STATE OF MICHIGAN

COURT OF APPEALS

SEAN TAYLOR,

Plaintiff-Appellee,

v

GEOFFREY L. HOCKMAN,

Defendant-Appellant.

UNPUBLISHED
August 24, 2010

No. 288443
Oakland Circuit Court
LC No. 2007-083246-CK

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff following a jury trial. In addition to raising trial-related issues, defendant argues that the trial court erred in denying his pretrial motion for summary disposition. We reverse and remand for a new trial on plaintiff's promissory estoppel claim only.

I. RELEVANT FACTS AND BACKGROUND

In April 2003, plaintiff was approached about lending funds to Robert and Chris Falor with respect to investment property that they, defendant, and others were attempting to purchase. April 21, 2003, was the deadline for securing a purchase agreement for the property and certain funds had to be deposited by that date. Plaintiff alleged that he agreed to loan the funds if defendant and Robert Falor personally guaranteed the loan. The loan transaction was not completed by April 21, 2003, but plaintiff received correspondence from defendant on April 24, 2003, regarding signing the loan and guaranty documents that day. On April 25, 2003, plaintiff received a loan agreement signed by Chris Falor on behalf of his company and a guaranty for the loan signed by Robert Falor with a space for defendant's signature, which was blank. Defendant never signed the guaranty, and the loan principal was never repaid. Plaintiff filed this action against defendant for breach of contract, fraud, and promissory estoppel based on his alleged guaranty.

II. STATUTE OF FRAUDS

Defendant first argues that he was entitled to summary disposition because the statute of frauds barred plaintiff's claims. We review de novo a trial court's decision whether to grant summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).

We also review de novo the question whether the statute of frauds bars a contract claim. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006).

Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Because defendant relied on evidence outside the pleadings, the motion properly is reviewed under MCR 2.116(C)(7) and (10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

In considering a motion under MCR 2.116(C)(7), a court must accept the plaintiff's well-pleaded factual allegations as true, and construe them in the plaintiff's favor unless contradicted by documentary evidence submitted by the moving party. *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006). The court must consider the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. *Id.* If no facts are disputed, and reasonable minds could not differ regarding the legal effect of those facts, whether the plaintiff's claim is barred is a question for the court as a matter of law. *Id.* at 111-112. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Id.*

Summary disposition of all or part of a claim may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley*, 470 Mich at 278. The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then must show by evidentiary materials that a genuine issue of disputed fact exists. *Id.*

It is undisputed that defendant never signed the April 25, 2003, guaranty. Under the statute of frauds, "[a] special promise to answer for the debt, default, or misdoings of another person" is void unless the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement. MCL 566.132(1)(b). Relying on *Kent v Bell*, 374 Mich 646, 653-654; 132 NW2d 601 (1965), the trial court concluded that an exception to the writing requirement existed where application of the statute of frauds would serve to perpetrate fraud and found that there was a question of fact whether this exception was applicable in this case. Accordingly, it denied defendant's motion.

Kent involved an oral contract to devise real estate for services rendered and a cause of action for specific performance. *Id.* at 650-651. In holding that the statute of frauds did not apply, the Court relied on the doctrine of part performance and the general proposition that equity will not allow the statute of frauds to be used to aid a fraud or otherwise prevent justice from being done. *Id.* at 653-654; see also *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 540; 473 NW2d 652 (1991) (explaining the doctrine of part performance); *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 526; 644 NW2d 765 (2002) (recognizing that the purpose of statute of frauds is to prevent fraud, not to aid it).

Defendant argues that *Kent* is distinguishable because, unlike this case, it involved specific performance of a contract involving land due to part performance. "'The doctrine of

part performance has historically been applied only to contracts involving the sale of land.'" *Dumas*, 437 Mich at 540, quoting *Oxley v Ralston Purina Co*, 349 F2d 328, 332 (CA 6, 1965). Because of its historical application, the *Dumas* Court declined to apply the part performance exception to contracts that are not to be performed within one year in light of the statute of frauds writing requirement, MCL 566.132(1)(a). *Dumas*, 437 Mich at 540-541. That distinction is equally applicable here. Thus, we agree with defendant that the exception recognized in *Kent* does not apply to this case.

