STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY K. MARK,

Plaintiff-Appellant,

v

ESTATE OF VERA MASSEY,

Defendant-Appellant.

UNPUBLISHED
February 19, 2009

No. 281206
Genesee Circuit Court
LC No. 06-083359-CK

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant. We affirm.

This breach of contract case arises out of plaintiff's real estate purchase agreement with Vera Massey.[1] The agreement was contingent upon Massey's ability to obtain a mortgage. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) alleging that there was no genuine issue of material fact that Massey's mortgage application was denied. Defendant supported this claim with an affidavit from a local mortgage broker, Robert Sabo, who handled the application. Massey's children, Dale Massey and Gwen Ashbaugh, also confirmed the denial in affidavits. Additionally, the affidavit of Dale Massey delineated the extensive amount of debt that prevented his mother from obtaining a mortgage. Thus, defendant claimed that the condition precedent failed, and no liability attached.

In opposition, plaintiff claimed that genuine issues of material fact existed regarding Massey's compliance with the terms of the purchase agreement and the application for the mortgage. Specifically, plaintiff submitted an affidavit wherein he learned from Sabo that Massey was approved for a mortgage in the amount of $300,000, but her "cold feet" stopped the sale from transpiring. Additionally, plaintiff's counsel submitted an affidavit indicating that he was unable to locate Sabo through the local office and served a subpoena on the company's office in Dallas, Texas. In response to the subpoena, he received a letter from Cindy Gressett of

[1] Massey passed away following the filing of plaintiff's complaint. Consequently, plaintiff amended his complaint to pursue a claim against defendant, Massey's estate.

the Texas office indicating that the bank did not have a "record of a mortgage loan application" from Massey. However, after receiving this letter, plaintiff did not obtain an affidavit from Gressett or any other bank representative. Questioning the admissibility of plaintiff's evidence and concluding that there was no genuine issue of material fact that Massey's mortgage application was denied, the trial court granted defendant's motion for summary disposition.

Plaintiff first alleges that the submission of competing affidavits called the credibility of the witnesses into question, and therefore, summary disposition was improper. We disagree. This Court reviews a trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). The moving party has the initial burden to "specifically identify the issues as to which [it] believes there is no genuine issue" of material fact. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006), quoting MCR 2.116(G)(4). In response to a motion for summary disposition, the opposing party cannot rest on the complaint. *Id.* Instead, the opposing party must offer "[a]ffidavits, pleadings, depositions, admissions, or other documentary evidence" to survive summary disposition. *Id.* "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163-164; 645 NW2d 643 (2002), citing MCR 2.116(G)(6). "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Const Co (On Remand)*, 268 Mich App 460, 464-465; 708 NW2d 448 (2005). The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991). "[W]hen the truth of a material factual assertion depends on a determination of credibility, a genuine factual exists and summary disposition may not be granted." *Id*. at 18-19.

The mere submission of competing affidavits does not create a genuine issue of material fact or require the trial court to engage in a credibility contest. In the present case, Massey's son submitted an affidavit attesting that his mother was unable to obtain a mortgage. He further delineated that she had an outstanding mortgage of approximately $75,000 on her home in Lewiston and approximately $50,000 in credit card debt with limited income from Social Security and a small pension. Plaintiff failed to address this information and determine through an expert or through the mortgage broker used by Massey whether this debt would prevent her from obtaining a mortgage in the amount of $180,000. The truth of the factual assertions in the defense affidavits was not contingent upon credibility alone and could have been contradicted through discovery and expert or other witness opinion. *Arbelius, supra*. The mere submission of a counter affidavit, without regard to content, does not create a genuine issue of material fact, and plaintiff's claimed error is without merit.

Although not raised in the statement of questions presented, plaintiff acknowledges that his affidavit contains hearsay statements by Sabo, but asserts that the statements are admissible under MRE 803(3) or MRE 613 to create material factual issues. We disagree.

"Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *Tobin v Providence Hosp*, 244 Mich App 626, 640; 624 NW2d 548 (2001). "MRE 803(3) excepts from the rule against hearsay '[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical

condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .'" *UAW v Dorsey*, 273 Mich App 26, 36; 730 NW2d 17 (2006). "[A] statement explaining a past sequence of events (from the standpoint of the declarant at the time of the statement) is not a then existing . . . condition within the meaning of the rule but, rather, a 'statement of memory or belief' that is explicitly excluded from the exception." *People v Hackney*, 183 Mich App 516, 527 n 2; 455 NW2d 358 (1990).

Here, plaintiff's recollection of Sabo's alleged statement that Massey was approved for a mortgage amount up to $300,000 is hearsay because it is an out of court statement offered to prove that the mortgage was approved. *Tobin*, *supra*. Furthermore, Sabo's alleged statement explains a past sequence of events, that is, the application and alleged approval. Thus, it is a statement of memory or belief that is explicitly excluded from the exception in MRE 803(3). *Hackney*, *supra*. Similarly, Sabo's alleged opinion that Massey got "cold feet" is also an inadmissible statement belief and arguably hearsay within hearsay. Therefore, Sabo's statements are not admissible under MRE 803(3).

Plaintiff alternatively argues that his affidavit regarding Sabo's statements would have been admissible for impeachment purposes pursuant to MRE 613. Prior inconsistent statements may be used in some circumstances to impeach credibility. MRE 613; *Westphal v American Honda Motor Co*, 186 Mich App 68, 70-71; 463 NW2d 127 (1990). However, Michigan "does not allow prior inconsistent statements to be used as substantive evidence." *People v Alexander*, 112 Mich App 74, 77; 314 NW2d 801 (1981); see also *People v Avant*, 235 Mich App 499, 511; 597 NW2d 864 (1999). Thus, regardless whether plaintiff's affidavit regarding Sabo's statement that Massey was approved for a $300,000 mortgage was admissible for impeachment purposes pursuant to MRE 613, it was not substantively admissible.

Because the challenged statement in plaintiff's affidavit was not substantively admissible pursuant to MRE 803(3) or MRE 613, the trial court could not consider the affidavit when it decided defendant's motion for summary disposition. *Veenstra*, *supra*. The weight of the only admissible evidence suggests that Massey's mortgage application was denied. Thus, there was no genuine issue of material fact that the condition precedent failed, thereby preventing plaintiff's breach of contract claim. *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 583; 739 NW2d 696 (2007). The trial court did not err when it granted defendant's motion for summary disposition with respect to this claim.[2]

Plaintiff next alleges that the trial court erred in requiring him to prove that all conditions precedent were satisfied when it was only his burden to "plead, not prove." We disagree.

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[2] We also note that at the hearing on defendant's motion for summary disposition, plaintiff alleged that he could not locate Sabo to interview him regarding the circumstances surrounding the application. However, at the time of the motion hearing, discovery had closed, and plaintiff never filed a motion to compel information regarding Sabo. Furthermore, plaintiff does not raise the availability or compelled production of Sabo as an issue on appeal.

Plaintiff relies on MCR 2.112(C)[3] for the proposition that pleading performance or occurrence of conditions precedent merely requires general allegations. Defendant has not challenged the sufficiency of the pleadings alone and moved for summary disposition in accordance with MCR 2.116(C)(8), but rather, challenged the factual basis to support the claim, relying on MCR 2.116(C)(10). The court rules and case law clearly require plaintiff to respond with admissible documentary evidence to create a genuine issue of material fact. MCR 2.116(G)(4), (6); *Veenstra, supra*. Plaintiff's reliance on MCR 2.112(C) is misplaced.

Lastly, plaintiff contends that the trial court erred in granting summary disposition to defendant when the Gressett letter established the absence of a record of a request for mortgage financing, thereby creating a genuine issue of material fact. We disagree.

As previously stated, "Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *Tobin, supra*. Generally, hearsay is not admissible. *Id.* However, MRE 803(7) provides that the following facts are not excluded from evidence by the hearsay rule:

> Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

As the rule provides, MRE 803(7) is subject to the foundation requirements in MRE 803(6). Pursuant to MRE 803(6):

> [A] qualified witness must establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record . . . Knowledge of the business involved and its regular practices are necessary. [*People v Vargo,* 139 Mich App 573, 580; 362 NW2d 840 (1984).]

Therefore, for a business record to be admissible under MRE 803(7), the proponent must present an adequate foundation for admission under MRE 803(6) by demonstrating that the records were prepared in the course of regularly conducted business activity. *Price v Long Realty, Inc*, 199 Mich app 461, 467-468; 502 NW2d 337 (1993).

Even if the absence of a record of Massey's mortgage application allowed the inference that she failed to apply for a mortgage, plaintiff failed to lay a proper foundation for Gressett's letter pursuant to the requirements in MRE 803(6). *Price, supra*; *Vargo, supra*. Plaintiff did not argue that Gressett was a qualified witness. It is questionable whether Gressett would be qualified to testify or have knowledge of records of past applications to a separate branch of

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[3] Plaintiff cited to MCR 2.111(C), however, the text cited is from MCR 2.112(C).

Colorado Federal Savings Bank. Further, Gressett's letter did not provide any information regarding whether Massey's application would have been kept in the course of a regularly conducted business activity or that it was the regular practice of such business activity to make that record.

Absent proper foundation pursuant to MRE 803(6), Gressett's letter does not fall under MRE 803(7) and it would have been inadmissible hearsay evidence. Thus, the trial court could not consider the letter when it decided defendant's motion for summary disposition. *Veenstra, supra*. The weight of the only admissible evidence suggests that Massey applied for the mortgage. There was no genuine issue of material fact regarding whether Massey breached the purchase agreement by failing to apply for the mortgage. Thus, the trial court did not err when it granted defendant's motion for summary disposition with respect to this claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood