STATE OF MICHIGAN

COURT OF APPEALS

LOFGRENS ENTERPRISES, INC.,

Plaintiff/Counterdefendant-Appellant,

V

DORE & ASSOCIATES CONTRACTING, INC.,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
June 24, 2004

No. 249049
Cheboygan Circuit Court
LC No. 01-006844-CK

Before: Gage, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiff/counterdefendant, Lofgrens Enterprises, Inc. (plaintiff), appeals of right the trial court's May 28, 2003, order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant/counterplaintiff, Dore & Associates Contracting, Inc. (defendant). This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Pursuant to its contract with the Michigan Department of Environmental Quality (MDEQ), defendant was obligated to remove and recycle or dispose of a 30,000-ton sawdust pile that had been in the City of Cheboygan (the City) for over one hundred years. Defendant entered into a contract with plaintiff, whereby defendant would pay plaintiff to "receive and own non-contaminated sawdust" from defendant at one of two locations owned by plaintiff. The contract between plaintiff and defendant did not obligate defendant to recycle or reprocess the sawdust at plaintiff's sites. Defendant's sole obligation was to pay plaintiff for the depositing of sawdust at one of plaintiff's sites.

The City required the posting of a $2 million performance bond for the use of one of plaintiff's sites, and the MDEQ approved the other site as a recycling location only. Although plaintiff presented evidence that the City decided to require the $2 million performance bond before plaintiff and defendant actually signed their contract, plaintiff admitted that neither party contemplated the $2 million performance bond when they entered into the contract. Because neither of plaintiff's sites would be acceptable locations for defendant to simply deposit the sawdust, defendant made other arrangements for its removal and disposal. Plaintiff filed a complaint against defendant, alleging that defendant breached the contract. This breach of contract claim forms the basis for this appeal.

Plaintiff filed a second complaint against the City, alleging intentional interference with a contractual relationship and impairment of contract.[1] Plaintiff's president signed the complaint against the City, in which plaintiff alleged as follows:

> ¶ 7. That [defendant] contracted with the Plaintiff to deposit a portion of said "sawdust pile" on property owned by the Plaintiff or under contract with the Plaintiff . . . .
>
> ¶ 8. That [defendant] applied to the Zoning Board of Appeals for the City of Cheboygan for permission to deposit said material on the property owned or under the control of the Plaintiff.
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> * * *
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> ¶ 11. That the $2,000,000.00 bond, which was not subject of [sic] the contract agreement with the Department of Natural Resources, made the cost of said contract between the Plaintiff and the Defendant prohibitive.
>
> ¶ 12. The Cheboygan City Council then offered that [defendant and another contractor] could deposit said materials on the property directly adjacent to the property under the control of the Plaintiff without posting any bond, but only a letter of credit.
>
> ¶ 13. That [defendant], as a result of said offer, negated the contract with the Plaintiff and undertook to deposit some forty (40) tons of materials on [sic] the "Old City Dump."
>
> ¶ 14. That the City Council for the City of Cheboygan by using its legislative authority impaired the contract between the Plaintiff and [defendant] by legislative action for its own benefit.
>
> ¶ 15. That Article I, Section 10 of the Michigan Constitution provides as follows:
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> "Sec. 10. No bill of attainder, *ex post facto* law or law impairing the obligation of contract shall be enacted."
>
> ¶ 16. That there is [sic] no immunity provisions for the actions of the City Council and the City of Cheboygan for the intentional interference with contractual relationships and impairment of a contract for the specific benefit of the City of Cheboygan, and in this case, by literally taken [sic] the contract away from the Plaintiff by imposing a bond requirement not imposed against one of the contracting parties if it provides a service to the legislative body at its direction.

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[1] The issues raised in plaintiff's complaint against the City are not at issue in this appeal.

Defendant filed a motion for summary disposition, arguing that plaintiff's allegations in the complaint against the City constituted an admission that it was impossible for defendant to perform the contract. Plaintiff's president submitted an affidavit, in which she claimed that her earlier statement about the prohibitive nature of the contract "referred only to the processing/recycling of the sawdust for sale to an end user. It did not release Dore from its responsibility under the contract for the gravel pit site as a processing/recycling area or the Lincoln Avenue property for the agricultural use of the sawdust." Although plaintiff is correct in its assertion that nothing prohibited defendant from using plaintiff's sites for agricultural spreading or reprocessing of the sawdust, defendant was under no contractual obligation to do so.

Plaintiff argues on appeal that the trial court erred in granting defendant's motion for summary disposition because it overlooked genuine issues of material fact about whether defendant breached the contract. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Michigan Dept of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek, supra* at 337. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.*

We agree with the trial court's conclusion that plaintiff could not disown the representations it made in the complaint it filed against the City. In light of plaintiff's representations in its complaint against the City, plaintiff may not rely on the affidavit of its president to establish the existence of a genuine issue of material fact. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479; 633 NW2d 440 (2001). It is well established that "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition." *Id.*, citing *Mitan v Neiman Marcus*, 240 Mich App 679, 682-683; 613 NW2d 415 (2000) and *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). As a result of plaintiff's own assertions in its complaint against the City, plaintiff's ability to present a case was challenged. *Dykes, supra* at 481-482, applying *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972).

Unlike the parties in *Gamet* and *Dykes*, plaintiff's president was not subject to cross-examination when she made the statements in the complaint against the City. MCR 2.114(D), however, provides that the signature of a party constitutes a certification by the signer that:

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Because MCR 2.114(D) dictates that the president certified her assertions by signing the complaint against the City, we conclude that the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens