# STATE OF MICHIGAN

# COURT OF APPEALS

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HOWARD P. LEVY, D.O.,

Plaintiff-Appellant,

v

CORPORATE HEALTH SYSTEM, INC., ROBERT AMSLER, JOHN JOHNSON, ROBERT KILGORE, and MICHAEL TAWNEY, jointly and severally,

Defendants-Appellees.

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UNPUBLISHED
September 19, 1997

No. 196300
Macomb Circuit Court
LC No. 96-001322-CK

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order that granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff was an officer, director, and shareholder of defendant Corporate Health Services (CHS) along with the named defendants. Plaintiff sold his stock in CHS to defendants and resigned as officer and director. Plaintiff received a promissory note for the stock, severance pay, and payment for an agreement not to compete, totaling $525,000, and signed a release releasing defendants from liability. A year later, defendants sold all of the outstanding CHS stock to Occu-System, Inc. Plaintiff brought suit alleging that defendants had begun negotiations with Occu-System prior to purchasing his stock and failed to inform him. On appeal, plaintiff argues that he entered into a settlement agreement in which defendants fraudulently concealed material information, the "tender rule" does not apply in this case, and the release language in the settlement agreement did not bar him from bringing this suit.

A motion for summary disposition under MCR 2.116(C)(7) does not test the merits of a claim but rather certain defenses that may make a trial on the merits unnecessary. *DMI Design & Mfg, Inc v ADAC Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true plaintiff's well-pleaded allegations, and construe them in a light most favorable to plaintiff. *Florence v Dep't of Social Services*, 215 Mich App 211, 213; 544 NW2d 723 (1996). This motion should not be granted

unless no factual development could provide a basis for recovery. *Id*. at 213-214. The pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties must be considered in a light most favorable to the nonmovant pursuant to MCR 2.116(G)(5). *Gortney v Norfolk & Western RR Co*, 216 Mich App 535, 539; 549 NW2d 612 (1996). If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the trial court must enter judgment without delay pursuant to MCR 2.116(I)(1). *Id*. at 539. This Court reviews a summary disposition determination de novo as a question of law. *Florence*, *supra* at 214.

Plaintiff first argues that since defendants fraudulently concealed from him that they were negotiating with Occu-System, he is not barred from bringing this cause of action. We disagree.

Pursuant to MCR 2.116(C)(7), a claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of fraud, an agreement to arbitrate, infancy or other disability of the moving party, or an assignment or other disposition of the claim before commencement of the action. Pursuant to MCR 2.112(B)(1), the circumstances constituting fraud must be stated with particularity.

Plaintiff offers no evidence that defendants met with Occu-System prior to defendants' purchase of his stock, other than his general allegations that the parties met. He offers no witnesses who had knowledge of the negotiations, or any minutes, memoranda, or records as evidence as to when the negotiations took place. Plaintiff's allegations do not comport with the requirement under MCR 2.112(B)(1), that an allegation of fraud must be pled with specificity. Therefore, the trial court properly granted defendants' motion for summary disposition on plaintiff's fraud claims.

Plaintiff also argues that he did not need to tender the consideration he received because defendants committed fraud in the execution. We disagree.

A release of liability is valid if it was executed knowingly and the recited consideration was received. *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 164-165; 458 NW2d 56 (1990). The plaintiff has the burden of showing, by a preponderance of the evidence, that the release is unfair or incorrect on its face. *Id*. at 165. The plaintiff must tender the recited consideration before there is a right to repudiate the release. *Id.* In Michigan, there are two exceptions when consideration need not be tendered before there is a right to repudiate the release: 1) defendant has waived plaintiff's duty and 2) fraud in the execution. *Id*.

There is no evidence in the present case that defendants committed fraud in the execution. Plaintiff initiated the negotiations between himself and defendants. He was represented by counsel throughout the negotiations. He offers no evidence that negotiations with Occu-System were taking place while he was negotiating his deal, and that defendants failed to inform him.

He also argues that *Stefanac* is inapplicable because the consideration was simply what he was paid for the stock, severance pay, and non-competition agreement. Since the settlement

cannot be viewed as defendants' admission of liability for any potential claims, pursuant to *Badon v General Motors Corp*, 188 Mich App 430; 470 NW2d 436 (1991), his failure to tender the consideration was not fatal to his claim. We disagree.

In *Badon*, this Court relied in part on the fact that the plaintiff sought equitable relief and *Stefanac* did not decide whether the tender rule applied to solely equitable claims. In this case, plaintiff seeks money damages, and *Stefanac* clearly held that a plaintiff "must, in all cases where a legal claim is raised in contravention of an agreement, tender the consideration recited in the agreement prior to or simultaneously with the filing of suit." *Stefanac, supra* at 176. We feel constrained to follow *Stefanac*.

Furthermore, although plaintiff argues that tender would have been futile since the stock had been sold and he could not be returned to the status quo, this argument is without merit. The purpose behind tendering the consideration is not so plaintiff can receive his stock, but to return what he received in exchange for defendants giving the release. As stated in *Stefanac*, plaintiff is not entitlted to retain the benefits of the agreement and at the same time bring suit in contravention of the agreement. *Id.* at 177. *Mettetal v Hall*, 288 Mich 200; 284 NW 698 (1939) and *Salate v Dylewski*, 234 Mich 331; 207 NW 895(1926), upon which plaintiff relies are distinguishable since these cases sought equitable remedies, a remedy which plaintiff does not seek. Since plaintiff did not tender the consideration prior to or contemporaneous with bring this suit, summary disposition was properly granted.

Plaintiff finally argues that the language in the release only covers those transactions in which the parties were involved. Since plaintiff did not have knowledge of the secret negotiations between defendants and Occu-System, the release does not bar him from bringing this suit. At the outset we note that plaintiff failed to raise this issue below, thus waiving it for appellate review. *Gortney, supra* at 544. Nevertheless, the argument is without merit since the language of the release is unambiguous and clearly refers to claims arising out of the selling of the stock, the severance pay, and the non-competition agreement. Since this case presents such claims, the release barred plaintiff's suit, and summary disposition was properly granted.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gribbs