

STATE OF MICHIGAN
COURT OF APPEALS

OUT COLD ENTERPRISES, INC.,

Plaintiff-Appellant,

v

PATRAGER ENTERPRISES, INC., and GARY
RAGER,

Defendants-Appellees,

and

RAGER ENTERPRISES, INC.,

Defendant.

UNPUBLISHED

October 25, 2002

No. 233504

Wayne Circuit Court

LC No. 00-012679-CK

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

MEMORANDUM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 545-455; 597 NW2d 28 (1999).

Plaintiff's contract and fraud claims were based on a misrepresentation as to the earnings potential of the business it purchased from defendants. The contract executed by the parties was silent as to profits but did contain a merger and integration clause. Pursuant to the parole evidence rule, evidence of defendants' representations is not admissible to modify the parties' written agreement, *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 87-88; 360 NW2d 876

(1984), and thus defendants were entitled to judgment on plaintiff's breach of contract claim. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502, 507; 579 NW2d 411 (1998). Because plaintiff's fraud claims were predicated on a representation that was nullified by the merger and integration clause, defendants were also entitled to judgment as to those claims as well. *Id.* at 504-505.

We reject plaintiff's argument that defendants could be held liable for breach of contract for violating a duty of good faith imposed by the Uniform Commercial Code. However, it is by no means clear that the UCC applied to this transaction, which involved a sale of both tangible and intangible assets and in which the majority of the purchase price was attributable to good will. *McFadden v Imus*, 192 Mich App 629, 632-633; 481 NW2d 812 (1992).

We also reject plaintiff's argument that defendants could be held liable for breach of an express warranty relating to the power to transfer the name of the business. Not only was this theory not alleged in the complaint, the argument was not raised below and thus has not been preserved for appeal. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra