

STATE OF MICHIGAN
COURT OF APPEALS

O'LEARY FAMILY, LLC,

Plaintiff-Appellant,

v

JOSEPH C DEKROUB, JR,

Defendant-Appellee.

UNPUBLISHED

March 3, 2009

No. 283403

Livingston Circuit Court

LC No. 05-021716-CB

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition, pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant is the general partner in a land development partnership. In 1989, plaintiff bought a 1/12 share in the land development partnership and a lakefront lot for \$221,000. The partnership agreement required defendant to submit annual, certified accounting statements to the other partners but he failed to do so for years. In 1997, plaintiff sold its lot for \$250,000, while retaining his partnership share. In 2005, plaintiff sued for a formal accounting and for breach of contract, alleging that defendant breached the partnership agreement by paying too much for excavating services, by engaging in excessive self-dealing, and by failing to provide annual accounting statements. Plaintiff asserted that defendant's actions prevented it from assessing the true economic state of the partnership, and that had plaintiff known the true return on its investment, it would have terminated the investment and invested elsewhere.

Pursuant to a stipulation of the parties, the trial court ordered an accounting by an independent certified public accountant. The accountant performed the accounting and reported to the trial court that he found no improprieties, and thus the failure to report was a "technical violation" of the agreement. Because plaintiff was able to make a profit on its investment in a short time, the accountant averred that plaintiff had no damages. Upon receiving the accounting, defendant moved to dismiss, arguing that the accountant effectively countered all of plaintiff's allegations of wrongdoing and damages. The trial court adjourned the matter to allow the parties more time to review the accounting. At the next hearing, the trial court agreed entirely with the accountant and defendant, and granted defendant's motion, finding no genuine issue of material fact.

In this Court, plaintiff argues that the accounting was inadequate to reveal the wrongdoing it was alleging; only a full audit would identify how defendant had unjustly enriched himself. Plaintiff had an expert who would testify on its behalf at trial, and the presence of this expert, along with the expert's affidavit and plaintiff's own affidavit that plaintiff had suffered damages, was enough to create a fact question that should go to a jury. Thus, the trial court erred in finding no question of material fact.

Under MCR 2.116(C)(10), summary disposition is proper if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When a motion under subrule (C)(10) is made and supported as provided in this rule, the opposing party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The opponent's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10); "[t]he court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden, supra*, at 121. "[D]amages which are purely speculative in character, and dependent on so many contingencies that they cannot be traced with reasonable certainty to the breach of the contract, are not allowable." *Valley Die Cast Corp v A C W Inc*, 25 Mich App 321, 338-339; 181 NW2d 303 (1970) (citation omitted).

In this case, plaintiff has not established the existence of a genuine issue of material fact regarding its damages. The independent accountant's analysis and affidavit provide facts in support of defendant's position; plaintiff's expert merely states conclusions unsupported by facts. Plaintiff merely avers that it has suffered financial damages, including a loss of return on its investment and the loss of the opportunity to terminate the investment. Its expert's affidavit is even more vague, alleging simply that plaintiff suffered financial damages, including the lost opportunity for investment. The mere promise to offer factual support at trial is insufficient to survive defendant's motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court's adjournment gave plaintiff time to provide specific facts regarding what investments it would have invested in more profitably, but plaintiff merely promised its expert would testify that plaintiff suffered injury as a result of defendant's actions. The trial court correctly granted summary disposition for defendant.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering