

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of RUSSELL VALLEAU, Deceased.

THERESA VALLEAU MURRAY,

Petitioner-Appellant,

v

LORI LEE PETTY,

Respondent-Appellee.

UNPUBLISHED

September 16, 2008

No. 279427

Oakland Probate Court

LC No. 2006-304778-DE

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Petitioner appeals as of right from the probate court's grant of summary disposition to respondent pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision on a motion for summary disposition. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Robinson v Ford Motor Co*, 277 Mich App 146, 150-151; 744 NW2d 363 (2007).

On appeal, petitioner does not claim she met her burden of providing evidentiary proof establishing a genuine issue of material fact. Rather, petitioner argues that dismissal of the case prior to the close of discovery was premature.

Generally, summary disposition based on the lack of a material factual dispute is premature if granted before discovery on a disputed issue is complete, unless further discovery does not have a fair chance of uncovering factual support for the position of the party opposing the motion. *Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

In her brief on appeal, petitioner states she "never conducted any discovery prior to the motion hearing." However, our review of the lower court record reveals that petitioner served

document requests to respondent on or around December 14, 2006, and respondent submitted her responses on or around January 19, 2007.

Petitioner further complains she was not able to depose respondent and Luanne Johnson. However, in her brief, petitioner concedes that she acquiesced, through her attorney, to respondent's request to postpone the deposition of respondent until after the probate court ruled on the motion for summary disposition. Moreover, at the hearing, counsel for petitioner stated he would stipulate to the prohibition of additional discovery until the court ruled on the motion for summary disposition. "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 529; 695 NW2d 508 (2004), quoting *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

In any event, in opposing a motion for summary disposition because discovery is not complete, the opposing party must provide some independent evidence that a factual dispute exists. *Michigan Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Mere speculation from the nonmoving party that further discovery might produce pertinent facts is not sufficient. See *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540-541; 687 NW2d 143 (2004).

Here, petitioner has failed to specify the deposition testimony that she expects respondent and Johnson would provide. Both respondent and Johnson executed affidavits that were attached to the brief in support of respondent's motion for summary disposition. Petitioner has provided no evidence that their affidavits were untruthful or that either would change her testimony if she were deposed. Under the circumstances, there was no fair chance of uncovering factual support for petitioner's position, and the probate court properly granted summary disposition to respondent. See *Coblentz v Novi*, 264 Mich App 450, 456; 691 NW2d 22 (2004), *aff'd in part, rev'd in part on other grounds* 475 Mich 558; 719 NW2d 73 (2006).

We affirm.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio