STATE OF MICHIGAN

COURT OF APPEALS

BISCAYNE CORNER DELI & BAKERY EAST, LLC, Plaintiff-Appellant, v MC OFFICE INVESTMENTS, LLC, Defendant-Appellee, and CAPSTONE ADVISORS, and FARBMAN MANAGEMENT GROUP OF DETROIT, Defendants.	UNPUBLISHED May 18, 2004 No. 246743 Wayne Circuit Court LC No. 01-109938-CK

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendant MC Office Investments, LLC, in this breach of contract action seeking recovery for lost business because of inadequate heating, air conditioning, and ventilation (HVAC) in commercial space plaintiff leased from defendant. We affirm.

I

In 1996, plaintiff entered into a lease of commercial space for the operation of a deli in the First National Building in Detroit. During renovation for the deli, plaintiff redesigned the leased space to eliminate an interior wall so that the deli opened into a common area of the main building. Plaintiff installed a separate HVAC system in the leased space; however, the deli allegedly was plagued with extreme hot and cold temperatures from the time of opening. Plaintiff maintained that although its HVAC was adequate for the deli space, the inadequate heating and cooling system in the adjacent common facilities caused the temperatures in the deli to rise and fall to uncomfortable levels. Plaintiff allegedly complained to the landlord, but the problem was not corrected.

In May 1998, defendant purchased the First National Building and assumed the rights and obligations of the original lessor. Plaintiff allegedly pursued the heating and cooling problems with defendant to no avail. In March 2001, plaintiff filed this action against defendants, alleging breach of contract and breach of the covenant of quiet enjoyment/nuisance.[1] Plaintiff alleged that defendant had failed to provide adequate heating and cooling of the premises as required by the lease and that repair work in the common facilities had interfered with plaintiff's business because of odors, noise, and blocked entrances. Plaintiff sought damages of $413,500 for injuries during 1998 and 1999 and specific performance of the lease.

Defendant filed a motion for summary disposition on several grounds, including that plaintiff failed to present sufficient evidence to support its claims and that plaintiff was estopped from claiming damages because the HVAC claim originated in 1996 and plaintiff's representative, Samuel Sesi, had signed tenant estoppel certificates in 1997 and 1998, acknowledging the landlord's satisfactory performance under the lease. The trial court granted defendant's summary disposition motion in part, finding that pursuant to the lease, plaintiff's damages were limited to rent abatement. However, the court denied summary disposition of the HVAC claim on the basis that plaintiff "wishe[d] to submit the testimony of customers about inadequate heating or cooling," which was sufficient to create a genuine issue of material fact.[2]

Defendant submitted a motion for reconsideration, arguing that the court erred in denying summary disposition on the basis of plaintiff's promise to submit testimony from customers, which was insufficient to survive a motion for summary disposition. The court agreed and on reconsideration, granted summary disposition in full. The court subsequently denied plaintiff's motion for reconsideration.

II

This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10).[3] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

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[1] Defendants Capstone Advisors, and Farbman Management Group of Detroit were dismissed from the action and are not involved in this appeal.

[2] The court also found that the estoppel certificates were not dispositive because plaintiff was claiming damages after 1998.

[3] Defendant moved for summary disposition pursuant to MCR 2.116 (C)(10) and (C)(8). The court did not specify the subrule under which summary disposition was granted. Because the court considered evidence beyond the pleadings, we review the motion pursuant to MCR 2.116(C)(10). *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996).

A party moving for summary disposition has the initial burden of supporting its motion by affidavits, depositions, admissions or other documentary evidence. *Id*. at 455. The opposing party then has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. *Id.* "'Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.'" *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III

Plaintiff argues that the trial court erred in granting summary disposition. We disagree. Plaintiff challenges the trial court's ruling on several grounds. We are not persuaded that any of the grounds justify reversal.

Contrary to plaintiff's argument, defendant carried its initial burden of presenting evidence to support its motion for summary disposition. Defendant submitted substantial documentary evidence, including the parties' lease; the tenant estoppel certificates; depositions of Sesi and plaintiff's accountant, Robert Hittie; plaintiff's estimate of damages; and plaintiff's tax returns. This documentary evidence supported defendant's position. *Quinto, supra* at 362. A moving party may either submit affirmative evidence that negates an essential element of the nonmoving party's claim or demonstrate that the nonmoving party's evidence is insufficient to establish an essential element of the claim. *Id*. At this point, the burden shifted to plaintiff to present evidentiary proofs in opposition to the motion for summary disposition. *Smith, supra* at 455.

Again, contrary to plaintiff's argument, plaintiff failed to carry its burden in opposing defendant's motion. A party opposing a motion for summary disposition must set forth specific facts at the time of the motion to show a material factual dispute. *Smith, supra* at 455; *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Plaintiff's cursory argument in its five-page response to defendant's motion for summary disposition did not meet plaintiff's burden.

Although Sesi's deposition is replete with references to documentary evidence that would support Sesi's allegations, plaintiff did not proffer this evidence in opposition to defendant's motion for summary disposition. Plaintiff presented no documentary evidence to support its argument opposing summary disposition. Plaintiff's statements such as "[t]he motion record demonstrates that [plaintiff] will present evidence at trial do (sic) show both the heating and air conditioning at the Premises are unreasonably deficient" are insufficient to survive a motion for summary disposition. A litigant's mere pledge to establish a genuine issue of material fact at trial is insufficient to survive a motion for summary disposition. *Id*. at 121.

Plaintiff argues that its citations to Sesi's deposition, submitted by defendant in moving for summary disposition, sufficiently responded to defendant's motion. We disagree.

In its response to defendant's motion for summary disposition, plaintiff cited Sesi's deposition in a footnote as follows:

> The deposition testimony shows that temperatures range as low in 40s, 50s and low 60s in the winter months [Sesi p 69-70; 114] to between 95 and 100 degrees for weeks at a time in the summer months [Sesi p 72]. Biscayne has endured frozen pipes, oven equipment so called (sic "cold") it took hours extra to come up to useful cooking range, conditions where employees must work and patrons must dine with their winter coats on. [Sesi p 67-68.]

This footnote was provided for plaintiff's factual assertion that "[t]he Premises are excessively hot in warm summer weather and excessively cold in cold winter weather." Plaintiff further stated that this was an extreme, ongoing problem, that defendant was not obeying the terms of the lease, and therefore plaintiff was entitled to judicial remedy. These general statements were insufficient to survive defendant's motion for summary disposition. Plaintiff has the burden of setting forth specific facts and admissible evidence in response to defendant's motion for summary disposition, including issues of breach, causation, and damages. Sesi's speculation regarding the periods of extreme heat and cold and promises to produce customer testimony concerning the intolerable temperatures as well as other documentation of plaintiff's injuries do not meet this burden.

Plaintiff's remaining arguments are also unpersuasive. Plaintiff argues that the issue of damages is not the subject of a (C)(10) motion. While a motion under MCR 2.116(C)(10) does not consider whether a dispute exists regarding damages, it does not follow that an alleged failure to establish damages, where relevant, is beyond the purview of such a motion.

Plaintiff argues that the trial court failed to consider that plaintiff was entitled to damages for defendant's intentional refusal to remedy the HVAC inadequacies and other business disruptions. Plaintiff argues that the limitations on damages in the lease are unenforceable under Uniform Commercial Code principles because they fail of their essential purpose. Finally, plaintiff argues that it would be unconscionable to limit plaintiff's remedy for the inadequate HVAC system to the lease provision for repair. With the exception of the claim of unconscionablity, plaintiff failed to raise these issues before the trial court and they are therefore unpreserved for appellate review. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). Nonetheless, we conclude that these arguments fail on the merits.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio