STATE OF MICHIGAN

COURT OF APPEALS

RALPH AYAR and SAAD AYAR,

Plaintiffs-Appellants,

v

BAYMONT INNS, INC., a Wisconsin corporation, and MARCUS CORPORATION, a foreign corporation,

Defendants-Appellees,

and

MOLINARO KOGER, INC., a Virginia corporation, JOHN C. JAMESON and ROBERT T. KOGER, jointly and severally,

Defendants.

UNPUBLISHED
April 20, 2004

No. 245775
Oakland Circuit Court
LC No. 00-023662-CK

Before: Griffin, P.J., and Zahra and Borrello, JJ.

PER CURIAM.

In this action for the alleged breach of contract regarding the sale of a hotel, plaintiffs appeal as of right an order of summary disposition granted in favor of defendants pursuant to MCR 2.116(C)(8) and (10). We affirm. The facts are summarized in the well-reasoned written opinion by the Honorable Richard D. Kuhn:

> On June 8, 1999, plaintiffs submitted to defendants a proposal containing the terms of an offer to purchase one of defendants' hotels. Defendants replied on June 25, 1999, by letter ("the Letter") . . . .
>
> The Letter outlined terms under which defendants would agree to sell the hotel to the plaintiffs, including a statement that the defendants would "require use of [seller's] Purchase and Sale Agreement." The Letter further requested that "[i]f the items listed above are acceptable . . . please have [the plaintiffs] acknowledge acceptance of these terms and we will prepare a Purchase and Sale Agreement." Signature lines were provided for both plaintiffs. Immediately following the sentence regarding acknowledgment, was the following language:

> "Neither party is bound until such time as a Purchase and Sale Agreement is fully executed by both parties."
>
> Plaintiffs allege that they signed the Letter and forwarded it by facsimile to defendant Jameson. Defendants Marcus and Baymont allege that while the above correspondence was being exchanged, negotiations were also continuing with another prospective buyer, who purchased the hotel on July 15, 1999.

Because the circuit court relied on documentary evidence attached to the pleadings, we will treat the motion as having been decided under MCR 2.116(C)(10). *Sharp v City of Lansing*, 238 Mich App 515, 518; 606 NW2d 424 (1999). The grant or denial of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* The moving party is entitled to judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; MCR 2.116(C)(10), (G)(4). In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id.* If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363.

In the present case, plaintiffs argued in the lower court and on appeal that defendants' June 25, 1999, letter, which plaintiff accepted, constituted a legally binding express or implied contract, or in the alternative, a legally enforceable "agreement to agree." We disagree.

Contractual liability is based on mutual consent as viewed on an objective basis. In *Rood v General Dynamics Corp*, 444 Mich 107, 118-119; 507 NW2d 591 (1993), our Supreme Court set forth the following principles to be applied for claims of alleged contract:

> Contractual liability is consensual. 1 Farnsworth, Contracts, § 3.1, p 160. A basic requirement of contract formation is that the parties mutually assent to be bound. *Id*. . . .
>
> In deciding whether a party has assented to a contract, we follow the objective theory of assent, focusing on how a reasonable person in the position of the promisee would have interpreted the promisor's statements or conduct. Calamari & Perillo, Contracts (3d ed), § 2-2, p 27. As Professor Farnsworth stated:
>
> "Since it is difficult for a workable system of contract law to take account of assent unless there has been an overt expression of it, courts have required that

assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective." [*Id*. at § 3.1, pp 160-161.]

Otherwise stated, to determine whether there was mutual assent to a contract, "we use an objective test, 'looking to the expressed words of the parties and their visible acts,'" Rowe [*v Montgomery Ward & Co,* 437 Mich 627; 473 NW2d 268 (1991)] at 640, quoting *Goldman v Century Ins Co,* 354 Mich 528, 535; 93 NW2d 240 (1958), and ask whether a reasonable person could have interpreted the words or conduct in the manner that is alleged.

The letter at issue contains an express statement that it shall not be deemed to be a binding contract by the parties: "Neither party is bound until such time as a Purchase and Sale Agreement is fully executed by both parties." The circuit court ruled that the wording of the letter is clear and unambiguous and from an objective standpoint it clearly did not constitute a binding contract:

Defendants here included very specific language that neither of the parties was to be bound until the purchase and sale agreement was executed. If wording is clear and unambiguous, a court is to give it the objective operative meaning. *Derda, Inc v Foley-Belsaw Co,* 1992 WL 71815 (W.D. Mich 1992), citing *Heritage Broadcasting Co v Wilson Communications, Inc,* 170 Mich App 812, 818 [428 NW2d 784] (1988). Plaintiffs here allege only that they had a subjectively different interpretation of the plain words of the letter, which is insufficient to show that a meeting of the minds did not occur. *Heritage, supra* at 818.

General contract principles provide further weight to the argument that there was no meeting of the minds between the parties in this matter.

"A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."

Restatement (Second) of Contracts § 26. Similarly, the plain language of the Letter here provided Plaintiffs with a reason to know that the defendants did not intend to be bound until such time as the purchase and sale agreement was executed.

Plaintiffs further argue that, at the very least, the language of the Letter created a contract to draft the Purchase and Sale Agreement. Given that the hotel was sold very shortly after the Letter was exchanged, it would be senseless to attempt to enforce a contract to draft a useless agreement, even if a contract to draft a purchase agreement could be proved.

Accordingly, no contract was formed between the parties, as defendants clearly expressed their intention not to be bound, and therefore the required mutual assent did not exist. . . .

> Plaintiff also seeks recovery under a theory of implied in fact contract between the parties. The same arguments regarding mutual assent to be bound apply to the formation of an implied contract as to an express contract. As stated previously, defendants made it clear that they did not intend to be bound. Therefore, there is no implied in fact contract.

We agree and hereby adopt the above portions of Judge Kuhn's opinion as our own. In addition, we note that plaintiffs' reliance on *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354; 320 NW2d 836 (1982), and *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812; 428 NW2d 784 (1988), is misplaced. Unlike *Opdyke* and *Heritage*, the document at issue in the present case contains an express statement that the letter will bind neither party until such time as a final purchase and sale agreement is fully executed. Accordingly, even if all material terms were set forth in the letter, defendants reserved their right not to be bound to any agreement until such time as a final purchase and sale agreement was executed.

Finally, plaintiffs argue on appeal that summary disposition was prematurely granted because discovery had not been completed. Again, we disagree. In *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994), we rejected a similar argument:

> We also reject plaintiff's claim that summary disposition was premature because discovery was incomplete. This Court has held that a grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). However, a disputed issue must be before the court. *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993); *Pauley, supra.* Here, plaintiff failed to do so.

In the present case, because the document at issue is clear and unambiguous, there is no genuine material factual dispute that would necessitate further discovery.

Affirmed.

/s/ Richard Allen Griffin
/s/ Brian K. Zahra
/s/ Stephen L. Borrello