

STATE OF MICHIGAN
COURT OF APPEALS

MARKET MAKERS, INC.,

Plaintiff-Appellee,

v

JENERIC GROUP, LLC,

Defendant-Appellant,

and

JOHN DOE #1, JOHN DOE #2, and JANE DOE,

Defendants.

UNPUBLISHED

May 9, 2000

No. 212027

Wayne Circuit Court

LC No. 97-717332-CH

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order granting plaintiff's motion for partial summary disposition and denying defendant's motion for summary disposition. We reverse.

Plaintiff and Quality Mailing Service, Inc. entered into a lease agreement for property located at 4000-4004 West Jefferson in the City of Detroit.¹ However, numerous mortgages encumbered the property, and plaintiff was allegedly experiencing financial difficulties. NBD Bank, the senior mortgage holder, sent Quality Mailing Service, Inc. a notice of default by plaintiff regarding the lease property and requested assignment of rent from plaintiff to NBD Bank. NBD Bank allegedly offered to sell its mortgage interest in the subject property to Quality Mailing Service, Inc. Initially, the offer was refused, but members of Quality Mailing Service, Inc. later formed defendant, a corporate entity, to purchase the notes and mortgages held by NBD Bank relating to plaintiff and the subject property. A foreclosure sale for the subject property occurred, but there was no bidder for the property. Plaintiff was unable to redeem the subject property prior to the expiration of the statutory redemption period.

Plaintiff filed a complaint alleging that it had entered into an agreement with Mansour Ayar, a non-related third party, who was ready, willing, and able to advance sufficient funds to allow plaintiff to

redeem the property from defendant. In order to obtain the financing from Ayar, plaintiff allegedly was required to discharge a junior mortgage on the property held by Scot Lad. Plaintiff allegedly entered into an oral agreement with Lad to discharge the mortgage, but defendant intervened and induced Lad to refuse to discharge the junior mortgage to plaintiff. Accordingly, plaintiff sought an equitable extension of the right of redemption and damages for tortious interference with a business relationship, civil conspiracy, and unjust enrichment. Plaintiff moved for partial summary disposition of the claim seeking equitable extension of the right of redemption, and the trial court granted plaintiff's motion for summary disposition.²

Defendant first argues that the trial court erred in concluding that unusual circumstances existed that required extension of the redemption period. We conclude that summary disposition was inappropriate because the underlying facts offered in support of the claim of unusual circumstances were disputed. A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must identify the issues where there is no genuine issue as to any material fact. MCR 2.116(G)(4). The moving party must make and support the motion with pleadings, depositions, admissions, and other documentary evidence. *Spiek, supra*; MCR 2.116(G)(4), (5). Once the moving party has made and supported the motion, the opposing party may not rest on the mere allegations and denials contained in the pleadings, but must set forth facts showing that there is a disputed issue for trial. *SSC Associates Ltd Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991); MCR 2.116(G)(4). A disputed fact, or the lack thereof, must be established by admissible evidence. *SSC, supra*. Where the truth of a material factual assertion is contingent upon credibility, a genuine issue arises that must be decided at trial, and the motion for summary disposition cannot be granted. *Id.* at 365. Summary disposition is inappropriate where motive, intention, or other conditions of the mind are material issues. *Pemberton v Dharmani*, 207 Mich App 522, 529, n 1; 525 NW2d 497 (1994). Summary disposition is also suspect where the credibility of a witness or deponent is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994).

The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on issues of law. *American Community Mutual Ins Co v Comm'r of Insurance*, 195 Mich App 351, 362; 491 NW2d 597 (1992). Summary disposition involving mixed questions of law and fact is inappropriate where certain material facts are disputed. Cf. *Haupt v Kerr Mfg Co*, 210 Mich App 126, 132, n 2; 532 NW2d 859 (1995). Mixed questions of law and fact are those decisions that require the application of a legal standard to fact determinations. *Thompson v Keohane*, 516 US 99, 109-111; 116 S Ct 457; 133 L Ed 2d 383 (1995).

The trial court concluded, as a matter of law, that unusual circumstances warranting an exercise of equitable power existed in this case. We disagree. A court may exercise its equitable power in unusual circumstances, such as fraud, to effectuate a redemption where one has not been executed within the statutory period. *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996). However, fraud is not the only unusual circumstances warranting exercise of this equitable power. *Id.* at n 25. While the evaluation of unusual circumstances warranting an exercise of equitable power to allow redemption outside the statutory period presents a question of law, the underlying facts offered in

support of unusual circumstances presents a question of disputed fact.³ Linda Erlich, a member of defendant, presented an affidavit in which she denied any knowledge of plaintiff's contract negotiations with Lad. Rather, she asserted that her business dealings with Lad commenced based on her desire to obtain his junior mortgage interest in the subject property. Erlich's affidavit states that her motive was to obtain a mortgage interest that would have decreased any chance of eviction from the subject property in the event of another default by plaintiff. However, contrary to the affidavit of Erlich, plaintiff submitted the deposition testimony of Michael Langnas, who served as legal counsel for defendant. Langnas testified that defendant offered Lad \$80,000 in exchange for Lad's failure to enter into an agreement with plaintiff regarding discharge of his junior mortgage. Furthermore, the affidavit of Laura Stafford, attorney for Lad, also contradicts the Erlich affidavit. Stafford's affidavit provides that Langnas initiated negotiations to allow defendant to make a counteroffer prior to any agreement between Lad and plaintiff. Stafford's affidavit also provides that defendant did not seek to purchase the mortgage interest of Lad, but rather, requested that Lad agree not to release his mortgage to plaintiff. Accordingly, defendant's motive in its dealings with Lad involves a credibility assessment that makes summary disposition inappropriate. *Pemberton, supra*. Because this factual dispute impacts the ultimate question of law, summary disposition was inappropriate.

Defendant next contends that, irrespective of any ruling regarding unusual circumstances, the trial court erred in granting plaintiff's motion for summary disposition when plaintiff was not ready, willing, and able to redeem the subject property. Again, factual disputes regarding this issue require reversal of summary disposition in favor of plaintiff. In *Marble v Butler*, 249 Mich 276, 279-280; 228 NW 677 (1930), our Supreme Court held that a person will be relieved of a harsh forfeiture where he is ready and willing to make full payment coupled with the existence of unusual circumstances. Defendant contends that plaintiff was not ready, willing, and able to redeem the subject property because his financing arrangement was contingent on the release of Lad's junior mortgage, and Lad, in his own motion for summary disposition, denied any contractual agreement with plaintiff. Defendant relies on Lad's statement that appears in the narrative portion of Lad's brief. A moving party must make and support summary disposition with admissible documentary evidence. *SSC, supra*. Defendant has failed to present sworn deposition testimony or an affidavit from Lad to corroborate this narrative statement. Accordingly, defendant failed to meet its burden as required by MCR 2.116(G)(4). In any event, even if defendant had satisfied its burden under MCR 2.116(G)(4), plaintiff presented documentary evidence to create an issue of material fact. On June 6, 1996, plaintiff sent a letter to Lad indicating that it had received a buyer for the property and that Lad would receive a pay-out as set forth in the letter. The letter requested that Lad send, via facsimile, his agreement to release the lien based on the "previously stated terms." In his deposition, Donald Reed, representative of plaintiff, testified that an agreement with Lad had been reached and that any other contingencies for obtaining financing from Mansaur Ayar were removed. The affidavit of Ayar corroborates Reed's position. Accordingly, in order to determine whether plaintiff was ready, willing, and able to redeem the property, the trier of fact must conclude whether an agreement was reached with Lad regarding release of his junior mortgage and also whether this agreement was reached prior to any alleged interference by defendant. Summary disposition was inappropriate based on this factual issue that is contingent upon a meeting of the minds and the time frame of any contractual agreement. *Pemberton, supra*. Accordingly, the trial court's order granting partial summary disposition in favor of plaintiff is reversed.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ William C. Whitbeck

¹ The lease agreement provided that it was executed between City Storage, Inc. and Quality Mailing Service, Inc. However, the parties do not dispute that the lease was amended to reflect that Quality Mailing Service, Inc. entered into a lease with plaintiff.

² The trial court granted plaintiff's motion for partial summary disposition of the equitable extension of the right of redemption claim, but acknowledged that it would hold an evidentiary hearing regarding the redemption amount. However, defendant's application for leave to appeal was granted. Consequently, the action was stayed below, and a hearing regarding the redemption amount and the remaining claims alleging tortious interference, civil conspiracy, and unjust enrichment remains outstanding.

³ Defendant contends, without citation to authority, that this issue presents a question of law only. Defendant principally relies on the *Flynn* decision. However, in *Flynn, supra* at 196, the trial court engaged in fact finding following an evidentiary hearing. In the present case, the parties have presented deposition testimony and affidavits that discussed motive and meeting of the minds of the various parties; however, the credibility of the deponents' testimony or affidavits was not placed before the trier of fact. Furthermore, the parties did not agree to an evidentiary hearing before the circuit court. Accordingly, defendant's contention, that a decision is ripe for review as a matter of law, is not supported by the record.