STATE OF MICHIGAN

COURT OF APPEALS

MEA-NEA LOCAL I (MOUNT CLEMENS EDUCATION ASSOCIATION MEA-NEA),	UNPUBLISHED October 26, 2004
Plaintiff-Appellant,	
v	No. 248794 Macomb Circuit Court
MOUNT CLEMENS COMMUNITY SCHOOLS and EDISON SCHOOLS, INC.,	LC No. 2002-005005-CK
Defendants-Appellees.	

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiff, MEA-NEA Local I (Mount Clemens Education Association), appeals as of right from the trial court's opinion and order granting summary disposition in favor of defendants Mount Clemens Community Schools (MCCS) and Edison Schools, Inc. (Edison). We reverse the grant of summary disposition in favor of MCCS because a material factual dispute exists regarding whether MCCS is estopped from asserting that plaintiff failed to exhaust its remedies under the collective bargaining agreement (CBA). We reverse the grant of summary disposition in favor of Edison because plaintiff's claim against Edison is not precluded on the ground that plaintiff is not a third-party beneficiary of the management agreement between MCCS and Edison. We remand this case to the trial court for further proceedings.

I

Plaintiff and defendant MCCS were parties to a CBA covering the wages, hours, and terms and conditions of the teachers in the Mount Clemens school district from September 1, 2000 through August 31, 2003. In July 1995, Edison and MCCS entered into an agreement under which Edison was hired to manage and operate several schools for MCCS, including Martin Luther King Primary Academy (MLK).

In the fall of 2001, plaintiff filed a grievance on behalf of kindergarten teachers who taught during the 2000-2001 school year at Seminole Elementary School. Although the 2001 grievance was not filed on behalf of MLK teachers, the 2001 grievance alleged CBA violations substantively identical to those at issue in this case, raised on behalf of MLK teachers in a grievance filed in May 2002. Both grievances alleged that defendant MCCS violated § XII(L) of

the CBA by failing to provide a classroom teaching aide and/or failing to pay kindergarten teachers the aide's hourly rate for each hour the aide was not provided during the school day. Section XII(L) of the CBA states as follows:

> Every effort will be made to provide substitute Classroom Aides during the period of the Aide's absence. However, in those situations when a substitute is not available, the substitute aide hourly rate will be paid to the affected teacher(s) for each hour of Aide absence. This compensation will be prorated, as appropriate (See also Appendix D-4).
>
> [Appendix D-4 provides:]
>
> The tentative agreement for Section XII, L (new) includes compensation for new teachers when a Classroom Aide provided for under the Collective Bargaining Agreement is not available. The tentative agreement states that this is at the "substitute aide hourly rate". This Memorandum of Agreement avers that the substitute hourly rate is $8.00.[1]

A settlement agreement was entered into on October 10, 2001, regarding "the presently pending grievances related to the assignment of teaching aides for all kindergarten teachers . . . at Seminole Elementary School. . . ." The settlement agreement provides in pertinent part:

> All full time kindergarten teachers are to have a full time aide assigned six (6) hours per full working day, in accordance with Section VIIA of the parties agreement. Every effort will be made to provide substitute Classroom Aides during the period of the regular Aide's absence. However, in those situations when a substitute is not available, the substitute aide hourly rate will be paid to the affected teacher(s) for each hour of Aide absence, at the rate required by the collective bargaining agreement. This compensation will be prorated as appropriate.

On May 8, 2002,[2] plaintiff filed a second grievance against MCCS, this time on behalf of MLK teachers, requesting that MCCS pay "the Edison MLK Primary kindergarten teachers the amount claimed from January 7, 2002 to date, the $8.40 per hour pay rate for lack of assigned classroom aides." The grievance stated that payment for lack of classroom aides was based on CBA § XII L, and the settlement agreement entered into between plaintiff and defendant on October 19, 2001.[3]

---

[1] According to plaintiff's complaint, the hourly rate was subsequently increased to $8.40.

[2] The grievance was signed on May 8, 2002, by the grievant and signed as received by the school administrator on May 9, 2002, and is accordingly referenced by either date.

[3] The grievance incorrectly references the date as October 19, 2001, rather than October 10, 2001.

In response to plaintiff's grievance, Phil Easter, the assistant superintendent of human resources for MCCS, sent correspondence to Robert Holcolm, president of MEA Local I, stating as follows:

> This will confirm that a grievance was filed by the teacher's union on May 9, 2002, concerning a request made by kindergarten teachers at MLK Primary for compensation for working without an assigned aide. As alleged in the grievance process, on October 10, 2001, the MEA and the Mount Clemens Community School District settled the identical issue with non-Academy staff. It was my understanding that the October 10, 2001 disposition was to have district wide application. I have not had the benefit of any explanation from the Academy program as to their position why the settlement is inapplicable. By copy of this answer to the grievance, and the grievance which you previously filed, to the Academy Administration, I will advise them of the pendency of this matter. I am not in a position to grant the grievance.

Plaintiff did not further pursue its grievance under the procedure set forth in the CBA. According to Daniel J. Hoekenga, the union attorney for plaintiff, the union did not follow through on the grievance procedure because of assurances from Easter and district superintendent Wallace that this was unnecessary and because Hoekenga was told by MCCS assistant superintendent Venkat Saripalli that "the Union should look to Edison Schools for payment, since the School District had already paid to Edison monies out of which the teachers should be compensated." When payment from neither MCCS nor Edison was forthcoming, plaintiff filed this action in circuit court.

The trial court granted defendants' motions for summary disposition. First, the trial court held that summary disposition for defendants was proper because the clear language of the management agreement between MCCS and Edison provided that no third-party beneficiary relationship resulted from the agreement. Second, the court held that even assuming arguendo that plaintiff was an intended beneficiary, the arbitration clause in the management agreement required that plaintiff's claim be submitted to arbitration. Thus, because plaintiff had failed to provide any documentary evidence opposing MCCS' argument regarding the arbitration clause, plaintiff had failed to present evidentiary proofs establishing a genuine issue of material fact for trial. Accordingly, defendants were entitled to summary disposition.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Although the trial court did not specifically articulate which subrule it relied on in granting defendant's motion, the court relied on matters outside of the pleadings and specifically found that "plaintiff has failed to present evidentiary proofs creating a genuine issue of material fact for trial." Therefore, review is properly under subrules C(7) and (10) rather than subrule C(8). *Maiden, supra* at 118-120; *Driver v Hanley (After Remand),* 226 Mich App 558, 562; 575 NW2d 31 (1997).

Summary disposition is properly granted under MCR 2.116(C)(7) on the basis that an action is barred because of an agreement to arbitrate. *Maiden, supra* at 118 n 3. In ruling on a motion for summary disposition under this subrule, the court must consider all affidavits, pleadings, and other documentary evidence submitted. *Id.* at 119. Supporting proofs must be admissible in evidence. *Id.* "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* The court must construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery. *Diehl v Danuloff,* 242 Mich App 120, 123; 618 NW2d 83 (2000).

MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden, supra* at 120. Summary disposition is proper if there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. All affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in the light most favorable to the nonmoving party. *Id.*; *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 523 n 2; 644 NW2d 765 (2002).

III

Plaintiff first argues that the trial court erred in summarily dismissing plaintiff's claims against MCCS on the stated grounds. We agree.

The trial court apparently concluded that plaintiff's claim against MCCS was governed by the management agreement between MCCS and Edison, and thereby governed by the arbitration clause in the management agreement. We find no basis for the trial court's conclusion.

Plaintiff alleged that MCCS was liable under the terms of the CBA in accordance with the settlement of the prior grievance in 2001. MCCS defended on the ground that plaintiff's claim was barred for failure to exhaust its administrative remedies under the CBA, i.e., failure to timely pursue arbitration under Step Four[4] of the CBA grievance procedure, and thus MCCS sought summary disposition under MCR 2.116(C)(7). In response, plaintiff argued that under principles of equitable estoppel, MCCS was estopped from asserting that plaintiff failed to timely pursue the grievance because at Step Three of the grievance, MCCS conceded that the grievance was valid, stating in the June 4, 2002 letter in response to the grievance that the settlement of the 2001 grievance on this issue applied district wide and conceding that the MLK teachers were entitled to payment. Relying on these admissions by MCCS, plaintiff did not proceed with the grievance.

The issue thus framed was whether MCCS was estopped from defending on the ground that plaintiff failed to exhaust its remedies under the grievance procedure. Contrary to the trial

[4] The parties dispute the level of the grievance at issue. The grievance does not appear to strictly comply with the procedures and levels provided for in the CBA. Regardless, resolution of this disputed issue is unnecessary to our disposition.

court's conclusion, this issue is not resolved under the terms of the management agreement between MCCS and Edison.

Generally, if a CBA requires the pursuit of internal remedies to resolve disputes, a party must exhaust those remedies before filing a court action, unless the remedies are futile. *AFSCME Council 25 & Local 1416 v Highland Park Bd of Ed*, 214 Mich App 182, 187, 191; 542 NW2d 333 (1995), aff'd 457 Mich 74; 577 NW2d 79 (1998). In this case, plaintiff presented documentary evidence to supports its contention that proceeding with the grievance was futile or unnecessary.

Specifically, plaintiff presented the June 4, 2002 letter from Easter, the prior settlement agreement from the 2001 grievance, and the affidavit of attorney Hoekenga. Plaintiff's position was that it made a level three appeal under the grievance procedure and that Easter's letter ended the procedure in plaintiff's favor when he admitted that the CBA was violated and the MLK teachers were entitled to payment. Easter stated in the letter that the October 10, 2001 settlement agreement addressed the identical grievance issue presented in this case for non-academy staff. Further, he stated that it was his "understanding that the October 10, 2001 disposition was to have district wide application."

Additionally, according to Hoekenga's affidavit, he was involved in the 2001 grievance and settlement in which MCCS agreed to pay compensation to all affected kindergarten teachers; he later discovered that the school was failing to honor its commitment with regard to MLK teachers; he was involved in pursuing the subsequent grievance for MLK teachers; Easter advised him that he was correct in asserting MCCS violated the CBA and the Settlement Agreement with respect to MLK teachers; MCCS officials advised him that the union should look to Edison for payment because MCCS had already paid Edison the monies out of which the teachers should be paid; and MCCS officials continually assured him that there was no further need or point in pursuing the grievance as MCCS agreed the money was owed.

Even if this documentation does not establish the grievance was technically settled,[5] and therefore futile, it is sufficient to create a triable issue of fact regarding whether MCCS represented to plaintiff that proceeding with the grievance was unnecessary and is therefore estopped from arguing that plaintiff failed to exhaust its administrative remedies. *Lakeside Oakland Development, supra* at 524, 527.

> Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. [*Id*. at 527 (citations omitted).]

[5] Easter's letter concluded by stating that he was "not in a position to grant the grievance."

The first element requires that false representations be made that "intentionally or negligently induces another party to believe facts." *Id.* The affidavit provided by attorney Hoekenga states:

> In the course of conversations with Dr. Wallace and Mr. Easter in June 2002 and again in the fall of 2002 before filing this suit, I was *continually assured* that the School District agreed that the 2001 Settlement Agreement had "district wide application" and that there was thus no further need nor point in the Union to pursue the May 8, 2002 grievance as it was agreed the money was owed. [Emphasis added.]
>
> Contrary to the assertions of the school district . . ., I was never advised by any School District representative that in order to obtain the money which the District acknowledged is owed to MLK kindergarten teachers the Union would have to further process the grievance or take it to arbitration.

By contrast, both Easter and Wallace deny in their affidavits that verbal assurances were made to plaintiff that the grievance procedure was exhausted or that it was unnecessary for plaintiff to seek arbitration following the June 4, 2002 letter from Easter denying relief on plaintiff's grievance. Summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

We also find that there are genuine issues of material fact regarding whether plaintiff detrimentally relied on the assurances from MCCS that arbitration was unnecessary because plaintiff never sought arbitration of its grievance. According to Hoekenga, the person who would have sought arbitration on plaintiff's behalf, the only reason plaintiff did not seek arbitration was because of the "continual assurances" from MCCS that this was unnecessary.

The final issue in the estoppel analysis is whether plaintiff would be prejudiced if MCCS denied that it made assurances that arbitration was unnecessary. Since a judgment in favor of MCCS, based on the failure to arbitrate the grievance pursuant to the CBA, would otherwise require a judgment in MCCS' favor, prejudice is established as a matter of law. *Lakeside, supra* at 528.

There were genuine issues of material fact regarding whether plaintiff failed to exhaust the grievance procedure, making summary disposition in favor of MCCS improper. *Lakeside, supra* at 524. We therefore reverse. If factual issues exist, based on the totality of the factual circumstances, including the parties' representations, regarding whether a party is estopped from asserting a particular defense against a party who reasonably and justifiably relied on a particular belief, the issue should be submitted to the jury. *Id.* at 529.

IV

Plaintiff claims that the trial court erred in granting summary disposition in favor of Edison on the ground that plaintiff was not a third-party beneficiary of the management agreement between defendants. We agree.

MCL 600.1405 provides in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

Only intended third-party beneficiaries, not incidental beneficiaries, may enforce a contract under § 1405. *Koenig v City of South Haven*, 460 Mich 667; 680, 694; 597 NW2d 99 (1999); *Greenlees v Owen Ames Kimball Co*, 340 Mich 670, 676; 66 NW2d 227 (1954); "A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof." *Id*. "The standard for determining whether a promisor has undertaken to perform or refrain from performing a given act is an objective one which is determined from the form and meaning of the contract itself." 8 Michigan Law and Practice, Contracts, § 213, p 220, citing *New Amsterdam Casualty Co v Sokolowski*, 374 Mich 340; 132 NW2d 66 (1965); see also *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 189; 504 NW2d 635 (1993).

Although Article II, ¶ C of the management agreement clearly and unambiguously repudiates the establishment of any third-party beneficiary relationships, we conclude that this disclaimer is not dispositive of the issue whether the union is an intended beneficiary. The provisions of the management agreement establish that plaintiff was "directly and intentionally provided for" in the agreement and that the agreement provided for the "direct protection of plaintiff" and therefore plaintiff is entitled to maintain his cause of action under the third-party beneficiary statute. *Greenlees, supra* at 676-677.

The management agreement provides that "Edison shall have the responsibility and authority to determine staffing levels, and to select, evaluate, assign, discipline and transfer personnel, consistent with state and federal law, subject to the provisions of this Article V." Article V, ¶ A(3) of the management agreement incorporates the CBA, including modifications, into the management agreement:

> The Teachers shall be employed by the Board. The teachers shall be covered by the collective bargaining agreement between the Board and the MEA-NEA Local 1, Mount Clemens, with the modifications provided for in the June 21, 1994 Letter of Understanding Between Mount Clemens Board of Education and MEA-NEA Local 1, Mount Clemens, and any subsequent agreements. *Such letter of understanding and agreements are hereby incorporated into this Agreement by reference.* The maintenance of such modifications for the life of this Agreement is a pre-condition to Edison's obligations hereunder. [Emphasis added.]

Thus, the management agreement ensures that the CBA applies to the MLK teachers. Article V of the agreement further provides:

> Edison and the Board's superintendent will determine on a case-by-case basis whether Edison should assist the Board in negotiations with any unions where necessary and upon request by the Board Edison shall assist to achieve the waivers necessary to the implementation of the Partnership Design. …
>
> * * *
>
> The Board shall be responsible for payment of the salaries, fringe benefits, and state and federal taxes for all its employees at the Academy. Edison shall reimburse the Board for such payments.
>
> Where pursuant to a collective bargaining agreement or otherwise employees at the Academy have accrued a benefit which they then seek to use while employed at the Academy, then the cost of any benefits accrued prior to the employee's employment at the Academy shall be chargeable to the Board and the cost of any benefit accrued on or after the date of employment at the Academy shall be chargeable to Edison.

Despite the general clause disclaiming any third party beneficiary status, the substantive provisions of the management agreement clearly directly benefit plaintiff by specifically extending bargained-for benefits and other protections to union members assigned to MLK. Plaintiff is an intended third-party beneficiary because the management agreement expressly benefits plaintiff and contains promises on behalf of plaintiff. *Kammer Asphalt, supra* at 190.

Moreover, because plaintiff is not a party to the management agreement, the provisions of the agreement mandating arbitration of "[a]ny and all disputes between the *parties*, concerning any alleged breach of this Agreement, or arising out of or relating to the interpretation of this

Agreement or the parties' performance of their respective obligations under this Agreement"[6] are inapplicable to plaintiff. Even if they were applicable, the trial court erred in concluding that the arbitration provision governed plaintiff's claim because the management agreement specifically provides that should any conflicts arise between the terms and conditions of the management agreement and the CBA, the provisions of the CBA shall prevail, Article V, ¶ 5(G):

> It is expressly understood that should any conflicts arise between the terms and conditions of this Agreement and those contained within a Collective Bargaining Agreement between the School District and one of its unions as modified by any letter of understanding, the provisions of the Collective Bargaining agreement as modified by any letter of understanding shall prevail.

We conclude the trial court erred in granting summary disposition in favor of Edison on the ground that plaintiff was not a third-party beneficiary of Edison's agreement with MCCS.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey

[6] Article XI, ¶ A, "Alternative Dispute Resolution Procedure."