

STATE OF MICHIGAN
COURT OF APPEALS

SALAH KULATO,

Plaintiff-Appellant,

v

RONNIE MANSOUR and ACN TELEVISION
CORPORATION,

Defendants-Appellees.

UNPUBLISHED

May 31, 2002

No. 227143

Oakland Circuit Court

LC No. 99-019900-NZ

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Plaintiff Salah Kulato appeals as of right from the trial court's order granting defendants Ronnie Mansour and ACN Television Corporation's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

According to Kulato's complaint, which he filed on December 29, 1999, he and Mansour formed ACN "on or about July 1998," with each man holding fifty percent of the shares in the corporation. Kulato alleged that Mansour, his cousin, engaged in unspecified "wrongful conduct," forcing Kulato to leave the corporation without being paid the wages and dividends owed to him. In Kulato's view, the corporation was "hopelessly deadlocked." Consequently, he asked the trial court to order an accounting, appoint a receiver, dissolve the corporation, award damages for breach of fiduciary duty and misuse of corporate assets, and to award injunctive relief.

Responding to the complaint with a motion for summary disposition on February 7, 2000, defendants presented a very different picture of ACN's business affairs that did not include Kulato as a shareholder to any extent. For instance, ACN's May 12, 1998, articles of incorporation listed Mansour as the sole incorporator, and ACN's lease had only Mansour's signature, listing him as president. Mansour's affidavit averred that Kulato had been only a part-time salesperson working on commission for the corporation, earning about \$500 a month, as briefly noted in a letter dated July 1, 1998. Copies of checks issued to and cashed by Kulato revealed that they had been for "commissions."

In response to the motion for summary disposition, Kulato submitted his own affidavit in which he claimed to own a fifty-percent interest in the television corporation and that he had an agreement with Mansour regarding their respective duties and salary. Kulato argued that defendants' motion was an attempt to block discovery and that defendants "never answered the Complaint with any affirmative defenses," to which defendants countered that Kulato had never sent them any discovery requests. Kulato acknowledged that he had nothing in writing to show that he was a shareholder because "this is a family matter" and the division of labor between the two cousins entailed Mansour filling out the paperwork he was using to prove his complete ownership of the corporation. Nevertheless, Kulato asserted that he could produce "about ten witnesses" to say he was a shareholder, naming twelve individuals. He did not provide affidavits from any of these potential witnesses. He did not explain why he could not produce their affidavits, if they were unavailable, or whether he wanted additional time to secure their sworn statements.

The trial court granted defendants' motion for summary disposition on April 3, 2000, reasoning that Kulato's failure to provide any documentary evidence demonstrating his ownership interest in ACN in the face of defendant's evidence showing that he was only a sales representative left no question of fact regarding the corporation's ownership. Without this ownership interest, the trial court held, Kulato had no right to sue under the Business Corporation Act¹ for the relief he had requested. Ten days later, on April 13, 2000, Kulato moved for reconsideration, arguing that summary disposition was premature because there had been no discovery. In support for his claim that he had an ownership interest in the corporation, Kulato submitted an affidavit from a person ACN formerly employed in which the affiant declared that Mansour told her that plaintiff "was his partner in ACN Television Corporation and owned 50% of the corporation." The trial court denied Kulato's motion for reconsideration, explaining that he had not brought anything new to its attention.

Kulato now argues that the trial court erred in granting the motion for summary disposition before allowing him an opportunity to engage in discovery.

II. Standard Of Review

Case law requires that we review de novo orders granting or denying summary disposition.²

III. Legal Standard

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.³ When deciding a motion for summary disposition under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine

¹ See MCL 450.1101 *et seq.*

² *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

³ *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

whether a genuine issue of any material fact exists to warrant a trial.⁴ The nonmoving party cannot simply rest on allegations or denials, but must present evidence showing that a material issue of fact is in dispute requiring resolution at trial.⁵ In the end analysis, summary disposition is appropriate if the documentary evidence establishes “that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.”⁶

IV. Opportunity For Discovery

In *Village of Dimondale v Grable*⁷ this Court explained that,

“[a]s a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete.” “However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion.”^[8]

Kulato has never alleged that defendants are in possession of evidence, documentary or otherwise, that would support his claims. He acknowledged that there is no documentary evidence proving or suggesting that he has an ownership interest in ACN, while defendants presented the trial court with documentary evidence contradicting Kulato’s claims. Though Kulato alleged in his affidavit that other individuals would be able to verify his claim that Mansour admitted that they were equal partners in the corporation, he did not provide any evidence from these individuals in time for the trial court to consider it while ruling on the motion for summary disposition.⁹ Moreover, MCR 2.116(H) provides a process by which a party can demonstrate to the trial court that other critical affidavits are unavailable, making summary disposition premature or inappropriate. Despite alleging that “at least ten” individuals would support his claims when drafting his own affidavit, Kulato did not provide the information MCR 2.116(H) requires. Thus, Kulato neither demonstrated that he needed additional time to discover evidence his party opponents might have been holding or to secure affidavits from favorable witnesses at the time the trial court ruled on the dispositive motion. From the evidence available and arguments made, there was no reason for the trial court to believe that the record would be any more favorable to Kulato if it denied or delayed ruling on the motion for summary disposition.

⁴ *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); see also MCR 2.116(G)(5).

⁵ *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4).

⁶ *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

⁷ *Village of Dimondale v Grable*, 240 Mich App 553; 618 NW2d 23 (2000).

⁸ *Id.* at 566 (citations omitted).

⁹ Though Kulato submitted an additional affidavit following the trial court’s ruling on the motion for summary disposition, the affidavit was not part of the record the trial court had considered when deciding the motion. Notably, Kulato does not challenge the trial court’s ruling on the motion for rehearing.

Kulato also argues that the trial court erred by granting defendants' motion for summary disposition because whether he was a shareholder was a factual matter that rested on the credibility of witnesses. Questions revolving around witness credibility, as well as motive or intent, ordinarily should be submitted to a factfinder.¹⁰ The nature of Kulato's claims leaves the real possibility that, had this case gone to trial, the jury would have weighed his credibility and the credibility of his supporting witnesses against defendants' contrary claims and evidence to reach a verdict. However, in order to survive a motion for summary disposition under MCR 2.116(C)(10) so that he could ask the jury to believe him over his cousin, Kulato had to provide some evidence that went beyond his allegations in the complaint.¹¹ His affidavit added nothing to the statements in the complaint and, thus, was insufficient in light of defendants' ample evidence.¹² Consequently, the trial court did not err in granting the motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

¹⁰ See *Vanguard Ins v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994).

¹¹ See MCR 2.116(G)(4).

¹² See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).