STATE OF MICHIGAN

COURT OF APPEALS

ATLAS OIL CO. and FTV BELLEVILLE-15400 SUMPTER RD., L.L.C.,	UNPUBLISHED August 26, 2010
Plaintiffs/Counter-Defendants-Appellees,	
v	No. 291092 Wayne Circuit Court
JIHAD NASSAR,	LC No. 07-725935-CZ
Defendant-Appellant,	
and	
BELLEVILLE PETROLEUM, INC.	
Defendant/Counter-Plaintiff-Appellant.	

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant Jihad Nassar, and defendant/counter-plaintiff Belleville Petroleum, Inc., appeal as of right an order granting summary disposition to plaintiffs/counter-defendants, Atlas Oil Co. ("Atlas") and FTV Belleville-15400 Sumpter Rd., L.L.C. ("FTV"). The claims and counter-claims in this case stem from a contractual dispute related to the providing of gasoline to a gas station. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

On May 11, 2004, Belleville Petroleum entered into a product supply agreement with Atlas. On that same day, Nassar, the president of Belleville Petroleum, entered into a "personal guaranty" agreement with Atlas, personally guaranteeing to pay any and all indebtedness, costs, and fees that arose from the contracts between Belleville Petroleum and Atlas. The salient provisions of the Product Supply Agreement included the following:

- Atlas is to be Belleville Petroleum's sole and exclusive supplier of motor fuel; [¶ 3(a)]

- Belleville Petroleum is required to purchase at least 140,000 gallons per month from Atlas; [¶ 3(a)]

- The price of the gasoline is "Atlas Oil's established dealer price for the day of delivery"; [¶ 3(b)]

- Belleville Petroleum is to pay Atlas through the use of electronic fund transfers; [¶ 3(e)]

- Atlas will finance $25,000 for the purposes of "Clark" brand imaging of the gas station; [¶ 3(g)]

- Atlas is to pay Belleville Petroleum a rebate of $0.015 per gallon of fuel purchased by Belleville Petroleum. [¶ 3(i)]

Roughly a year later, on May 27, 2005, FTV executed a warranty deed that conveyed the gas station premises to Belleville Petroleum. The deed contained a restrictive covenant, which stated in relevant part:

> Grantee, on its own behalf and for its successors and assigns, agrees that prior to August 1, 2019, the premises shall not be used for the sale, marketing, storage or advertising of petroleum fuels except the trademarked products distributed by Atlas Oil Company or one of its subsidiaries or authorized agents, and this restriction shall be a covenant running with the land . . . .

Simultaneous with the conveyance of the gas station premises, Belleville Petroleum and FTV entered into a separate "environmental" agreement where FTV agreed to deposit $19,118 into a bank account that could only be withdrawn on the approval of both FTV and Belleville Petroleum. These funds were to be held in the account until FTV submitted invoices from an environmental consultant to Belleville Petroleum that requested payment for services related to the investigation and remediation of the gas station premises. Upon completion of the remediation, Belleville Petroleum was to authorize the disbursal of any remaining funds back to FTV.

Sometime between December 2, 2005, and December 16, 2005, Atlas reduced the margin it charged from $0.04 to $0.02 per gallon of fuel. Additionally, it is undisputed that Atlas stopped paying any rebates at this same time.

In September 2007, Atlas made four different deliveries of fuel. However, the Belleville Petroleum electronic fund transfer payments failed for these deliveries because of insufficient funds. The four payments that "bounced" were for $17,240.60, $24,240.58, $19,761.04, and $25,565.25, totaling $86,807.47. Around this time, on September 14, 2007, Belleville Petroleum sent a "termination letter" to Atlas, stating that it was terminating their relationship because of Atlas's "numerous misrepresentations" and because of "violations of the Petroleum Marketing Practices Act" ("PMPA"), 15 USC 2801 *et seq.*

Plaintiffs filed their seven-count[1] complaint on September 26, 2007, against defendants, seeking an injunction and essentially alleging breach of contract, conversion, and breach of covenant.

On October 1, 2007, the trial court granted plaintiffs' request to enter a preliminary injunction against defendants. The injunction ordered Belleville Petroleum to purchase gasoline exclusively from Atlas, consistent with the contract. However, on October 24, 2007, the trial court found defendant in contempt of court for violating this order by purchasing fuel from a different supplier. After this order was entered, there were no other reported violations.

Defendants filed, along with their answer, a five-count[2] counter-complaint, seeking declaratory relief from enforcing the restrictive covenant and alleging breach of contract, breach of the Uniform Commercial Code ("UCC"), and violation of the PMPA.

On November 24, 2008, plaintiffs filed motions for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). Atlas argued that it was entitled to summary disposition because there was no genuine issue of material fact whether Belleville Petroleum received the four deliveries of fuel without paying for them. With respect to Belleville Petroleum's counter-claims, Atlas argued that Belleville Petroleum was not entitled to any rebates after December 2005 because the parties modified the contract, such that the rebates were no longer to be provided in exchange for a $0.02 price reduction. Last, Atlas argued that Belleville Petroleum's environmental counter-claim was deficient because the contract referenced in the counter-complaint was between Belleville Petroleum and Comerica Bank–not Atlas. Accordingly, Atlas argued that it could not be liable on any such document.

Defendants responded to plaintiffs' motions for summary disposition by arguing that there was no evidence whatsoever of any contract modification that eliminated the original $0.015 per gallon rebate. Defendants claimed that Atlas improperly asserted the existence of a contract modification when Atlas made the declaration in its brief with no supporting documentation. Conversely, in an affidavit attached to defendants' response, Nassar stated that there never was any agreement to give up the rebate or modify the pricing scheme.

The trial court essentially treated plaintiffs' seven counts as only two: breach of contract for the nonpayment of fuel and a request for a permanent injunction.[3] The trial court granted

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[1] Counts I-III: Breach of contract; Count IV: Conversion; Count V: Breach of personal guaranty; County VI: Breach of covenant; Count VII: Request for injunctive relief.

[2] Count I: Breach of contract against FTV; Count II: Breach of contract against Atlas; Count III: UCC violation against Atlas; Count IV: Violation of PMPA against Atlas; Count V: Request for declaratory relief that restrictive covenant is not enforceable.

[3] The court apparently considered the breach of contract claims (Counts I-III) and breach of personal guaranty (Count V) as a single breach of contract count. Plaintiff's Count IV for conversion and Count VI for breach of covenant were implicitly dismissed because the court never referenced them, nor did plaintiffs reference them in their motions for summary disposition.

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summary disposition to Atlas for the nonpayment of the four fuel deliveries because it found that there was no dispute that Belleville Petroleum received the fuel, later sold the fuel, and never paid Atlas for it. However, the trial court, with no further explanation, denied the request for a permanent injunction.

Regarding Belleville Petroleum's counter-claims,[4] the trial court ruled that Belleville Petroleum failed to meet its burden with respect to the claim that FTV breached the environmental agreement. The court found that defendants were suing FTV for $34,000 on a contract between Comerica Bank and Belleville Petroleum. Since FTV was not a party to that contract, the court dismissed the count. Regarding the counter-claim that Atlas owed Belleville Petroleum rebate money, the court granted Atlas's motion for summary disposition and stated,

> [T]here has been no documentary evidence to refute plaintiffs' position, other than a self-serving affidavit. I mean attached was apparently an Excel spreadsheet supporting plaintiffs' position that they didn't pay the rebate but they all agreed that they would lower the Atlas margin by almost two cents so that defendant could have a wider margin of–or at least recoup more money on the gas that he sold, or make more money, have a higher profit, I guess, on the gas that he did sell.

Last, to address Belleville Petroleum's counter-claim alleging that Atlas failed to finance the gas station's "reimaging," the court ordered, without reference to any motion for summary disposition, that Atlas "complete and honor its imaging/branding requirements on behalf of Defendants/Counter-Plaintiffs pursuant to the Product Supply Agreement between the parties."

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10).[5] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The

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[4] Defendants agreed to dismiss their PMPA counter-claim, and defendant's lack of good faith UCC claim apparently was subsumed into the breach of contract claims because it was not referenced by the court.

[5] Although Belleville Petroleum also argues that Atlas's motion should not have been granted under MCR 2.116(C)(8), Atlas's motion for summary disposition stated that it was seeking summary disposition under MCR 2.116(C)(8) only for the PMPA counter-claim and was seeking summary disposition under MCR 2.116(C)(10) for all the other counter-claims. Defendants agreed to dismiss their PMPA claim, so that counter-claim and the standard applicable to motions decided under MCR 2.116(C)(8) are not at issue.

motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues and has the initial burden of supporting that position by affidavits, depositions, admission, or other documentary evidence. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Then the party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of material fact exists. *Id.* A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

A. INITIAL SUBSTANTIAL BREACH DEFENSE AGAINST ATLAS'S CLAIMS

At the outset, defendants argue that summary disposition should not have been granted on Atlas's claims because Atlas initially breached the contract, thereby making any subsequent breach by defendants not actionable. This argument fails.

"He who commits the first *substantial breach* of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform." *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968), quoting *Ehlinger v Bodi Lake Lumber Co*, 324 Mich 77, 89; 36 NW2d 311 (1949) (emphasis added); see also *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). A substantial breach requires a breach of an essential part of the contract:

> [The Michigan Supreme Court's decisions on this] point indicate that the words "substantial breach" in the ruling must be given close scrutiny. Such scrutiny discloses that the *application of such a rule can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible*, such as the causing of a complete failure of consideration (*Kunzie v Nibblelink*, 199 Mich 308[; 165 NW 722 (1917)] or the prevention of further performance by the other party (*Stahelin v Sowle*, 87 Mich 124[; 49 NW 529 (1891)]. [*McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (emphasis added).]

In other words, a breach is substantial when it undermines the very essence of the contract, or "goes to the heart of the agreement." *Able Demolition v Pontiac*, 275 Mich App 577, 586; 739 NW2d 696 (2007).

Here, defendants maintain that Atlas initially breached the contract when Atlas stopped paying the $0.015 per gallon rebate in December 2005, and failed to pay for "re-imaging" the gas station. Neither of these two events, individually or collectively, entails a substantial breach as required by case law. For one, assuming that Atlas did breach the contract by failing to pay $0.015 per gallon to Belleville Petroleum, the main benefit that Belleville Petroleum gained from

the agreement was not the $0.015 per gallon rebate; this was but a small aspect of a much larger agreement. Instead, the agreement's overriding purpose was for Belleville Petroleum to have a guaranteed supply of fuel from Atlas, which it then could sell to its customers and make a profit. This agreement was also part of a larger deal involving purchase of the gas station and property. And, although the profit margin on gasoline is on the magnitude of cents per gallon, the evidence showed that discontinuing the $0.015 per gallon rebate coincided with Atlas reducing the price it charged Belleville Petroleum by $0.02 per gallon. Thus, it is difficult to see how the change in this pricing scheme made Belleville Petroleum's further performance impossible in any manner. If anything, Belleville Petroleum's economic situation was improved. Either way, losing out on the 0.015 per gallon did not render Belleville Petroleum's performance impossible or ineffective. Accordingly, if there was a breach, it cannot be categorized as substantial, and defendants cannot avail themselves of the initial substantial breach defense.

This also holds true when considering the discontinued payment in conjunction with Atlas's failure to "reimage" the premises as required in the contract. While the 14-year contract, required Atlas to provide financing for such a task, there was no timeframe spelled out in the contract for when this task was to be completed. Thus, it is impossible to state that there was a breach as of September 2007. Moreover, assuming that this was a breach, it would not have been a *substantial* breach that would have gone to the essence of the contract by rendering Belleville Petroleum's performance impossible or ineffective. Accordingly, defendants' defense that plaintiffs were barred from claiming breach of contract against defendants fails.

B. BELLEVILLE PETROLEUM'S COUNTER-CLAIMS

Belleville Petroleum next argues that there was no basis to grant summary disposition under MCR 2.116(C)(10) in favor of Atlas on Belleville Petroleum's counter-claims. While arguing that there was no basis for the trial court to have granted summary disposition with respect to its counter-claims, Belleville Petroleum addressed four specific issues in its brief on appeal: breach of contract against Atlas for (1) failing to pay the $0.015 per gallon rebate and (2) charging an incorrect amount for gasoline; breach of the UCC against Atlas for failing to act in good faith; and breach of contract against FTV for failing to perform under a separate environmental agreement. Defendants' failure to brief and specifically argue the merits related to the dismissal of any other counter-claims, such as the "reimaging" counter-claim, constitutes an abandonment of those issues. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Accordingly, our analysis will focus on the four specific aspects to these counter-claims that defendants reference in their brief.

i. THE $0.015 PER GALLON REBATE

Belleville Petroleum claims that the trial court should not have granted summary disposition on the counter-claim that alleged that Atlas breached the contract when it stopped paying the $0.015 per gallon rebate. We agree.

Atlas does not deny that it stopped paying the rebates as of December 2005. Instead, Atlas claimed in its brief in support of its motion for summary disposition that Atlas and Belleville Petroleum modified the contract whereby Atlas would reduce the price it would charge to Belleville Petroleum by $0.02 per gallon in exchange for forgoing the $0.015 per gallon rebate. Since this "evidence" was not presented in the form of any documentary evidence as

required by court rule, it was not proper for the trial court to consider it.[6] See *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005). In contrast, Belleville Petroleum submitted an affidavit of its president, Nassar, in which he stated that there never was any agreement to forgo any rebates. Thus, even if Atlas did provide documentary evidence to support its position that the contract was modified, Nassar's affidavit created a genuine issue of material fact with respect to the status of the contract. The trial court appeared to discount Nassar's affidavit because it was "self-serving." But whether it was or was not self-serving goes to credibility concerns. "[I]t is not for the trial court to make factual findings or weigh credibility when deciding a summary disposition motion." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). Accordingly, the trial court erred when it stated that the parties did modify the contract when there was documentary evidence to the contrary. Thus, there is a genuine issue of material fact with respect to the existence of a contract modification, and the trial court erred when it granted summary disposition on the rebate counter-claim.

ii. PRICING OF GASOLINE

Belleville Petroleum next argues that the trial court erred when it granted summary disposition related to its counter-claim that Atlas breached the contract by overcharging for gasoline. We disagree. The contract simply provided that the price for the gasoline was to be "Atlas Oil's established dealer price for the day of delivery." Belleville Petroleum failed to produce any documentary evidence showing that Atlas charged the incorrect amount. Belleville Petroleum relied on the same spreadsheet that Atlas created, which showed the pricing of 18 deliveries that spanned several months before and after December 2005.

However, there was nothing to support defendant's specific position except for a statement in Nassar's affidavit, which alleged, "Atlas . . . charg[ed] . . . the price for 'Clark Branded' gasoline, which is typically several cents higher than the 'unbranded' price specified in the Agreement and includes a 'Clark Brand licensing fee.'" This type of general and conclusory statement absent any underlying facts is insufficient to create an issue of fact. *Hamade v Sunoco Inc (R&M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006). Additionally, the exhibit that defendant submitted along with this affidavit clearly showed an "Unbranded Rack" price component to each delivery. Thus, Nassar's affidavit was not sufficient to create a genuine issue of material fact, and summary disposition was warranted with respect to this pricing aspect of defendant's counter-claim.

iii. VIOLATION OF UCC'S DUTY TO ACT IN GOOD FAITH

[6] Atlas did attach a spreadsheet to its motion for summary disposition, which showed that it lowered its own profit margin from $0.04 per gallon to $0.02 per gallon in December 2005. Arguably, this is indirect evidence of a contract modification between the parties, but it clearly cannot speak to the existence of the status of the rebate payments.

Belleville Petroleum next argues that the trial court erred when it failed to address the UCC counter-claim when it granted summary disposition in favor of Atlas. We hold that any omission was harmless.

Belleville Petroleum maintained a separate count in its counter-complaint that alleged a violation of the UCC. Specifically, Belleville Petroleum accused Atlas of violating its obligation under the UCC to act in good faith. When the trial court issued its order dispensing of the case, it did not reference this specific counter-claim. To the extent that this was erroneous, it was harmless. Here, Atlas sought summary disposition under MCR 2.116(C)(10), when it should have sought it under MCR 2.116(C)(8). While MCR 2.116(C)(10) tests the factual sufficiency of a claim, *Corley*, 470 Mich at 278, MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Summary disposition under MCR 2.116(C)(8) against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). Summary disposition under MCR 2.116(C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). Additionally, if a motion for summary disposition should have been brought under MCR 2.116(C)(8), but was brought under another subrule, review is not precluded if the record permits review under the correct subrule. *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 477 n 6; 760 NW2d 526 (2008).

MCL 440.1203, part of Michigan's UCC, provides that "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement." The comment to this section states in pertinent part:

> This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract . . . . [MCLA 440.1203, UCC comment.]

Thus, the language of MCL 440.1203 and its comment make it clear that Belleville Petroleum has no separate claim arising from Atlas's breach of the UCC's duty of good faith. Any such claims have to be based on a breach of contract. As a result, summary disposition under MCR 2.116(C)(8) was warranted in favor of Atlas because Belleville Petroleum failed to state a claim on which relief could be granted, and the trial court's implicit dismissal of this particular counter-claim (by failing to address it) was harmless.

iv. ENVIRONMENTAL COUNTER-CLAIM

Last, Belleville Petroleum argues that its breach of contract counter-claim against FTV should have survived summary disposition. We disagree, although for different reasons than those articulated by the trial court.

Belleville Petroleum and FTV's separate environmental agreement stated that FTV would deposit $19,118 into a bank account that could only be withdrawn on the approval of both parties. These funds were to be held in the account until FTV submitted invoices from an environmental consultant to Belleville Petroleum that requested payment for services related to

the investigation and remediation of the gas station premises. Upon completion of the remediation, Belleville Petroleum was to authorize any remaining funds to be disbursed back to FTV.

In an effort to oppose FTV's motion for summary disposition, Belleville Petroleum submitted Nassar's affidavit, which simply provided, "FTV has breached the May 27, 2005 agreement by never arranging for or paying for the environmental work required by that agreement." However, pursuant to MCR 2.119(B)(1), affidavits must "be made on personal knowledge" and "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit." See, also, MRE 602. Here, Nassar's affidavit did not contain any facts showing that he had any personal knowledge of whether FTV dealt with a third-party environmental firm. Consequently, because the affidavit lacked the necessary facts to establish that Nassar had any personal knowledge about these events, the affidavit was inadequate to establish a prima facie case, and summary disposition on this count was properly granted.[7]

IV. CONCLUSION

The trial court erroneously granted summary disposition with regard to Belleville Petroleum's counter-claim alleging that Atlas breached the contract by not paying the $0.015 rebate per gallon after December 2005. There was an issue of material fact with regard to the existence of a contract modification that supposedly removed the rebate provision of the original agreement. Accordingly, only that portion of the trial court's order is reversed.[8]

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher

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[7] We note that the trial court apparently granted summary disposition based on the belief that Belleville Petroleum was suing FTV based on a contract between Belleville Petroleum and Comerica Bank. To the extent the trial court thought that this was the case, it was erroneous– Belleville Petroleum was relying on the Comerica contract to establish its consequential damages, not that FTV breached. However, because we find that summary disposition was warranted, we will not disturb that decision even though it was reached for the wrong reason. *Dybata v Wayne Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 283413, issued March 25, 2010), slip op, p 8.

[8] We express no opinion on the wisdom of defendants pursuing such a counter-claim when, if it is found that the contract was *not* modified, there is a possibility that Atlas may be able to recover the $0.02 per gallon that it lowered its prices by after this time period.