STATE OF MICHIGAN

COURT OF APPEALS

ROOTWELL, INC, Plaintiff-Appellant,	UNPUBLISHED November 20, 2007
v	No. 271918 Oakland Circuit Court
DAVID ALLEN, RZI, L.L.C., and RZI PRODUCTS, Defendants-Appellees.	LC No. 2006-071759-CZ

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendants. We reverse and remand.

Plaintiff manufactures and sells a product designed to more efficiently deliver water, aeration and nutrients to tree roots. The company was started by Frank Walker and Jeff Thomas. Eventually, defendant Allen was hired a part-time commissioned sales person. Later, Allen became the full-time Vice-President of Marketing & Sales, was given a one-third ownership interest in the corporation and a seat on the board of directors. The company continued to struggle and eventually plaintiff and Allen parted ways. Meanwhile, Allen formed his own business, defendant RZI, which initially served as a separate company to do the installation work of plaintiff's products. But ultimately, RZI stopped utilizing the Rootwell product. Rather, RZI began manufacturing its own products, which plaintiff claims are replicas of the Rootwell product.

Plaintiff filed the instant action, alleging multiple claims against defendants. Defendants, in lieu of filing an answer, filed a motion for summary disposition. Although the scheduled time for the close of discovery had not yet expired, the trial court granted summary disposition in favor of defendants, except on the account stated claim, on which the trial court ruled in plaintiff's favor.

Although defendants' motion for summary disposition was filed under MCR 2.116(C)(7), (8) and (10), the trial court's reasoning appears to be based exclusively upon MCR 2.116(C)(10).

We understand the trial court's skepticism regarding whether plaintiff will ultimately be able to prove its claims against defendants. Indeed, we share a great deal of that skepticism. It

would not seem likely that plaintiff will be able to prevail on some, perhaps all, of its claims short of an admission by defendant Allen. But the trial court reached that conclusion before discovery closed. At a minimum, plaintiff should have been afforded the opportunity to depose Allen, and any other witnesses it may have, before the summary disposition motion was heard. While one might presume that Allen will deny the claims, it is also possible that once placed under oath, if there is merit to plaintiff's claims, Allen will admit as much.

In short, while it is certainly true that summary disposition under MCR 2.116(C)(10) may occasionally be appropriate before the close of discovery, it ordinarily should not be entertained until after discovery has closed. *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006). We are not persuaded that the case at bar presents one of those unusual cases where the motion was properly considered before the close of discovery.

The trial court's grant of summary disposition in favor of defendants is reversed and the matter is remanded to the trial court with directions to set a new date for the close of discovery and to allow discovery to run its course. If they wish, defendants may renew their motion for summary disposition after the close of discovery.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray