STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CHARLES E. STUART.

CHARLES E. STUART, II, Personal Representative of the Estate of CHARLES E. STUART, III,

Petitioner-Appellant,

v

JOY M. PODHORSKY,

Respondent-Appellee.

UNPUBLISHED
July 10, 2008

No. 276373
Saginaw Probate Court
LC No. 06-119898-DE

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

This claim involves questions regarding the ownership of certain property allegedly owned by the estate of Charles E. Stuart, III. The parties filed cross-motions for summary disposition under MCR 2.116(C)(7) (barred claim) and MCR 2.116(C)(10) (no genuine issue of material fact). The trial court denied petitioner's motion for summary disposition and granted respondent's motion pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part and remand.

In August 1998, decedent and respondent began living together so that respondent could distance herself from ongoing marital problems. Respondent, decedent, and respondent's two children originally lived in Harrison, Michigan, but moved to a trailer park in Chesaning in 1999. At the heart of this dispute lies the Fairpoint manufactured home that respondent and decedent resided in at the trailer park. The trailer was purchased in July 1999 from Dale Stoddard. According to Stoddard, he sold the trailer to decedent on July 8, 1999 and "signed off" on the title giving it to decedent. The purchase agreement shows a sale price of $9,500 and lists the "Buyer" simply as "Stewart," but contains both decedent and respondent's signatures. Stoddard claimed to have never communicated with respondent regarding the title to the trailer "or any other matter." Respondent admitted that she was not present at the purchase, but claimed decedent brought the "bill of sale" home and had her sign it. Respondent claimed to have paid $4,500 to $5,000 of the purchase price with money her parents lent her.

In October of 2005, decedent died in a car accident. It was only after decedent passed away that respondent found the title document to the trailer that had been previously signed by Stoddard. She then filled in her name and information on the certificate of ownership and filed an application for certificate of manufactured home ownership. The application misstated the purchase date as November 23, 1999, and the purchase price as $900. Respondent obtained a title to the trailer in November 2005.

Petitioner first argues on appeal that the court improperly granted summary disposition under MCR 2.116(C)(10). We agree. We review de novo the grant or denial of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The entire record is examined in the light most favorable to the nonmoving party. *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998). When the motion for summary disposition is brought under MCR 2.116(C)(10), it may be granted only when there is no genuine issue of material fact. *Id.*

After our review of the record, we think there are several instances of error warranting reversal. First, the trial court stated the title history was not provided. In fact, the record before the trial court did contain the title history. Second, the trial court indicated that "all alleged facts pled against defendant can be turned the opposite way with the same conjecture and speculation as to the estate." This statement is problematic because it appears to ignore the requirement to view the entire record in the light most favorable to the nonmoving party, in this case, petitioner. *Id*.

It is true that petitioner, as the nonmoving party, could not rest on mere allegations but had to "set forth specific facts showing that a genuine issue of material fact exists." *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). However, there were sufficient facts before the trial court, including Stoddard's affidavit, decedent's father's deposition testimony, and the ambiguous purchase agreement,[1] to show that a genuine issue of material fact existed as to ownership of the trailer, such that summary disposition was improper. Respondent testified that decedent had intended for her to be a co-owner of the trailer. Decedent's father testified that decedent told him he was not signing over title to the trailer to respondent, like respondent thought, even though respondent was pressuring decedent to do so. Stoddard indicated in his affidavit that respondent was not involved in the purchase of the trailer. Accordingly, summary disposition was improper not only because there was a material fact question as to whether decedent intended respondent to be a co-owner of the trailer, but also because the disposition of the issue required an assessment of witness credibility. See *Morris*, *supra* at 364 (observing that "the court may not make factual findings or weigh witness

[1] Looking at only the four corners of the purchase agreement, there is only one buyer, "Stewart," but both decedent and respondent signed the document on the lines at the bottom listed "Buyer." The contract is ambiguous as to whether sole-ownership to decedent or co-ownership with respondent was intended. Additionally, respondent's admission that she was not present when the document was signed by Stoddard as seller and decedent as buyer, but that decedent brought it home for her to sign, created a latent ambiguity as to whether respondent was intended to be a co-owner. See *City of Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). Therefore, we think the contract is ambiguous.

credibility in deciding a motion for summary disposition"). Taking all of the facts in favor of petitioner as the opposing party, *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), respondent was not entitled to judgment as a matter of law. Because there were genuine issues of material fact, neither party was entitled to summary disposition.

Next, petitioner argues that the court erred when it granted summary disposition for respondent because petitioner's pleadings were insufficiently stated. Although the court stated that it was granting summary disposition on the basis of MCR 2.116(C)(10), its reasoning, in part, is also consistent with MCR 2.116(C)(8). Specifically, the trial court found that petitioner made a claim not cognizable in an estate case and failed to plead with specificity as to certain issues. While neither party motioned for summary disposition under MCR 2.116(C)(8), the court could sua sponte grant summary disposition based on a subrule different than that raised "if neither party is misled." *Computer Network, Inc v American Gen Corp*, 265 Mich App 309, 317; 696 MW2d 49 (2005). Further, the court may render judgment at any time after an action begins if the pleadings show that a party is entitled to judgment as a matter of law. MCR 2.116(I)(1). Moreover, this Court may review under the correct subrule an order granting summary disposition under the wrong rule. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000).

Unsupported conclusory statements of fact or law are inadequate to state a claim on which relief can be granted. *Kloian v Schwartz*, 272 Mich App 232, 241; 725 NW2d 671 (2006); MCR 2.116(C)(8). In reviewing a court's grant of summary disposition for failure to state claim, this Court considers the pleadings alone, assuming all the non-moving party's factual allegations are true, and determines whether there is a sufficient legal basis for the claim. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). The motion is properly granted only where the claims alleged are so clearly unenforceable as a matter of law that "no factual development could justify the . . . claim for relief." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

After a review of the complaint, we think the court properly dismissed the claim brought on behalf of the deceased's father in his individual capacity because it is unenforceable as a matter of law. Only the personal representative has the capacity to bring an action on behalf of the estate. See MCL 700.3715(x); *In re Duane V Baldwin Trust*, 274 Mich App 387, 400; 733 NW2d 419 (2007). As to petitioner's claims, brought as the personal representative of the estate, the court improperly granted summary disposition pursuant to MCR 2.116(C)(8). We think the court was correct to find that petitioner failed to support its allegations with specific factual support and made conclusory statements of law. See *Kloian*, *supra* at 241. For example, petitioner merely states that respondent had converted personal property and engaged in acts of fraud. However, "because [petitioner's] claim is not so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, summary disposition should not have been granted." *Harris-Fields v Syze*, 461 Mich 188, 195; 600 NW2d 611 (1999).

Further, to meet this end, we conclude that petitioner should have been allowed to amend his complaint. After the court granted summary disposition in favor of respondent at the motion hearing, petitioner moved to amend the complaint. The court denied the motion based solely on petitioner's failure to timely file the amendment pursuant to the pretrial scheduling order. "Delay, alone, does not warrant denial of a motion to amend." *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997). The opposing party must also suffer actual prejudice. *Id.* at 658.

In this context, prejudice results if the amendment would prevent the opposing party from obtaining a fair trial, for example, if evidence has been destroyed or an entirely new claim is raised. *Id.* at 659 There is no indication that respondent would be prejudiced by the amendment. Petitioner, in moving for an amendment, was not seeking to introduce a new claim. Rather, petitioner was asking to conform the pleadings to the proofs. Respondent was well aware of petitioner's conversion claim and we see no other way in which amendment would have prejudiced respondent. Accordingly, we find that the court abused its discretion when it denied petitioner's request to amend the pleadings. *Lewandowski v Nuclear Mgt*, 272 Mich App 120, 126-127; 724 NW2d 718 (2006).

Lastly, petitioner urges this Court to disqualify the trial judge. Petitioner requested reconsideration of the trial court's grant of summary disposition and timely requested "another independent judge to determine the merits of the case." See MCR 2.003(C)(1); *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197 (1988) (observing that a claim of bias on the part of the trial judge was not preserved because a motion for disqualification was not brought below). The trial court noted petitioner's request, but chose not to rule on the matter because it was "not brought up at the motion." Having been brought before the trial court, although not decided, this issue would generally be considered preserved. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

However, respondent correctly asserts that the motion did not include the affidavit required by MCR 2.003(C)(2). "Generally, to preserve this issue for appellate review, . . . the moving party must submit an affidavit." *Kloian, supra* at 244. Therefore, we decline to review the issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra