

Court of Appeals, State of Michigan

ORDER

Michigan Petroleum Technologies Inc v Richfield Management LLC

Docket No. 276221

LC No. 06-000248 CZ

Kirsten Frank Kelly
Presiding Judge

Donald S. Owens

Bill Schuette
Judges

The Court orders that the motion for clarification is GRANTED and that the May 6, 2008 opinion is hereby VACATED, and a new opinion is attached.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 26 2008

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN PETROLEUM TECHNOLOGIES,
INC.,

UNPUBLISHED

June 26, 2008

Plaintiff/Counter-Defendant-
Appellee,

v

RICHFIELD MANAGEMENT, LLC,

No. 276221

St. Clair Circuit Court

LC No. 06-000248-CZ

Defendant/Counter-Plaintiff-
Appellant.

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

PER CURIAM.

Defendant Richfield Management, LLC (Richfield), appeals as of right from the trial court's order granting summary disposition under MCR 2.116(C)(10) to plaintiff Michigan Petroleum Technologies, Inc. (MPT), on Richfield's counter-complaint. We reverse and remand. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

MPT contracted with Richfield to supply Richfield with premium diesel fuel beginning in January 2004. Over the course of nearly two years, MPT sold between 30,000 and 50,000 gallons of diesel fuel per month for Richfield's large fleet of waste-hauling trucks. When Richfield fell behind in paying for the fuel and negotiations concerning payment failed, MPT sued on an account stated. MPT claimed that Richfield owed \$143,697.58, plus interest, costs, and fees.

Richfield filed an answer with affirmative defenses. It also filed a counter-complaint in which it asserted that MPT breached the contract, breached warranties, and committed fraud by selling it adulterated fuel.

In the discovery process, MPT deposed Richfield's CEO, Bernard Rumbold. He testified that, after Richfield changed fuel suppliers, it had substantially reduced fuel costs. He speculated that the reason for the dramatic decrease in fuel consumption by Richfield's fleet was that its new supplier, Atlas Oil Company, was selling premium grade diesel fuel, and that MPT had not. Rumbold also testified that Richfield's municipal business included the collection of yard waste.

This part of the business, although small, was seasonal and it required the use of two trucks during the time when yard waste was being collected. Seasonal pickups typically ended in October or November. According to Rumbold, yard waste was just a “small portion” of what Richfield picked up in terms of truck utilization. Rumbold also testified that there had been no appreciable loss of customer base after Richfield had switched fuel suppliers.

MPT moved for summary disposition on its account stated and on Richfield’s counter-complaint under MCR 2.116(C)(10). In support of the motion, MPT offered in the affidavit of its executive vice-president in which it was claimed that Richfield actually used more fuel after switching suppliers. But another document showed that Richfield did use slightly less fuel (3,900 gallons). MPT urged that there was no factual basis for Richfield’s claim of having “dramatic” reductions in fuel use after January 2006.

In response to MPT’s motion, Richfield offered the affidavit of its general manager in charge of all trash pickup services. The affidavit noted some gains and losses of customers, with some changes in routes and the number of trucks utilized by Richfield during 2005, but concluded that Richfield “continued to operate substantially the same number of trucks using substantially the same number of miles over substantially the same routes during the entire period of October 2005 through May 2006.”

Richfield also offered an affidavit from an experienced petroleum expert, Dr. James Speight. Dr. Speight gave the qualities of premium diesel fuel and pointed out that the heating values of premium fuel provided better economy than lesser grades. After determining that Richfield’s trucks drove approximately the same number of miles over substantially the same routes but consumed less fuel from its new supplier than fuel purchased from MPT, Dr. Speight concluded that “[t]he diesel fuel supplied by [MPT] contained a lower heating value and is not a Premium fuel as defined by generally accepted industry standards.”

The tables attached to Dr. Speight’s affidavit showed that Richfield consumed about 30,000 fewer gallons of diesel fuel in the first three months of 2006 using fuel from the new supplier than it did in the last three months of 2005 using fuel purchased from MPT.

At the motion hearing, MPT argued that the facts showed that Dr. Speight relied on erroneous information and that the assumptions on which he based his hypothesis were incorrect. It also urged that the seasonal nature of Richfield’s business accounted for the decrease in fuel use in the off-season.

Richfield asserted that the affidavits of Vezzetti and Dr. Speight created a genuine issue of material fact that was not amenable to summary disposition.

The trial court ruled:

Now, this Court notes that the Defendant’s expert hasn’t tested the fuel or have any reason to believe that it wasn’t premium other than the fact that the Defendant bought less from a subsequent supplier. Based upon the evidence presented to this Court or lack of evidence, this Court—by the Defendant’s response to Plaintiff’s Motion to Dismiss Defendant’s Counter-Complaint in this, in this Motion for Summary Disposition, this Court is going to grant the

Plaintiff's Motion for Summary Disposition on the Defendant's Counter-Complaint.

II. STANDARD OF REVIEW

We review the grant or denial of a motion for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We review all of the pleadings, depositions, affidavits, and documentary evidence in a light most favorable to the nonmoving party. If there are no genuine issues of material fact, the trial court must be affirmed. However, if a factual question is present, reversal is required. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Neither the trial court nor this Court may find facts or assess credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The party opposing the motion may not rest on its pleadings and allegations, but must, by affidavits or other offers of proof, set forth specific facts showing that there is a genuine issue of fact. MCR 2.116(G)(4); *Maiden, supra* at 120.

III. ANALYSIS

We conclude that the trial court erred in granting summary disposition to MPT on Richfield's counter-complaint. Contrary to what the trial court held, we do not believe Richfield's inability to test the fuel purchased from MPT was fatal. Clearly, the fuel from MPT had been consumed by the time Richfield discovered what it believed was a substantial decrease in diesel fuel consumption after changing suppliers. Were this otherwise, any party to a lawsuit who used up what later might be part of its proofs in the course of doing business would be without a remedy or a defense in the litigation.

The affidavits proffered by Richfield set forth some circumstantial evidence that it used less fuel after it switched suppliers. If, as the affidavits claimed, Richfield ran substantially the same operations between October 2005 and May 2006 but used less fuel, a difference in the quality of the fuel is a logical, and perhaps compelling, inference in support of its claims, notwithstanding the equally logical and compelling evidence supporting MPT's position.

Richfield's affidavits, when viewed in a light most favorable to it, created a material question of fact. The evidence proffered by Richfield need not refute every other possibility or probability. See *Mulholland v DEC Int'l Corp*, 432 Mich 395, 412-414; 443 NW2d 340 (1989). Hence, the trial court erred in granting summary disposition to MPT on Richfield's counter-complaint.

We decline to address MPT's challenge to Richfield's standing to sue because it was not raised or addressed below.

We reverse the trial court's order of November 13, 2006 granting summary disposition to MPT and dismissing Richfield's defenses and counter-complaint, vacate the judgment, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette