STATE OF MICHIGAN

COURT OF APPEALS

MARGARET M. KEANE,

Plaintiff-Appellant,

v

IBM PENSION PLAN,

Defendant-Appellee.

UNPUBLISHED
December 29, 1998

No. 201912
Kalamazoo Circuit Court
LC No. 95-002051 CZ

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Plaintiff and her ex-husband, Joseph P. Keane, were divorced on November 18, 1985. The original judgment of divorce awarded plaintiff a portion of Mr. Keane's pension at IBM. On May 28, 1991, plaintiff and Mr. Keane agreed to the entry of a qualified domestic relations order ("QDRO") that awarded plaintiff fifty percent of Mr. Keane's accrued benefit in the pension plan as of November 18, 1985. Mr. Keane subsequently retired in 1992 at age sixty-two. Plaintiff filed suit against defendant IBM Pension Plan, claiming, among other things, that defendant incorrectly calculated her benefits and that she is entitled to the increased value of her portion of the pension from 1985 to 1992. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8) and (10). Plaintiff appeals as of right. We affirm.

Plaintiff argues that defendant arbitrarily calculated her pension benefit in a manner inconsistent with the Employee Retirement Income Security Act of 1974, PL 93-406, 88 Stat 829, which appears generally as 29 USC 1001 *et seq*. ("ERISA") and that the trial court erred in granting summary disposition to defendant on the issue. Specifically, plaintiff contends that she is entitled to an "actuarial increase" in her benefit payment to compensate her for the seven-year delay between the date of her divorce and the date the she requested her benefit payments to commence. We disagree.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by looking at the pleadings alone, *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), and may be

granted where the opposing party "has failed to state a claim on which relief can be granted," MCR 2.116(C)(8). All factual allegations in support of the claim are accepted as true. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A motion may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). The courts are liberal in finding a genuine issue of material fact. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available to it. *Patterson, supra*, 434. The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences are to be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

ERISA § 206, 29 USC 1056(d)(3)(A), requires a pension plan to "provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." The first paragraph of the QDRO in this case establishes the amount of plaintiff's benefit as fifty percent of Mr. Keane's "accrued benefit" as it would have been calculated if he terminated his employment with IBM on November 18, 1985:

> NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the IBM Retirement Plan (the "Plan") assign and pay as provided below to the Defendant, [Plaintiff] MARGARET M. KEANE (the "Alternate Payee"), Fifty (50%) Percent of the Plaintiff, JOSEPH P. KEANE'S (the "Participant"), accrued benefit under the Plan as of November 18, 1985, being Fifty (50%) Percent of the benefit payments the Participant would receive under the Plan if Participant terminated participation in the Plan on November 18, 1985, and commenced benefit payments at Participant's Normal Retirement Age in the form of an annuity for the Participant's life with payment ceasing at Participant's death (the "Assigned Benefit").

However, the second paragraph of the QDRO sets forth a mechanism by which plaintiff is awarded the "actuarial equivalent" of plaintiff's assigned benefit in the event that the benefit commenced at a date other than Mr. Keane's normal retirement date:

> If the benefit required to be paid to the Alternate Payee [plaintiff] is required to be paid in a form other than the Assigned Benefit, that is other than commencing at Participant's [Mr. Keane's] Normal Retirement Date and payable for the Participant's life with payments ceasing at the Participant's death, the benefit paid in such form shall

> be a benefit which is actuarially equivalent under the Plan's actuarial assumption to the Assigned Benefit. For purposes of calculating actuarial equivalency and making payments to the Alternate Payee, the measuring life for any alternate form of benefit shall be the Participant's life.

We agree with plaintiff that the second paragraph of the QDRO applies to plaintiff's award because plaintiff was paid benefits in a form other than the "assigned benefit," i.e., in a form other than commencing at Mr. Keane's normal retirement date. The normal retirement age under defendant's plan is sixty-five years. Because Mr. Keane commenced his benefits before his normal retirement age of sixty-five and because plaintiff requested that her benefit payments also commence at that time, plaintiff is entitled to a benefit payment that is actuarially equivalent to her assigned benefit, as contemplated by paragraph two of the QDRO.

However, our interpretation of the QDRO leads us to conclude that the calculation employed to determine the actuarial equivalent of plaintiff's benefit has no impact on the delay between the date of divorce and the commencement of benefit payments. According to the plan, Joseph Keane's normal retirement age is sixty-five; thus, initially, it would appear that the amount of plaintiff's benefit payment would be determined by dividing her fifty percent interest in the pension as of November 18, 1985, into monthly payments commencing when Joseph Keane reaches the age of sixty-five and ending at his projected date of death. However, because Joseph Keane retired early, on August 1, 1992, when he was only sixty-two, and plaintiff elected to commence benefits at that time, the second paragraph of the QDRO, reproduced above, becomes applicable. In other words, because plaintiff's benefit payment is calculated in a manner "other than commencing at Participant's Normal Retirement Date," the benefit paid must be "actuarially equivalent" to the assigned benefit. In our view, this actuarially equivalency calculation, referenced in the QDRO, has no relevance to the delay between the divorce and the commencement of benefits. Rather, the calculation merely result in a smaller monthly benefit payment to compensate for the longer time period that the benefit will be paid. Accordingly, plaintiff's claim that paragraph two of the QDRO supports her argument that her benefit payment should be increased is without merit.

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition before discovery was completed. We disagree. "Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). "However, summary disposition is not premature if the discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition." *Id.* Because the trial court's decision in this case turned exclusively on its interpretation of the language of the QDRO, we conclude that further discovery would not have afforded plaintiff a fair chance of uncovering factual support for opposing defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy