STATE OF MICHIGAN

COURT OF APPEALS

ISABELLE CHILSON,

Plaintiff-Appellant,

v

JACK WEIN,

Defendant-Appellee.

UNPUBLISHED
January 29, 2004

No. 242607
Wayne Circuit Court
LC No. 00-040431-CH

JACK WEIN,

Plaintiff-Appellee,

v

ISABELLE CHILSON,

Defendant-Appellant.

No. 242620
Wayne Circuit Court
LC No. 01-118084-CH

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff Isabelle Chilson[1] has appealed of right from the order granting summary disposition to defendant that was issued with regard to two consolidated cases – Wayne Circuit Court No. 00-040431-CH (a case initiated by plaintiff seeking to have her title to property declared superior to defendant's claim), and Wayne Circuit No. 01-118084-CH (an action commenced by defendant in district court seeking to evict plaintiff from the property).[2] Because

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[1] Chilson is the plaintiff in Docket No. 242607 and the defendant in Docket No. 242620; however, for purposes of this appeal, Chilson will be referred to as plaintiff and Wein will be referred to as defendant.

[2] Plaintiff moved to remove the district court eviction action to circuit court and to consolidate it with her pre-existing circuit court case, and the district court granted her motion.

we conclude that genuine issues of material fact exist that preclude summary disposition, we reverse.

Plaintiff contends that the trial court erred by granting summary disposition to defendant because there was a genuine issue of material fact regarding whether she signed a warranty deed transferring the property to defendant's mother and because there was a legal issue whether, even if the warranty deed was valid, she had reacquired the property by adverse possession.

This Court reviews de novo the trial court's decision to grant summary disposition.[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> In reviewing a motion for summary disposition brought under MCR 2.116 (C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).]

Defendant moved for summary disposition; therefore, the trial court was required to view the evidence in a light most favorable to plaintiff, the non-moving party. *Id.* at 362. "A motion for summary disposition under MCR 2.116(C)(10) must be supported by documentary evidence." *Meyer v City of Centerline*, 242 Mich App 560, 574; 619 NW2d 182 (2000). If the moving party fails to present documentary evidence, the nonmovant has no duty to respond to the motion. *Id.* at 575. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), citing *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto, supra* at 369.

Plaintiff submitted a copy of the warranty deed she obtained in 1966 when she purchased the property. Defendant did not contest that plaintiff owned the property at least until 1980. Defendant submitted a copy of a warranty deed that purported to transfer the property from plaintiff to defendant's mother, Sema Wein, in May 1980. The deed indicated that the transfer was made in return for $37,500 and Wein's assumption of a $9,000 mortgage. Defendant is listed on the deed as a witness. Wein died within months of the transfer and defendant was

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[3] Although the trial court did not specify under which subrule it was granting summary disposition, the court considered documentary evidence apart from the pleadings, so we conclude its ruling was based on MCR 2.116(C)(10). *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 183-184; 551 NW2d 132 (1996).

appointed trustee of the trust established by her estate. Despite the apparent transfer of the property, as reflected in the Wein deed, there is no dispute that plaintiff lived on the property from 1980 until defendant succeeded in having her evicted in 2002.

Plaintiff testified in her deposition that she paid the property taxes, paid the mortgage, and maintained the property. To support this testimony, plaintiff presented a copy of the discharge of the mortgage entered in 1995; this document makes no mention of Wein, but, rather, indicates that plaintiff had paid off the mortgage. Furthermore, plaintiff presented a copy of a $4,115 home improvement mortgage she obtained in 1987 that did not mention Wein. These documents support the inference that plaintiff owned the property.

In response, defendant claimed that Wein paid plaintiff $37,500 and assumed the $9,000 mortgage, but he did not produce any documentation – and admitted he could not – to substantiate this claim.[4] He also claimed that plaintiff continued to occupy the property based on an "agreement" between her and Wein. However, once again, defendant failed to present any evidence that such an agreement existed. He admitted that he had not been present when this "agreement" had been made, he failed to present any written agreement, and he failed to present any documentary evidence showing that plaintiff had paid rent for the right to occupy the property. Although he claimed that his mother "was paying for the property," he failed to present any evidence demonstrating that Wein had paid *anything* on the property's mortgage, and he admitted he had no such evidence. In fact, given the fact that Wein died within four months of the execution of the warranty deed, the fact that defendant failed to present any documentary evidence indicating that Wein paid anything toward the mortgage, the fact that defendant disclaimed knowledge of the estate's alleged ownership of the property until 2000, the fact that *someone* had to be paying the mortgage, and the fact that the mortgage was eventually discharged in 1995 by plaintiff without any reference to Wein's ownership of the property, the evidence – particularly considered in a light most favorable to plaintiff – plainly suggests that Wein did *not* pay anything toward the mortgage.[5]

The only "evidence" defendant presented regarding the alleged "agreement" was his deposition testimony that he had been told by Wein and Susie Rutter[6] that such an agreement

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[4] Regarding the provision in the Wein deed that the property transfer was premised on Wein's promise that she would assume the existing $9,000 mortgage, the evidence indicates that this never occurred. It is undisputed that plaintiff discharged the mortgage in 1995 and defendant failed to produce any documentation indicating that the existing mortgage was assumed by Wein.

[5] Defendant continues to assert on appeal that there was an agreement to permit plaintiff to remain in physical possession of the property and that Wein *and* defendant made payments toward the mortgage. Defendant failed to present any evidence in the trial court to support these assertions. Our review is limited to the evidence presented to the trial court at the time it decided the motion for summary disposition. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd*, __ Mich App __; __ NW2d __ (Docket No. 245155, issued November 4, 2003), citing *Peña v Ingham Co Rd Comm*, 255 MA 299, 310; 660 NW2d 351 (2003).

[6] It appears that Susie Rutter was plaintiff's daughter – although this is not entirely clear from
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existed. Wein and Rutter were deceased. Their out-of-court statements were hearsay because they were offered for the truth of the matter asserted. MRE 801(c). Defendant was required to support his motion for summary disposition with *admissible* evidence, MCR 2.116(G)(6), and hearsay statements by two deceased individuals are not admissible evidence. MRE 802. See *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002) ("Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible.").

Furthermore, although Wein died in August 1980, it apparently took defendant close to twenty years to realize that Wein had owned the property – despite the fact that he was purportedly present as a witness when the warranty deed was executed. In fact, in his deposition testimony, defendant claimed that he learned of the "agreement" that plaintiff could occupy the property from his mother before she signed the deed. It seems highly unlikely that under these circumstances defendant would not know – or would fail to discover in short order – that his mother owned the property when he was present as a witness at the time his mother allegedly obtained legal title.

We therefore conclude that plaintiff demonstrated that a genuine issue of material fact existed. Reasonable minds could differ regarding whether plaintiff signed the warranty deed and whether, even if she did, there was an agreement that she could remain on the property for some undefined period of time. *West, supra* at 183.

Additionally, the trial court's decision appears to be based primarily on its comparison of plaintiff's purported signature on the Wein warranty deed with her admitted signature on the home improvement mortgage. Given that plaintiff testified under oath that she did not sign the document and that it was a forgery, the trial court's ruling constituted the resolution of a contested fact that should have been made by the ultimate trier of fact – not the trial court in the course of deciding a motion for summary disposition. *Nesbitt v American Comm Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999) ("In deciding motions for summary disposition, '[t]he court may not make factual findings or weigh credibility.'"), quoting *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). For this reason alone, we conclude that the trial court's grant of summary disposition should be vacated and the case returned to the trial court for further proceedings.

Plaintiff also claims that she established ownership of the property by virtue of adverse possession. The trial court did not address this claim. Accordingly, this issue may be raised by plaintiff and considered by the trial court on remand.

(…continued)

defendant's deposition testimony. Defendant stated: "Susie is her daughter. Susie's the one that was taking care of my mother." He also "accepted" that Rutter was her last name and that it was not Chilson.

Reversed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello