise. Furthermore, plaintiff argues all of Bunde's real estate was part of his trust except for his primary residence, which was still titled in Bunde's individual name. Plaintiff concludes that because these promises were to be funded from sources outside Bunde's will, this cannot be about a contract to make a will.

However, according to the definition of "estate" in the Estates and Protected Individuals Code, MCL 700.1104(b), *all* personal and real property in which Bunde had title or were held in his trust are part of Bunde's estate.[1] Plaintiff testified that Bunde was planning on making a new will, which she believed would fulfill the promise of financial security and living in the house. An agreement whose terms come due after the promisor's death is properly characterized as an agreement to make a will or devise. *In re Estate of McKim*, 238 Mich App 453, 455; 606 NW2d 30 (1999). Therefore, because plaintiff is arguing for the enforcement of Bunde's promises after his death and she was not provided for in Bunde's will or trust, the agreement is properly characterized as a contract to make a will.

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[1] MCL 700.1104(b) provides in pertinent part:

> "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration.

Such agreements, whether express or implied in fact, are governed by MCL 700.2514 (formerly MCL 700.140). *Id.* at 457. The statute provides in pertinent part:

> (1) If executed after July 1, 1979, a contract to make a will or devise, not to revoke a will or devise, or to die intestate may be established only by 1 or more of the following:
>
> (a) Provisions of a will stating material provisions of the contract.
>
> (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
>
> (c) A writing signed by the decedent evidencing the contract. [MCL 700.2514.]

The facts of *McKim* are strikingly similar to the one at bar. In that case, the decedent asked the plaintiff to "take up housekeeping with him." *In re McKim, supra* at 454. In exchange, the decedent promised to leave the plaintiff the house and a sum of money to maintain the quality of life to which she had become accustomed. *Id.* at 455. However, the decedent died without a will. *Id.*

The *McKim* Court held that, given the language of MCL 700.2514, enforcement of an express or implied-in-fact theory is precluded where the agreement concerns a contract to make a will. *Id.* at 459. The Court noted, "The clear language of the statute . . . evidences the Legislature's intent to bar agreements to make a will or devise absent a writing." *Id.* Allowing recovery without a writing would "nullify the clear purpose of the statute, which is to tighten the methods by which contracts concerning succession may be proved." *Id.* at 460. Here, plaintiff testified that the promises Bunde made, i.e., the agreement, were all oral. The record indicates no evidence of a writing existed. Therefore, plaintiff is not entitled to enforcement of the agreement.

Plaintiff also appears to argue an agreement should be implied in law. With an implied-in-law contract the court conclusively implies an intent to pay for services in order to prevent unjust enrichment. *In re Estate of Morris*, 193 Mich App 579, 582; 484 NW2d 755 (1992); *Roznowski v Bozyk*, 73 Mich App 405; 251 NW2d 606 (1977). A contract implied in law is "an obligation imposed by law to do justice even though it is clear that *no promise was made or ever intended*." *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988) (emphasis added).

In the instant case, plaintiff consistently contends that Bunde made promises and even testified as such in her deposition. Plaintiff does not argue for the sake of this theory that the promises were never made. In her complaint, under count five, plaintiff stated, "All previous allegations are incorporated in this count as if fully stated." Furthermore, plaintiff contended in her complaint that "Bunde requested the services [plaintiff's work in the bakery], and knew, or reasonably should have known that [*plaintiff*] *expected to be paid by Bunde for her work*." However, plaintiff testified that she never expected compensation for this work. Therefore, plaintiff's implied-in-law theory cannot stand.

Plaintiff argues that, in light of the trial court's own findings, the court should have granted partial summary disposition in favor of plaintiff. Plaintiff contends that these findings confirm that Bunde made certain promises to plaintiff, and thus, plaintiff is entitled to their enforcement. Defendant does not contest, for summary disposition purposes, the fact that certain promises were made by Bunde.

This Court has already determined that in order for plaintiff to be successful on appeal based on either an express or implied-in-fact theory, she would need to show that evidence of a writing regarding the alleged agreement existed. However, none of the court's findings indicate the existence of such a written agreement. Regarding plaintiff's implied-in-law theory, findings by the court that support the existence of express oral promises by Bunde undermine this theory, not sustain it. Therefore, the trial court's findings were not inconsistent with granting summary disposition in favor of defendant.

Plaintiff next argues that the court erred in allowing defendant's summary disposition motion to go forward before discovery was complete. Again, we disagree.

A motion for summary disposition 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, it 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).

Plaintiff argues that the testimony of four other witnesses will corroborate various pieces of plaintiff's testimony, particularly with regard to the substance of Bunde's promises. As noted in the discussion above, the survival of plaintiff's appellate claims depends solely on the existence of a writing which meets the requirements of MCL 700.2514. Plaintiff does not contend that any of these witnesses possess such evidence. Therefore, we conclude that further discovery was not mandated.

Citing MCR 2.116(G)(4), but without further explanation, plaintiff also argues that defendant failed to identify material fact issues which it claims are undisputed and therefore summary disposition should have been denied by the trial court. Issues insufficiently briefed are deemed abandoned on appeal. *Dresden v Detroit Macomb Hosp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his positions." *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). Therefore, we will not address this argument.

Lastly, plaintiff lists twenty-three "facts" in her appellate brief which she claims are undisputed. Plaintiff argues that if these "undisputed facts" are not contested by defendant, then summary disposition should have been granted in favor of plaintiff; if they are disputed, then summary disposition should not have been granted at all. We disagree.

Defendant asserts that most of the listed "facts" are either legal conclusions or opinions, and we agree. The remaining facts, if disputed, are not material because they do not evidence a writing pertaining to the agreement.

Affirmed.

/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra