STATE OF MICHIGAN

COURT OF APPEALS

R & M VENTURES, L.L.C.,

Plaintiff/Counter-Defendant-Appellant,

v

ESTATE OF ORVILLE G. WONSEY, Deceased, JOHN YUN, Personal Representative,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
August 2, 2012

No. 304241
Oakland Probate Court
LC No. 2007-311313-CZ

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right from a stipulated final order dismissing certain claims involved in this case (defendant's counter-claim and delivery action against plaintiff). However, plaintiff's sole issue on appeal concerns an earlier order that granted defendant's motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiff's claims. We affirm.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition because there were genuine issues of material fact regarding whether a valid contract existed between plaintiff and defendant and whether defendant unfairly benefited from plaintiff's property under the doctrine of unjust enrichment. We disagree.

This Court reviews de novo a trial court's granting of summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 278. The party moving for summary disposition must specifically identify the matters that have no issues of disputed fact. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing, through documentary evidence, that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999), superseded by statute on other grounds as stated in *McLiechey v Bristol West Ins Co*, 408 F Supp 2d 516 (WD Mich, 2006). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). This Court must review a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to

the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule [(C)(10)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). A motion for summary disposition should be granted if the evidence presented to the trial court by the parties does not establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 424-425.

Orville G. Wonsey owned OGW Tree Service and Trucking (OGW). Orville died on November 7, 2005, or November 8, 2005. On August 9, 2006, plaintiff sent an invoice to OGW and John Yun (the personal representative of Wonsey's estate) that stated that OGW owed plaintiff a total of $57,340 for storing a CAT D3C Bulldozer and a Case W30 Wheel Loader from March 1, 2006, to August 1, 2006, on plaintiff's property; for dumping dirt, sewage, rocks, and cement from March 1, 2006, to July 1, 2006; for leveling dirt, rocks, and cement; and for damage to a bridge.

Orville was Jason Wonsey's grandfather. Connie Parling was Orville's daughter and is Jason's aunt. Ron Wolfe was the owner of plaintiff. Jason was employed with OGW for about four years. Parling was also employed with OGW and oversaw some of its affairs following Orville's death. Jason was entitled to 51 percent of Orville's estate and business assets, and Parling was entitled to 49 percent of the estate and business assets.

Jason indicated the following: After Orville passed away, Jason and Parling needed dump sites for OGW. At some point after Orville's death, Jason arranged, by way of an oral agreement, to have dirt and street sweepings dumped on Wolfe's land. The agreement was for plaintiff to be paid $100 a load. Jason brought a loader and bulldozer across Wolfe's bridge in order to dump and haul loads onto Wolfe's property, with Wolfe's knowledge. At some point the loader and bulldozer broke down. Jason was not authorized to sign contracts on behalf of OGW. Also, Jason was aware that he could not make any decisions related to OGW without verifying them with Yun. However, Jason informed Parling that he entered into an oral agreement with plaintiff to dump dirt on plaintiff's property.

According to Parling, she first became aware of an alleged bill from plaintiff on August 30, 2006, when she was forwarded the bill from Yun. Accordingly, on September 16, 2006, she went to Wolfe's property in Howell, Michigan, to locate the missing bulldozer and loader, but Wolfe allegedly refused to release the equipment to her.

At the end of August 2006, Yun became aware of plaintiff and its claims regarding an invoice dated August 9, 2006. Yun never had a conversation or an agreement in any capacity with plaintiff or Wolfe while acting as successor representative of Orville's estate.

The trial court ruled as follows regarding defendant's motion for summary disposition:

> [T]he Court is satisfied from reading all the pleadings, as well as the affidavits, that while these items may have been pled in contract, they should have been pled in some of them [sic] in tort, but that's [sic] material. The issue is whether or not there's [sic] any facts to support any of these pleadings on any of these issues. The Court is satisfied that in reviewing all the alleged documents, which are support facts [sic], that they really are allegations and they are not facts, and then this is not a proper -- there are no proofs from which the Court could determine that there, at this point, is a dispute in fact. And therefore, the Court is satisfied in every one of these allegations for summary disposition should be granted . . . .
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> Let me just say, as a caveat, if some individuals may have entered into a contract with these people -- that's -- I'm not saying whether they did or did not -- but when the decedent died, they were on notice he was dead, and that was the end. Whether these individuals are liable, they may very well be, but not in this Court.

"In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. Mere discussions and negotiations cannot be a substitute for the formal requirements of a contract." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991) (citation omitted). "A contract implied in fact arises when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *Matter of Estate of Lewis*, 168 Mich App 70, 75; 423 NW2d 600 (1988) (internal quotation marks and citations omitted). Also, "[a]n agency relationship may arise when there is a manifestation by the principal that the agent may act on his account." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). It is incumbent on the party who relied on an alleged agency to show what authority the agent actually had. *Selected Investments Co v Brown*, 288 Mich 383, 388; 284 NW 918 (1939). "Agency may not be established by proof of declarations by the supposed agent." *In re Union City Milk Co*, 329 Mich 506, 513; 46 NW2d 361 (1951).

In defendant's motion for summary disposition, it emphasized that Wonsey, the late owner of OGW, died before plaintiff claimed to have entered into a contract with defendant/OGW. It further indicated that, at the time this alleged contract was formed, the only person with authority to bind defendant to contracts was Yun, Orville's personal representative.[1]

In response to defendant's motion for summary disposition, plaintiff relied on its answer to defendant's request for interrogatories and Wolfe's affidavit. In both documents, Wolfe asserted mostly legal conclusions rather than facts regarding alleged contracts. Wolfe claimed that on behalf of plaintiff, he had an oral contract with Jason, who represented to him that he was

[1] "Until termination of the appointment, a personal representative has the same power over the title to estate property that an absolute owner would have, in trust, however, for the benefit of creditors or others interested in the estate." MCL 700.3711.

the manager and owner of "Wonsey Tree and Trucking [S]ervice," for the dumping of clean dirt on plaintiff's property. Wolfe claimed that plaintiff had an oral contract with Parling and Yun to store equipment on plaintiff's property and to protect the equipment with locked gates and dogs. Wolfe claimed that on August 9, 2006, Parling came to plaintiff's property, while she was on the telephone with Yun, and stated, "Do not allow Jason, or anyone else to use or remove the equipment from [the] property," and during this visit she acknowledged damage to plaintiff's bridge, the dumping of broken cement and sewage dirt, and equipment being stored on plaintiff's property.

On February 16, 2009, Wolfe asserted, by way of affidavit, the following:

> 1. That I entered into an agreement with the decedent company to permit for a stated price, the dumping of clean dirt on my property;
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> 2. That I entered into an agreement with the decedent company for storage of equipment, which remains today, on my property. The agreement was initially with Jason Wonsey, but later ratified and agreed upon with Connie Parlin[g] and John Yun. Further, that Jason Wonsey, Connie Parling and John Yun agreed to the storage agreement;
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> 3. That at no time did I prevent anyone coming on my property to remove or inspect the property stored by me.
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> 4. That I never agreed with Defendant for dumping of contaminated soils to be dumped [sic].
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> 5. That my bridge was destroyed by Jason Wonsey and his truck driver crossing same.

Plaintiff argues that there was evidence that Jason and Parling had apparent and actual authority to bind OGW, and thus the estate, to a contract with plaintiff to dump dirt and store equipment on plaintiff's property. However, plaintiff did not establish this as a question of fact because it did not present any evidence in support of this assertion in its opposition to defendant's motion for summary disposition. Plaintiff admitted below that "[t]he [apparently initial] contract was entered into without [plaintiff] knowing Connie Parling or John Yung [sic]." Plaintiff did not present evidence of any *explicit* actual authority for Jason or Parling to bind OGW or the estate to a contract. In addition, there were no facts presented leading to a finding of *implied* actual authority granted to Jason or Parling. See *Meretta*, 195 Mich App at 698 (discussing express and implied actual authority).

As for apparent authority, the Michigan Supreme Court has defined this as follows:

> Whenever the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such a position, and thereby justifies those dealing with the agent in believing that he is acting within his mandate, an apparent authority results which replaces that actually conferred as the basis for determining rights and liabilities. The measure of authority consists

> of those powers which the principal has thus caused or permitted the agent to seem to possess, whether the agent had actual authority being immaterial if his conduct was within the apparent scope of his powers; *the question* involved is no longer what authority was actually given or was intended by the parties to the agency agreement, but *resolves itself instead into the determination of what powers persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe him to have on the basis of the principal's conduct*. Absence of intention to confer any power of the character of that exercised cannot be asserted so as to avoid or vitiate the authority, for the agent's authority as to those with whom he deals is what it reasonably appears to be. [*Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957) (internal citation and quotation marks omitted; emphases added).]

Plaintiff presented no evidence that Jason's and Parling's entering into the alleged contracts fell within the apparent scope of powers that the *principal* has "caused or permitted the agent to seem to possess." *Id.* We conclude that there is no genuine issue of material fact regarding whether Parling or Jason were competent to enter into a contract with plaintiff on behalf of defendant.

Defendant also argues that there was a question of fact regarding whether plaintiff had an express or implied agreement with *Yun* for the dumping of dirt and storage of equipment on plaintiff's land. However, in opposition to defendant's motion for summary disposition, plaintiff simply provided Wolfe's declaratory statements that plaintiff had entered into a contract with defendant through Yun, seemingly based on Wolfe's claim that on August 9, 2006, Parling came to plaintiff's property, while she was on the telephone with Yun, and stated, "[d]o not allow Jason, or anyone else to use or remove the equipment from [the] property," and because during this visit Parling identified damage to plaintiff's bridge, the dumping of broken cement and sewage dirt, and equipment being stored on plaintiff's property. It is undisputed that at the time in question, Yun was authorized to enter into a contract with plaintiff on behalf of defendant. However, plaintiff's bare assertion that it contracted with defendant through Yun, and its factual assertion that Yun was on the telephone with Parling when she allegedly ratified services plaintiff had allegedly already provided defendant, did not create a question of fact regarding whether Yun mutually agreed to enter into a contract with plaintiff or expected to pay plaintiff for the alleged services. Indeed, this is not evidence indicating that Yun intended to enter into an agreement with plaintiff. Therefore, there were no questions of fact regarding whether a valid contract existed between the parties.

Plaintiff also argues that there was a question of fact regarding whether defendant was enriched by plaintiff's services of allowing defendant to dump dirt and store equipment on its land. "[I]n order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). Plaintiff must show that the noncontracting defendant *unjustly* received and retained an independent benefit from the plaintiff. *Id*. at 196.

There is evidence that at some time after Wonsey's death, Jason arranged to have dirt and street sweepings dumped on Wolfe's land, through an oral agreement. Also, there is evidence that the loader and bulldozer were left on plaintiff's property. While this evidence may establish an issue of fact regarding whether Jason, who is not a party to this claim, was enriched by services allegedly provided by plaintiff, it falls short of establishing a genuine issue of fact regarding whether *defendant* was *unjustly* enriched. See, e.g., *id*. (discussing a situation in which a third party has received a benefit but has not requested the benefit or misled other contracting parties). Plaintiff did not provide sufficient evidence in opposition to defendant's motion for summary disposition to support its claim that defendant was unjustly enriched.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder