STATE OF MICHIGAN

COURT OF APPEALS

PARNELL SEATON, Plaintiff-Appellant,	UNPUBLISHED July 21, 2011
v	No. 297502 Wayne Circuit Court
WAYNE COUNTY CLERK, Defendant-Appellee.	LC No. 09-029558-AW

Before: M. J., KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing his complaint for mandamus. We affirm.

Plaintiff sought a writ of mandamus to compel defendant to provide him with copies of two 1979 court orders related to criminal cases previously pending against plaintiff in Detroit Recorder's Court. Mandamus is an extraordinary remedy, and plaintiff bore the burden of showing that he was entitled to the remedy. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438-439; 722 NW2d 243 (2006). A court may issue a writ of mandamus directing a defendant to perform a specific function or duty only when: "'(1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment.'" *Id*. at 438, quoting *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 655; 584 NW2d 743 (1998). Further, as the trial court noted, a court may not direct a defendant to perform even an established duty if performance would be impossible. See *State Bd of Ed v Sch Dist of Garden City*, 62 Mich App 376, 381; 233 NW2d 547 (1975).

In this case, defendant filed a motion to dismiss plaintiff's complaint, pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted the motion. We review de novo the trial court's decision. See *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A motion under MCR 2.116(C)(8) "should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). A motion under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 263-264; 715 NW2d 914 (2006). The moving party "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and "must support its position with affidavits, depositions, admissions, or other documentary evidence," *St Clair*

Med, 270 Mich App at 264; MCR 2.116(G)(5). Once the moving party has done so, "the burden shifts to the opposing party to show that a genuine issue of material fact exists" by offering documentary evidence "set[ting] forth specific facts to show that there is a genuine issue for trial." *St Clair Med*, 270 Mich App at 264.

Here, the trial court properly determined that plaintiff could not support his claim. In his complaint and letters of request to defendant, plaintiff expressed his presumption that the Recorder's Court judge had entered written orders of continuance or adjournment in connection with two hearings held in September 1979. The only evidence he provided in support of this presumption was docket journal entries from the underlying criminal cases. The entries established that a motion hearing was "adjourned at the request of the court" on September 18, 1979, and that a pretrial hearing "was adjourned at the request of the prosecution" on September 24, 1979. But, as was evident by defendant's responses to plaintiff's requests for copies of the orders, plaintiff had already received complete copies of each court file, which did not include written orders associated with the docket entries.[1] Defendant's agents also informed plaintiff that they "literally reviewed all three cases that were pending" in 1979 and "could not find a written documentation requesting an adjournment." They further explained that written court orders likely would not have been entered in connection with the two rulings reflected on the docket journals, stating: "Oftentimes the Court allows parties to orally request adjournments; therefore, the only documentation of this event would be a docket entry. This practice is acceptable." These documents supported defendant's motion because they were relevant to prove that no orders existed and, therefore, that defendant was incapable of providing copies of the orders. The trial court relied on these documents when it granted the motion; contrary to plaintiff's argument on appeal, the trial court did not engage in improper fact-finding—or supply its own factual basis—when it ruled in favor of defendant.

Most significantly, plaintiff was unable to present any evidence to refute these documents, and he therefore failed to show there was a genuine issue of material fact for trial. His arguments were based on his unsupported assumption that the journal entries indicated the existence of written orders and on authority generally directing courts to reduce their orders and judgments to written form. See, e.g., *People v Harrison*, 386 Mich 269, 272; 191 NW2d 371 (1971); *Hartman v Roberts-Walby Enterprises, Inc*, 380 Mich 105, 112; 155 NW2d 842 (1968). However, nothing in the docket entries at issue refers to written orders. Second, plaintiff does

[1] The Court Reporting Services Supervisor also informed plaintiff that "the court reporter of record has indicated that no verbatim record was made for the two hearings dates September 18 and 24, 1979. As a result, a transcript can't be produced." This statement was confirmed in a letter written by plaintiff acknowledging that the court reporter listed on the docket journal previously told plaintiff that "there were no proceedings recorded stenographically by him" on either date in connection with plaintiff's cases.

not explain how this general authority supports his claim that orders were *in fact* entered in this case in connection with the two hearings.[2]

Finally, plaintiff incorrectly argues on appeal that defendant's claim that the orders did not exist was an affirmative defense for which defendant bore the burden of production and persuasion. See *Detroit News, Inc v City of Detroit*, 185 Mich App 296, 300; 460 NW2d 312 (1990) ("An affirmative defense cannot succeed unless the matters upon which it rests are proved. The burden of producing evidence and establishing these facts rests upon the defendant."). That is, plaintiff argues that defendant bore the burden to produce affirmative evidence that the orders *did not* exist, but the trial court, instead, wrongly required plaintiff to produce affirmative evidence that the orders *did* exist. Plaintiff did not raise this argument in the trial court. Accordingly, it is unpreserved and we review it for plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149-150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id.* at 150.

Plaintiff wrongly characterizes defendant's argument in support of dismissal as an affirmative defense. "An affirmative defense does not deny the allegations of the plaintiff's complaint; rather it claims—'on some ground not disclosed in the plaintiff's pleadings'—that the plaintiff is not entitled to recovery." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 46; 698 NW2d 900 (2005), quoting *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). In contrast, defendant's argument here—that the documents did not exist and, therefore, defendant did not have a duty to produce them—directly negates the factual allegations underlying the central claim of plaintiff's complaint: that defendant *did* have such a duty because the documents, in fact, existed.

Plaintiff unsuccessfully relies on *Brown v Beckwith Evans Co*, 192 Mich App 158; 480 NW2d 311 (1991), to support his argument that "[t]he 'non-existence' of judicial records fit within the illustrative and definitional description of an affirmative defense." *Brown* did not address the nonexistence of judicial (or other) records. Rather, it addressed the burden of proof for a statutory exception to normal worker's disability standards for certain retirees. *Id.* at 165-166. The *Brown* decision has no bearing on plaintiff's argument here. For these reasons, the trial court's failure to treat defendant's argument as an affirmative defense was not erroneous and did not constitute plain error.

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[2] Plaintiff also cites "RC Form #3; Motion And Order For Continuance; C of D-552-RE (9-73)," but does not explain the citation. We assume he refers to a former Recorder's Court form. The putative existence of a form did not create an issue of fact regarding whether written orders were entered.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto