STATE OF MICHIGAN

COURT OF APPEALS

MM COMPLETE ACCOUNTING, INC., Plaintiff-Appellee,	UNPUBLISHED August 23, 2002
v	No. 230489 Livingston Circuit Court
PARK PLACE SHOPPING CENTER, INC., Defendant-Appellant.	LC No. 00-017705-CK

Before: Zahra, P.J., and Hood and Jansen, JJ.

PER CURIAM.

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

On August 24, 1999, plaintiff and defendant entered into a lease agreement for the rental of office space. The lease agreement contained a non-compete provision that provided:

> Landlord agrees that during the term of this Lease Landlord will not knowingly lease a store unit within the Shopping Center to a Tenant whose primary business is the same as Tenant's, to wit:
>
> tax preparation services, tax preparation instruction and electronic tax filing
>
> Notwithstanding anything contained herein to the contrary, Tenant agrees that Tenant will not sell, display, advertise or have on the Premises any items or merchandise of any nature or kind whatsoever, or provide any service which conflicts with, overlaps, or duplicates any service provided by any other Tenant in the Shopping Center or any merchandise or goods or items which are sold or displayed or advertised by any other tenant in the Shopping Center, unless Landlord specifically agrees, prior to same thereto, in writing.

After the lease agreement was executed, one of the two owners of defendant corporation, Lawrence Weinberg, began negotiating with Professional Management & Accounting Services, Inc. (PMA) to lease property in the same shopping center known as Park Place Shopping Center located on West Grand River in the City of Brighton. Weinberg inquired whether PMA's business was in competition with plaintiff. Tohnni Jones, PMA's office manager at the time, advised both Weinberg and defendant's sales representative, Lawrence Flaggman, that the two

businesses were not competitors. Jones advised defendant's representatives that PMA was a business management and full service accounting company for continuing clients.

Weinberg made further inquiry of any conflict with Linda Milder, principal owner, officer, and director of PMA. Milder advised Weinberg that plaintiff, doing business as H & R Block, and PMA occupied the same office space across the street from Park Place Shopping Center. Plaintiff's address was 8018 West Grand River, while PMA was located at 8014 West Grand River. There was never any allegation of competition raised by plaintiff. Milder described plaintiff's clientele as retail consumer tax returns rather than specialized business tax returns that were prepared by PMA. Milder further advised Weinberg that, in addition to performing monthly accounting services and high end tax returns, PMA provided services such as payroll processing, management consulting, loan packaging, business plans, new business set-ups, computerized accounting systems, buy-sell evaluations, and trouble tax payer assistance. Milder invited Weinberg to inquire with plaintiff whether the businesses were competitors. Weinberg testified that, following this investigation, there was no reason for further investigation or discussion with plaintiff because a conflict between the two businesses did not exist.

Flaggman handled the negotiation of the lease agreement with plaintiff. He inquired why plaintiff's business was seeking to move directly across the street from its present location to Park Place Shopping Center. Plaintiff's president and treasurer, Marty Hansen and Marlene Rybicki, represented that the move was based on the need for larger office space and more parking spaces. Plaintiff's representatives never indicated that the move was based on the desire to escape from competition with PMA. Weinberg alleged that plaintiff's representatives were angry that they were not able to obtain the lease terms that they desired and angry that PMA obtained prime center space. Weinberg further alleged that plaintiff's representatives had called off the lease deal on two prior occasions. Weinberg alleged that the motivation for the litigation was not competition, but plaintiff's desire to void the lease.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), alleging that defendant breached the contractual obligation to act in good faith, MCL 440.1203, by failing to contact plaintiff to determine if the noncompete agreement was violated by leasing to PMA. In support of the dispositive motion, the affidavit of Hansen was submitted. In the affidavit, Hansen attested that the move to defendant's shopping center was designed to avoid competition with PMA. Hansen further attested that the primary source of PMA's *revenue* was from tax preparation activities and that PMA advertised its tax services in the Livingston County area.

In response, defendant alleged that summary disposition was improper because questions of fact regarding any breach of the noncompete clause of the lease existed. Specifically, it was alleged that the lease requirement that defendant would not *knowingly* violate the noncompete agreement presented a question for the trier of fact. Furthermore, defendant submitted the affidavits of Weinberg, Flaggman, and Milder that revealed that Weinberg and Flaggman inquired about the nature of PMA's business. Flaggman's affidavit also provided that the need for larger office space and more parking spaces was the reason given for the move across the street, not competition. The trial court granted plaintiff's motion for summary disposition, concluding that defendant had constructive notice that the businesses were in competition because of advertisements placed in the yellow pages and should have telephoned plaintiff.

An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Construction and interpretation of a contract presents a question of law that an appellate court reviews de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). Summary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind. *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991).

Review of the contract language at issue reveals that defendant would not "knowingly" lease a store unit in the shopping center when the new tenant's "*primary business is the same*" as that of an existing tenant.[1] The trial court concluded that defendant could not "hide its head in the sand" and attributed fault to defendant for failing to contact plaintiff. However, plaintiff's subjective assessment of competition with PMA is not controlling. Rather, the contract imposed a knowledge requirement on defendant for allowing a tenant "whose primary business is the same" as plaintiff's. However, the contract fails to set forth the criteria to determine whether the primary businesses of the two tenants are the same. Plaintiff contends that the primary business requirement was established because of the amount of *revenue* generated by defendant from the preparation of income taxes. However, Milder attested that PMA presented a wide range of accounting services that merely included tax preparation to a largely business clientele that did not include plaintiff's consumer tax clientele. This dispute regarding the nature of PMA's business and whether revenue can determine the "primary business" criteria creates a factual dispute for the trier of fact. *Arbelius, supra*. Furthermore, while plaintiff's representatives indicated that the move to defendant's shopping center was to avoid competition with PMA, plaintiff's request for relief in its complaint merely sought to preclude enforcement of the lease. Pursuant to the noncompete provision of the contract, plaintiff could have sought to enjoin any overlapping service provided by PMA, but did not do so. Thus, whether plaintiff sought to terminate the lease based on the nature of PMA's business or used PMA's lease as a means of voiding the contract, as defendant alleged, presents a question for the trier of fact. See *Belt v Ritter*, 18 Mich App 495, 505; 171 NW2d 581 (1969), aff'd 385 Mich 402 (1971).

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Plaintiff does not dispute defendant's assertion that it provided the description of its business as "tax preparation services, tax preparation instruction, and electronic tax filing."