

STATE OF MICHIGAN
COURT OF APPEALS

DARLENE MONTGOMERY,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

October 4, 2012

No. 305423

Wayne Circuit Court

LC No. 10-012410-CL

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

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition on the basis that plaintiff's various claims were barred by collateral estoppel, governmental immunity, and/or the statute of limitations. We affirm.

In October 2007, defendant accused plaintiff, a customer service representative in defendant's Water and Sewerage Department, of "theft of service" for making unauthorized adjustments to customer accounts. Plaintiff's employment was terminated effective November 24, 2007. Plaintiff filed a grievance that was submitted to arbitration pursuant to a collective bargaining agreement. In November 2009, the arbitrator issued a decision upholding plaintiff's discharge on the basis of misconduct. Plaintiff filed the present action in October 2010, alleging a claim for libel and slander related to her discharge and seeking a declaration that defendant did not have the right to terminate her employment for theft of service. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity, statute of limitations, and collateral estoppel), (8) (failure to state a claim for relief), and (10) (no genuine issue of material fact). The trial court granted defendant's motion.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted pursuant to MCR 2.116(C)(7) when a claim is barred "because of . . . immunity granted by law, statute of limitations, . . . or other disposition of the claim before commencement of the action." A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Maiden*, 461 Mich at 119-120. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (citation and internal quotation marks omitted). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no

genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law.”

Although plaintiff argues that the trial court erred in granting summary disposition because discovery was incomplete, the record discloses that the trial court’s decision was issued after the discovery cutoff date and that no discovery requests were then outstanding. We also reject plaintiff’s argument that she is entitled to relief because defendant delayed providing its answers to interrogatories until the day before the motion hearing, preventing her from engaging in further discovery. Moreover, even if discovery was still open, we would find no error.

When discovery is not complete, a trial court may nonetheless grant summary disposition “if there is no fair likelihood that further discovery will yield support for the nonmoving party’s position.” *Anzaldua v Neogen Corp*, 292 Mich App 626, 636; 808 NW2d 804 (2011), quoting *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). Furthermore, a party opposing summary disposition on the basis that discovery is incomplete must assert that a dispute exists and support the allegation with some independent evidence. *Bellows v Delaware McDonald’s Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). A claim that summary disposition was premature because further discovery was necessary must relate the desired discovery to the basis of the trial court’s decision. For example, in *Anzaldua*, 292 Mich App at 636, the plaintiff asserted that discovery was incomplete concerning a supervisor’s motivation for terminating the plaintiff’s employment. The trial court granted summary disposition on the basis that the claim was time-barred. Because the requested discovery did not relate to the basis for the trial court’s decision, the plaintiff failed to demonstrate a fair likelihood that further discovery would refute the trial court’s conclusion that the action was untimely. Therefore, summary disposition in that case was not premature. *Id.*

In this case, plaintiff asserts that further discovery was necessary concerning her former supervisor’s conduct and the reasons for the supervisor’s termination in 2010. She claims that such discovery could produce facts to show that she was innocent of the alleged conduct that led to her firing. However, those matters have no bearing on whether governmental immunity or the statute of limitations barred plaintiff’s claims. Therefore, plaintiff, like the plaintiff in *Anzaldua*, has not shown a fair likelihood that further discovery could reveal anything to refute the trial court’s decision to grant summary disposition on those grounds, and accordingly, she is not entitled to any relief on appeal.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

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