STATE OF MICHIGAN

COURT OF APPEALS

MERCY MEMORIAL HOSPITAL,

Plaintiff/Counter Defendant-Appellee,

v

ARTHUR T. PORTER,

Defendant,

and

RADS, P.C., ONCOLOGY PROFESSIONALS, and DONALD BRONN,

Defendants/Counter Plaintiffs-Appellants,

and

AMERICAN ONCOLOGICAL ASSOCIATES OF MICHIGAN, a/k/a MICHIGAN INSTITUTE OF RADIATION ONCOLOGY, and FARIDEH BAGNE,

Defendants-Appellants.

UNPUBLISHED
December 21, 1999

No. 212223
Monroe Circuit Court
LC No. 96-006039 CZ

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

PER CURIAM.

Defendants appeal as of right from the trial court orders granting plaintiff's motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits,

admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

I

Defendants argue that the trial court erred in granting plaintiff's motion for summary disposition on their claim of breach of contract. Defendants assert that the trial court improperly made findings of fact and credibility determinations regarding the testimony of the witnesses.

A valid contract requires mutual assent on all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997); *Kamalnath v Mercy Memorial Hospital*, 194 Mich App 543, 548-549, 487 NW2d 499 (1992). In determining whether there was mutuality of assent, a court must apply an objective test, looking to the expressed words of the parties and their visible acts, including all writings, oral statements, and other conduct by which the parties manifested their intent. *Rood v General Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993).

Defendants complain that the trial court "emasculat[ed]" the affidavit of Joel Nass. However, we find no error. Nass' representations regarding purported statements made by plaintiff to James Parrott constitute inadmissible hearsay. The reviewing court must evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Considering only the admissible portions of Nass' affidavit, we conclude that it did not establish a genuine issue of material fact regarding the existence of a contract between the parties.

Defendants assert that the hearsay statements by Parrott are admissible because he was plaintiff's agent. We disagree. The party asserting that an agency exists has the burden of proof on the issue. See *Whitlow v Monroe*, 296 Mich 426, 431; 296 NW 314 (1941); *Northern Concrete Pipe, Inc v Phoenix Sprinkler & Heating Co*, 16 Mich App 650, 651; 168 NW2d 446 (1969). Defendants failed to provide any evidence that Parrott acted as plaintiff's agent. Contrary to defendants' assertion, Parrott did *not* admit at his deposition that he considered himself to be plaintiff's agent.[1] In fact, when asked, "Did you ever consider yourself to be acting on behalf of Mercy Memorial Hospital at any time?," Parrott responded, "Never." In any case, the authority of one person to contract for another must be determined from or by acts of his principal and cannot be proved by the admissions or statements of the alleged agent. *Harrigan & Reid Co v Hudson*, 291 Mich 478, 484; 289 NW 222 (1939).

Defendants also rely on the following report of the comments of plaintiff's president, Richard Hiltz, which appeared in the minutes of plaintiff's November 11, 1996, board meeting:

> [R]adiation oncology is a project that has developed complications. Originally we agreed that we would participate in a joint venture, however, the original proposed

> partner changed and presently a group with whom MMH has no contractual relationship is building a radiation oncology institution approximately two blocks north of the hospital.

Defendants contend that the minutes reflect "Hiltz' express acknowledgment . . . of an agreement to collaborate between RADS and the Hospital." We disagree. Even if Hiltz did state that the parties had an "agreement," the minutes contain no evidence that there was mutual assent on the essential terms of that agreement so that a legally binding contract was created. See *Eerdmans*, *supra*; *Kamalnath*, *supra*. Moreover, according to the minutes, Hiltz was referring to an agreement to participate in a joint venture; however, defendants state in their brief on appeal that "RADS' contract claim . . . nowhere sought to enforce any type of joint venture agreement." Under the circumstances, the minutes of plaintiff's board meeting do not raise a genuine issue of material fact with regard to the existence of a contract between the parties, and the trial court did not err in granting plaintiff's motion for summary disposition on defendants' contract claim.

II

Defendants also maintain that the trial court erred in granting defendants' motion for summary disposition on their promissory estoppel claim. The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Ardt v Titan Ins Co*, 233 Mich App 685, 692; 593 NW2d 215 (1999). The doctrine of promissory estoppel is cautiously applied. In order to support a claim of estoppel, a promise must be definite and clear. *Barber v SMH (US), Inc*, 202 Mich App 366, 376; 509 NW2d 791 (1993).

After reviewing the record and considering the evidence in the light most favorable to defendants, we conclude that the trial court correctly determined that defendants failed to establish that plaintiff made a definite and clear promise to them. See *id*. As already discussed, the representations in Nass' affidavit regarding purported statements by plaintiff to Parrott constitute inadmissible hearsay. Hiltz' September 29, 1994, letter to Nass states only that plaintiff had "been exploring . . . the possibility" of starting a radiation oncology center in Monroe and wanted to "pursue the potential of transferring the certificate of need." The fact that the parties engaged in discussions regarding the radiation oncology center does not establish that plaintiff made any promises to defendants. The other factors cited by defendants likewise do not demonstrate the existence of a definite and clear promise. Accordingly, the trial court properly granted plaintiff's motion for summary disposition on defendants' promissory estoppel claim.

III

Defendants next argue that the trial court erred in dismissing their antitrust claims. We disagree.

Under § 3 of the Michigan Antitrust Reform Act (MARA),

> [t]he establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful. [MCL 445.773; MSA 28.70(3).]

Defendants allege that plaintiff sought to maintain a monopoly over its own patients in order to exclude competition.

The MARA defines a "relevant market" as "the geographical area of actual or potential competition in a line of trade or commerce, all or any part of which is within this state." MCL 445.771(b); MSA 28.70(1)(b). No Michigan cases address whether a single hospital's patients may constitute a relevant market; however, the Legislature has provided that Michigan courts should "give due deference to interpretations given by the federal courts to comparable antitrust statutes." MCL 445.784(2); MSA 28.70(14)(2). Absent an allegation that the hospital is the only one serving a particular area or offers a unique set of circumstances, federal courts have rejected the proposition that a single hospital can constitute a relevant market. See, e.g., *Brader v Allegheny General Hosp*, 64 F3d 869, 878 (CA 3, 1995); *Flegel v Christian Hosp Northeast-Northwest*, 804 F Supp 1165, 1174 (ED Mo, 1992), aff'd 4 F3d 682 (CA 8, 1993). We find these cases persuasive and hold that plaintiff's roster of cancer patients is too narrowly defined to constitute a relevant market under MCL 445.771(b); MSA 28.70(1)(b).[2] In any case, defendants have failed to provide any evidence that plaintiff has monopolized the market; it is undisputed that plaintiff's patients can and do receive treatment at radiation oncology facilities in Detroit, Ann Arbor, Toledo, and other locations.

Defendants next claim that the trial court erred in finding that defendants failed to allege an antitrust injury. We disagree. "The antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477, 488; 97 S Ct 690; 50 L Ed 2d 701 (1977), quoting *Brown Shoe Co v United States*, 370 US 294, 320; 82 S Ct 1502; 8 L Ed 2d 510 (1962). Defendants allege only that plaintiff's conduct will make access to plaintiff's patients difficult.[3] Defendants do not allege that plaintiff has prevented or will prevent its patients from using their radiation oncology services.

Defendants emphasize the fact that plaintiff is planning on constructing its own radiation oncology facility. However, while the plaintiff's projected facility may have an adverse effect on defendants' establishment, defendants have made no showing that it will have an adverse effect on competition in the geographic market. Indeed, the introduction of another radiation oncology center into southeastern Michigan should serve to *increase* competition, rather than reduce it. Consequently, the trial court did not err in granting plaintiff's motion for summary disposition on defendants' claim under § 3 of the MARA.

Finally, defendants' claim that plaintiff violated § 2 of the MARA, MCL 445.772; MSA 28.70(2), by conspiring to restrain trade fails because, as discussed above, they did not establish

an injury to a relevant market. Accordingly, the trial court did not err in dismissing defendants' claim that plaintiff violated § 2 of the MARA.

Affirmed.

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

[1] Considering the entirety of Parrott's testimony on this issue, it is clear that he did not consider himself to be plaintiff's "agent" as the word is defined in the legal context. The transcript of Parrott's deposition contains the following exchange:

> Q. But you used the term "agent" in an answer to one of Mr. Sier's questions. And I think you said you considered yourself, "yourself" I'm referring to PPB and/or Jim Parrott, as an agent for both. I think you were referring to – why don't you tell me what you meant, if you recall that testimony.
>
> A. Well, I don't exactly remember what we were referring to, but I considered myself as agent, may or may not be a good word, but as the point person, I think we all know what that means, as the point person for negotiations for all parties and the person actually doing the legwork and the paperwork.
>
> * * *
>
> Q. And those – to the extent you used the word "agent," you were referring to yourself and PPB?
>
> A. As a paid employee of PPB, correct.

[2] Defendants cite *Potters Medical Center v City Hosp Ass'n*, 800 F2d 568 (CA 6, 1986), and *Stone v William Beaumont Hosp*, 782 F2d 609 (CA 6, 1986), in support of the proposition that a hospital's patients may constitute a relevant market. We find defendants' reliance on these cases to be misplaced. In *Potters Medical Center*, the plaintiff's characterization of the relevant market was not at issue. See *Potters Medical Center*, *supra* at 575, n 2. In *Stone*, the plaintiff alleged that the defendant hospital's refusal to grant him staff privileges would effectively preclude him from serving an entire geographic area. The court noted that, based on patient origin zip code data provided by the plaintiff, factual issues existed regarding whether the cardiac patients located within the geographic area served by the defendant hospital constituted a relevant market. *Id*. at 615, n 5. Here, defendants merely claim that they have no access to the patients in plaintiff's hospital; defendants' access to patients in the wider geographic area served by plaintiff's hospital is not at issue.

[3] Defendants provided evidence that most cancer patients rely on the advice of their physician when deciding what treatment options to pursue. However, defendants fail to explain how their difficulty in making plaintiff's patients aware of their services or the fact that some patients may be too ill to seek an

alternative source of radiation oncology services constitutes any antitrust violations on plaintiff's part. Defendants cite no support for the proposition that a business must inform its customers of both its competitors' existence and the services that they offer.