To the extent the trial court could have applied the doctrine of equitable estoppel to support its decision and accomplish the same result, see *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 365; 320 NW2d 836 (1982), we decline to uphold the trial court's decision on this basis because plaintiff failed to raise that doctrine to counter defendant's statute of frauds defense. See *Dumas*, 437 Mich at 541 n 9 (where the plaintiff only raised part performance and unjust enrichment, the Court declined to consider other theories that courts have used to defeat the statute of frauds, including equitable estoppel). Accordingly, the statute of frauds barred plaintiff's breach of contract claim.

In addition, plaintiff's fraud claim was improperly submitted to the jury. To be actionable, a fraud claim must not be dependent upon either direct or indirect enforcement of an oral contract that is voided under the statute of frauds. *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426, 435; 280 NW 814 (1938). Thus, in *Cassidy*, the plaintiff could not maintain an action for fraud where he alleged that the defendant induced him to enter into an oral contract while never intending to carry out the terms of the contract. *Id*. at 434, 440. Here, plaintiff's fraud claim was based on defendant's alleged promise to sign the guaranty contract and his alleged false statements to guarantee the debt that were designed to induce plaintiff's reliance. Thus, plaintiff alleged that defendant induced him to enter into an oral contract (to loan money in exchange for defendant's guaranty), which was void by operation of the statute of frauds, while never intending to guarantee the loan (carry out the terms of the oral contract). We discern no significant difference between this case and *Cassidy*.

However, defendant was not entitled to dismissal of plaintiff's promissory estoppel claim because such a claim, if proven, can circumvent the statute of frauds. *Opdyke*, 413 Mich at 365. Therefore, although the trial court erred in denying defendant's summary disposition motion with respect to plaintiff's breach of contract and fraud claims, it properly denied the motion with respect to plaintiff's promissory estoppel claim, albeit for different reasons.[1] See *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005) (trial court's ruling affirmed if it reached the right result, albeit for the wrong reason). But because the jury never reached the promissory estoppel claim, a new trial is required.

III. EVIDENCE OF PRIOR LITIGATION

[1] In light of this decision, it is unnecessary to address defendant's issue regarding the trial court's jury instruction on fraud based on a bad-faith promise.

Defendant also argues that the trial court erroneously admitted evidence relating to his prior lawsuits. Although we have already concluded that a new trial is required, we will briefly address this issue in the event it arises on retrial.

We review for an abuse of discretion a trial court's decision regarding the admission of evidence. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). "The credibility of a witness is an appropriate subject for the jury's consideration." *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

The trial court permitted plaintiff to introduce evidence of judgments against defendant in prior, unrelated litigation because it found that defendant opened the door to the evidence and its introduction was necessary to give the jury a complete picture regarding the prior litigation. Therefore, plaintiff elicited testimony that defendant had two prior judgments entered against him, in amounts over $43 million and $52 million, respectively.

A defendant may "open the door" to certain cross-examination into an issue or specific conduct if he testifies on direct examination regarding that issue. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 704 n 47; 630 NW2d 356 (2001). In this case, however, defense counsel's questions were limited to ascertaining whether defendant was actually a defendant in the cases listed on plaintiff's exhibit. Although defendant may have opened the door to inquiry into which cases on the list defendant was actually a named party, he did not open the door into inquiry concerning the results of those cases, which were not relevant to this case. Moreover, even assuming that evidence that judgments were entered against defendant could be considered necessary to "complete the picture," evidence of their amounts was not.

We disagree with the trial court that the evidence was relevant to defendant's credibility. Defendant did not deny that he was involved in other cases or deny that he had experience with litigation. Further, the record does not support plaintiff's contention that defendant was being selective in his memory of his litigation history. Thus, the trial court abused its discretion in allowing this evidence. See *Gainey v Sieloff (On Remand)*, 163 Mich App 538, 550-554; 415 NW2d 268 (1987) (in police brutality case, evidence of prior civil judgments regarding police misconduct was impermissibly admitted against the defendant police officers because it was not probative of truthfulness and, therefore, did not speak to the defendants' credibility).

Reversed and remanded for a new trial on plaintiff's promissory estoppel claim only. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood