

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN N. ROSS, Trustee of the STEVEN N.
ROSS REVOCABLE TRUST,

UNPUBLISHED
September 21, 2010

Plaintiff-Appellee,

and

BARRY ROSS,

Plaintiff,

v

BORROWERS NETWORK,

No. 292944
Oakland Circuit Court
LC No. 08-093801-CK

Defendant/Third-Party Plaintiff-
Appellant,

and

ROBERT GUNTMACHER,

Third-Party Defendant.

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

In this action for breach of a loan agreement, defendant Borrowers Network appeals as of right, challenging the trial court's order granting summary disposition in favor of plaintiff Steven N. Ross, trustee of the Steven N. Ross Revocable Trust, pursuant to MCR 2.116(C)(10), and awarding judgment of \$106,584.26 in favor of plaintiff. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition 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 . . . as a matter of law." To the extent that defendant's issue requires consideration of the meaning of MRE 408, we review that question de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

We find no merit to defendant's argument that the trial court improperly relied on evidence that was inadmissible under MRE 408, which states, in pertinent part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . . .

Plaintiff presented a series of letters in support of his motion for summary disposition, two of which were from defense counsel and addressed defendant's obligations under the loan agreement. None of these letters related to the offer or acceptance of consideration in order to compromise a claim that was disputed as to either validity or amount. Rather, the letters indicated that the parties intended to comply with the agreement and agreed on its terms. Thus, MRE 408 did not preclude consideration of the letters.¹

We also reject defendant's argument that there were disputed issues of fact concerning whether plaintiff provided the loan consideration. Defendant argues that plaintiff had the burden of showing that it provided consideration to be entitled to summary disposition, and there is no writing showing that plaintiff provided any consideration. When a party moves for summary disposition under MCR 2.116(C)(10), the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," and it has the initial burden of presenting affidavits, depositions, admissions, or other documentary evidence in support of the motion. MCR 2.116(G)(4)-(5); see also *Maiden*, 461 Mich at 120; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Once the moving party meets this burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Quinto*, 451 Mich at 362.

Plaintiff presented the loan agreement, which identifies plaintiff as "Lender" and states that "Lender" advanced \$74,000 to defendant. Ross's affidavit states that he is trustee of the Steven N. Ross Revocable Trust Agreement, dated September 12, 1996, and makes the affidavit on its behalf. The affidavit further avers that Ross "loaned \$74,000 to [defendant] pursuant to a written Loan Agreement dated December 22, 2004."

In response to plaintiff's motion, defendant presented checks to Parkchester L.L.C. ("Parkchester") from Steven Ross and from "Serman's Inc." ("Serman") as executed by Ross, as well as a cashier's check to Parkchester with Ross listed as "Remitter." The checks do not indicate that Ross was acting as trustee in executing the checks. Plaintiff and defendant agree that the \$74,000 referenced in the loan agreement was part of the funds originally provided by Ross and Serman to Parkchester and later transferred to defendant.

¹ Further, the record discloses that the trial court did not rely on the letters in determining that plaintiff was entitled to summary disposition.

Plaintiff met his initial burden of showing that he provided consideration in his capacity as trustee by presenting the loan agreement that recited the consideration defendant received from plaintiff. The checks from Ross and Serman to Parkchester do not contradict the representations in the loan agreement, and defendant did not present any evidence showing that it did not receive consideration from plaintiff. Even if Ross and Serman originally provided Parkchester the \$74,000 referenced in the agreements, evidence concerning the origination of the funds does not address the extent to which the funds belonged to the trust at the time of transfer to defendant. Thus, the representation in the agreement that plaintiff provided consideration was undisputed. Because defendant failed to show that a genuine issue of material fact existed, the trial court properly granted summary disposition to plaintiff.

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro