STATE OF MICHIGAN

COURT OF APPEALS

HAROLD WEISBERG,

Plaintiff-Appellant,

v

ALVIN WEISBERG,

Defendant-Appellee.

UNPUBLISHED
November 9, 1999

No. 210171
Oakland Circuit Court
LC No. 96-533715 CK

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10).[1] We affirm.

Plaintiff brought claims against defendant, his brother, for breach of contract, breach of a joint venture contract, and breach of fiduciary duties.[2] Plaintiff alleged that defendant had breached an oral contract in which defendant promised to convey one-half of his sixty percent interest in Total Pet Supplies, Inc., a corporation formed in September 1991 by defendant and two unrelated individuals, Paul Hrabovsky and Domenick Buccellato. Defendant maintained that, although he had, in 1992, orally offered plaintiff the opportunity to purchase fifty percent of his Total stock, one condition of the purchase was that plaintiff would not have a vote and would not participate in the management of Total stores; defendant alleged that plaintiff had rejected the offer under these conditions, and that no subsequent offer was made.

I

Plaintiff argues that the trial court erred in determining that his claims for breach of contract and breach of fiduciary duty were barred by the statute of frauds, and in thereby granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7),[3] with respect to those claims. This Court reviews a summary disposition determination de novo as a question of law. *Poffenbarger v Kaplan*, 224 Mich App 1, 6; 568 NW2d 131 (1997); *Lindsey v Harper Hosp*, 213 Mich App 422, 425; 540 NW2d 477 (1995). A trial court's decision whether to grant summary disposition pursuant to MCR 2.116(C)(7) is reviewed by considering the affidavits, pleadings, and other documentary evidence, and

construing them in the light most favorable to the nonmoving party. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999); *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Summary disposition is inappropriate unless no factual development could provide a basis for recovery. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993).

A

Plaintiff first contends that the trial court erred in determining that the alleged agreement constituted a "contract for the sale of securities," and that MCL 440.8319; MSA 19.8319 was, therefore, applicable. MCL 440.8319; MSA 19.8319 provided[4] as follows, in relevant part:

> A contract for the sale of securities is not enforceable by way of action or defense unless:
>
> (a) there is some writing signed by the party against whom enforcement is sought or by his or her authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or
>
> (b) . . . payment has been made, but the contract is enforceable under this provision only to the extent of the delivery, registration, or payment . . . .

The trial court did not err in determining that the alleged agreement constituted a "contract for the sale of securities" pursuant to MCL 440.8319; MSA 19.8319. Plaintiff argues that the agreement was not one for the sale of stock, but that it was a preincorporation agreement, because the agreement was made before the incorporation of Total in 1991. However, the trial court correctly acknowledged that, viewing the evidence in a light most favorable to plaintiff, there was no issue of fact concerning whether the alleged contract was a preincorporation agreement.

All of the pleadings and other documentary evidence provided concerning the dates of the alleged offer and acceptance support the conclusion that Total was incorporated prior to the making of the alleged agreement. Although plaintiff now claims that the alleged contract was a preincorporation agreement, plaintiff's complaint alleged that the contract was made after Total was incorporated. Specifically, plaintiff alleged in his complaint that Total was incorporated in September 1991, and that defendant offered him fifty percent of defendant's interest in Total "[i]n early 1992." Plaintiff further alleged in his complaint that it was during a trip to Ohio in June or July 1992 that defendant "fleshed out the details of the contract," including the detail that, in exchange for half of defendant's Total stock, plaintiff would be responsible for one-half of any bank loans or real estate leases that were signed personally and would share in all risk and profit equally with defendant.

Moreover, plaintiff's own deposition testimony indicated that the alleged agreement was made after Total was incorporated. While plaintiff was unable to recall the exact date of the offer, he testified at his deposition that defendant made his offer "after [Total] was incorporated, not prior to"; that, at the time the offer was made, two Total stores were already in existence; that he accepted defendant's offer

"in November in '91, the end of '91"; and that the parties' agreement consisted of plaintiff's "buying half of [defendant's] stock," which would not "chang[e] [Hrabovsky's or Buccellato's] holdings in the company." Defendant stated, in agreement with plaintiff, that he extended an offer to plaintiff in mid-1992. The attorney for Total, Stewart Weiner, testified that a telephone memorandum he prepared during his conversation with defendant on August 15, 1991, constituted notes regarding what defendant *intended* to offer to plaintiff, not regarding an existing agreement.

In short, plaintiff presented no evidence demonstrating that the alleged contract was a preincorporation agreement. Considering the affidavits, pleadings, and other documentary evidence in the light most favorable to plaintiff, *Barrow*, *supra* at 480; *Alcona Co*, *supra* at 246, it is apparent that no factual dispute exists regarding whether the alleged agreement was entered into prior to the incorporation of Total. Contrary to plaintiff's assertion, the trial court did not engage in impermissible fact-finding or make determinations of credibility in rendering its decision. Rather, the trial court properly considered the evidence submitted in the light most favorable to plaintiff, and determined that no evidence had been submitted to support his argument.

B

Plaintiff next argues that the trial court erred in determining that there was a "sale" pursuant to MCL 440.8319; MSA 19.8319, because no payment of a specific "price" was required under the parties' contract. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993); *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 695; 588 NW2d 715 (1998). The first criterion in determining intent is the specific language of the statute. *Id*. Judicial construction of a statute is not permitted where the plain and ordinary meaning of the language is clear. *Id*.

Although the term "sale" is not defined in Article 8 of the UCC, it is defined in Article 2.[5] MCL 440.2106(1); MSA 19.2106(1) provides that "[a] 'sale' consists in the passing of title from the seller to the buyer for a price . . . ." MCL 440.2304(1); MSA 19.2304(1) provides that "[t]he price can be made payable in money or otherwise." See also *Random House Webster's College Dictionary* (2d ed, 1997), p 1033, defining "price" as "1. the sum or amount of money or its equivalent for which anything is bought, sold, or offered for sale. . . . 4. that which must be given, done, or undergone in order to obtain a thing."

Therefore, based on the plain and ordinary meaning of the word "sale" as used in § 8319, and on the statutory definitions of "sale" and "price" as provided elsewhere in the UCC, we hold that the trial court did not err in determining that plaintiff's alleged agreement to "surrender something" in return for fifty percent of defendant's Total shares—that "something" consisting of plaintiff's "assumption of half of defendant's obligations on Total's bank loans, guarantees and real estate leases, his agreement to be available to loan money to Total, and his assumption of fifty percent of the risk faced by defendant"—constituted a "price" sufficient to render the subject agreement one for the "sale of securities" pursuant to MCL 440.8319; MSA 19.8319.

C

Finally, plaintiff argues that the trial court erred in determining that he did not make partial payment for the securities, such that MCL 440.8319(b); MSA 19.8319(b) rendered the agreement enforceable to the extent of such payment. It is true that partial performance of an agreement for the sale of securities may take the agreement out of the statute of frauds. See *Giordano v Markovitz*, 209 Mich App 676, 679-680; 531 NW2d 815 (1995). However, plaintiff's assertion that he made any "payment," or otherwise performed under the alleged agreement, is wholly unsupported by the evidence. Plaintiff testified that he never signed any of Total's bank loans, leases, or guarantees. Plaintiff further stated that he never paid defendant any money for his alleged interest in Total. Although plaintiff alleged that he had incurred out-of-pocket expenses in connection with his alleged interest in Total, he was unable to identify any such expenditures; when asked how he would calculate what his total out-of-pocket expenses were, plaintiff stated that he would "use the swag system," which he explained was a "scientific wild ass guess." Based on the foregoing, the trial court properly determined that no "payment" of any kind was made by plaintiff in return for the securities sufficient to satisfy MCL 440.8319(b); MSA 19.8319(b).

D

Upon considering the affidavits, pleadings, and other documentary evidence, and construing them in the light most favorable to plaintiff, *Barrow*, *supra* at 480; *Alcona Co*, *supra* at 246, we conclude that the trial court properly determined that plaintiff's claims were barred by MCL 440.8319; MSA 19.8319. Because it is clear that no factual development could provide a basis for recovery, summary disposition pursuant to MCR 2.116(C)(7) was properly granted. *Marrero*, *supra* at 441.

II

Plaintiff additionally argues that the trial court erred in allowing a "partial waiver" of defendant's attorney-client privilege with respect to an August 15, 1991, telephone conversation between defendant and his attorney, Stewart Weiner, and the "telephone memorandum" prepared by Weiner following the conversation. Plaintiff contends that, because defendant waived the privilege with respect to the August 15, 1991, conversation and resulting memorandum, the trial court erred in subsequently determining that several documents in defendant's and/or Weiner's possession were privileged; plaintiff contends that defendant should not have been permitted to invoke the attorney-client privilege after making a "partial waiver" of the privilege.

Plaintiff is simply mistaken as to the nature of the trial court's rulings. The court clearly ruled that Weiner's August 15, 1991, telephone conversation with defendant was *not* protected by the attorney-client privilege. The court additionally ordered that all communications between Weiner and defendant "wherein the communication was not made for the express purpose of obtaining legal advice on some right or obligation on the part of [defendant]" were not protected by the privilege. Therefore, it is clear that defendant did not "partially waive" the attorney-client privilege, and plaintiff's argument simply has no basis in fact.

Plaintiff additionally argues that defendant waived the attorney-client privilege for all purposes of this litigation when he turned over to plaintiff Weiner's file, which he contends was "complete with confidential memoranda and correspondence." However, it is evident from the record that defendant removed from this file at least 179 documents, claiming that they were privileged; indeed, the trial court, after an in camera inspection of these documents, determined that they were protected by the privilege. Moreover, plaintiff has failed to demonstrate that any of the documents which were produced by defendant during discovery contained confidential information such that defendant waived the attorney-client privilege, and nothing in the record supports his bare assertion that the privilege was waived in this manner.

Affirmed.

/s/ Mark C. Cavanagh
/s/ Martin J. Doctoroff
/s/ Peter D. O'Connell

[1] Plaintiff only appeals from the trial court's order granting summary disposition to the extent that it was based on MCR 2.116(C)(7). Plaintiff does not argue that the trial court erred in granting summary disposition of his joint venture claims, Counts IV and V of his complaint, pursuant to MCR 2.116(C)(10).

[2] An additional claim, alleging fraudulent misrepresentation, was withdrawn by plaintiff prior to the trial court's grant of summary disposition.

[3] MCR 2.116(C)(7) provides that a motion for summary disposition may be granted on the basis that "[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action."

[4] MCL 440.8319; MSA 19.8319 was repealed effective July 27, 1998, and was replaced by MCL 440.8113; MSA 19.8113, which provides as follows:

> A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within 1 year of its making.

[5] The Uniform Commercial Code Comment to former MCL 440.8319; MSA 19.8319 states that "[t]his Section is intended to conform the statute of frauds provisions with regard to securities to the policy of the like provisions in Article 2 (Section 2-201)."