

STATE OF MICHIGAN
COURT OF APPEALS

JAMES F. VLK,

Plaintiff-Appellee,

v

CHARLES L. SALYER,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 275339

Wayne Circuit Court

LC No. 06-610619-CK

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

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition to plaintiff in this action to recover on a promissory note. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In his complaint, plaintiff alleged that he loaned \$250,000 to defendant for use in defendant's then unincorporated financial services business. As security for the loan, defendant executed a promissory note on January 5, 1998, agreeing to repay plaintiff \$250,000, plus nine percent annual interest. Defendant also acknowledged his indebtedness to plaintiff in a notarized affidavit. Plaintiff alleged that defendant defaulted in making payments on the note, ignored plaintiff's requests for payment, and owed \$313,559.67 on the promissory note. In his answer, defendant denied executing the promissory note, denied receiving any funds from plaintiff, denied that plaintiff had requested payment on the note, denied defaulting on the note, and alleged that the statute of limitations on the alleged note had expired.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and (10). In support of the motion, plaintiff submitted affidavits from attorney David Kull, who stated that he drafted the promissory note and observed defendant sign it, and certified public accountant Theresa Lombardi, who stated that she observed defendant sign the note. An affidavit from plaintiff was also attached, in which plaintiff explained the circumstances surrounding his agreement to loan money to defendant for his business. Plaintiff maintained that defendant made his first payment on the note on August 28, 1998, when he gave plaintiff a check for \$75,000 drawn from defendant's personal checking account, and that defendant made several additional payments, the last on January 9, 2001. Plaintiff also submitted documentary evidence of the \$75,000 check and various ledger sheets purporting to track interest and payments on plaintiff's loans to defendant.

In response to plaintiff's motion, defendant denied receiving any funds for the promissory note and maintained that the note was intended to provide funds necessary to meet a state requirement for a servicing license, but the state waived the requirement for the fee and the note was never funded. Defendant contended that plaintiff had shown no proof that the funds were actually advanced, e.g., a copy of a check or receipt or a proof of deposit, and that plaintiff's affidavits did not state that the individuals witnessed any funds being transferred. Defendant further argued that the \$75,000 check was written for a different transaction to Sales Associates of Michigan, plaintiff's company, rather than to plaintiff personally. In support of his response to plaintiff's motion, defendant submitted a forensic audit by Gordon & Company, P.C., which was prepared at the behest of an attorney not connected to this case regarding separate litigation to which defendant's company was a party. The audit included a summary of transactions related to receipt and disbursement activity for defendant, plaintiff, and Theresa Lombardi. The auditors identified the transactions recorded from 1997 through 2001 and summarized the information. The cover letter stated that the descriptions for the transactions "indicate that amounts received from the parties are primarily for contributed capital and loans to the Company. The disbursements appear to be for repayment of loan principle and interest, expense reimbursement, financial services, and building rent payments. At this time, we have not reviewed the underlying source documents to confirm the accuracy of the recorded transactions." The ledger sheets attached to defendant's response contain notations for activity from January 15, 1998, through November 28, 2001, including an entry dated August 28, 1998, for a \$75,000 "Deposit" with the comment "Vlk-Salyer," and an entry dated September 11, 1998, for a \$75,000 "Disbursement" with the note "Repayment of loan."

At the hearing on plaintiff's motion, the court stated that defendant's argument that the note was never funded should have been raised as an affirmative defense in defendant's answer. The court commented that two other affirmative defenses had been raised, but nothing was raised about the loan not being funded until the motion for summary disposition. Accordingly, the court granted summary disposition to plaintiff.

Defendant now argues on appeal that the trial court erroneously granted summary disposition to plaintiff solely on the basis of its mistaken belief that he had not raised the defense that the note had not been funded in his first responsive pleading.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion brought pursuant to MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings by accepting all well-pleaded allegations as true. *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 668; 697 NW2d 180 (2005). Summary disposition is proper "if the defendant fails to raise a valid defense to a claim," *id.*, or "[i]f the defenses asserted are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery." *Id.*, quoting *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000) (citations omitted in quote). A motion for summary disposition brought under MCR 2.116(C)(9) "is tested solely by reference to the parties' pleadings." *Glass v Goeckel*, 473 Mich 667, 676-677; 703 NW2d 58 (2005).

The trial court determined that defendant failed to plead the affirmative defense of nondelivery of funds in his first responsive pleading and thus the defense was waived. An affirmative defense is a defense that "accepts the plaintiff's allegation as true and even admits

the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). "An affirmative defense must be stated in a party's responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading, or the defense is waived." *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001). The facts constituting an affirmative defense must be stated "[u]nder a separate and distinct heading." MCR 2.111(F)(3).

Defendant's answer did not contain a "separate and distinct heading" for affirmative defenses. However, defendant did plead that he had not received any funds under the promissory note as part of paragraph two of his answer and in the separate and distinct paragraph three. In an apparent reference to plaintiff's motion for summary disposition, in which plaintiff maintained that defendant had raised the affirmative defenses of not signing the promissory note and the statute of limitations in his answer, the trial court stated that only two affirmative defenses had been raised before defendant filed his response to plaintiff's motion and that defendant had failed to previously raise the issue of the loan not being funded. This statement was clearly erroneous because defendant plainly raised the issue in paragraph three of his answer and the trial court accepted as raised other affirmative defenses stated in the same manner in the answer. Therefore, the trial court erred in granting summary disposition on this ground.

However, this Court may uphold the trial court's grant of summary disposition to plaintiff if it reached the right result, albeit for the wrong reason. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005). Although the trial court stated as its ground for granting summary disposition defendant's failure to raise the funding issue before filing his response to plaintiff's motion, the court did reference the documentary evidence submitted by plaintiff. Therefore, the court may have also based its grant of summary disposition on MCR 2.116(C)(10). *Lugo v Ameritech Corp*, 464 Mich 512, 515 n 1; 629 NW2d 384 (2001). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003).

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment if appropriate, shall be entered against him or her. [MCR 2.116(G)(4).]

In reviewing an order of summary disposition under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

In his response to plaintiff's motion for summary disposition, defendant argued that plaintiff had shown no proof that the \$250,000 was given to defendant. There was no copy of a check or receipt for this amount or proof of a deposit, and the affidavits did not state that a transfer of funds was witnessed. In support of his argument, defendant attached only the forensic audit described above. He did not attach an affidavit from himself or others describing the circumstances under which the note allegedly was not funded but merely repeated his denials. He also did not present admissible evidence of the other loan from plaintiff's company, which he maintained explained the \$75,000 check.

As the party opposing the motion for summary disposition, defendant had the burden of showing by evidentiary materials that a genuine issue of disputed fact existed. MCR 2.116(G)(4); *AFSCME Mich Council 25 v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Defendant failed to submit documentary evidence such as an affidavit from himself or someone else competent to testify about the alleged nonfunding of the promissory note, or some other admissible evidence demonstrating that the note was never funded and, accordingly, failed to establish a genuine issue of fact with regard to this issue. See MCR 2.119(B)(1)(c); *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002). Because defendant did not support his denials with admissible evidence, MCR 2.116(G)(4) and (6), plaintiff was entitled to summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski