

STATE OF MICHIGAN  
COURT OF APPEALS

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GERALD R. NORTON,

Plaintiff/Counter-Defendant-  
Appellant,

v

T. M. SMITH TOOL INTERNATIONAL  
CORPORATION,

Defendant/Counter-Plaintiff-  
Appellee.

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UNPUBLISHED

August 4, 2011

No. 298085

Oakland Circuit Court

LC No. 2008-092042-CK

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying his motion for summary disposition pursuant to MCR 2.116(C)(10) and granting summary disposition to defendant pursuant to MCR 2.116(I)(2). This matter arises out of plaintiff's employment by defendant as defendant's executive. According to defendant, it discovered, during the course of an internal audit, that plaintiff had been submitting fraudulent expense claims and otherwise shirking his duties, whereupon it terminated plaintiff's employment. Plaintiff contends that he never engaged in any improprieties and commenced the instant wrongful termination suit. Plaintiff presented no evidence in support of his motion for summary disposition, and defendant presented an affidavit that was little more than a verbatim repetition of its answer to the complaint. The trial court granted summary disposition in favor of defendant, and this appeal followed. We affirm.

Motions for summary disposition are reviewed de novo; motions under MCR 2.116(C)(10) test the factual support for a claim and require the evidence and all legitimate inferences to be viewed in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Such a motion must be supported by some kind of documentary evidence, but the adverse party may likewise not merely rely on the pleadings; the parties must submit evidence setting forth specific facts to show the existence of a genuine issue for trial. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Affidavits providing conclusory allegations with no details cannot be used to avoid summary disposition. *Rose v National Auction Group, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002).

In relevant part, plaintiff's employment was pursuant to a contract that explicitly provided for termination, and subsequent loss of further compensation, for "serious misconduct." The complete text of ¶ 8(c) of the Employment Agreement is as follows:

Serious Misconduct. In the event the Employee engages in Serious Misconduct (as defined below), the Company may at any time thereafter in its sole discretion elect to terminate the employment of the Employee hereunder by giving written notice of such termination to the Employee, and any such termination shall be effective as of the giving of such notice or if later, as of the effective date of termination set forth therein. For purposes hereof, "Serious Misconduct" shall include: (i) fraud, misappropriation, embezzlement, or other act of material dishonesty against the Company or any subsidiaries or affiliates thereof; (ii) the unreasonable failure to render services in accordance with the terms of this Agreement; (iii) willful breach of any of the terms and conditions of this Agreement after Company has provided employee notice of such breach in writing and such breach has not been remedied within thirty (30) days from such notice; (iv) alcohol or drug abuse affecting in any material respect the performance by Employee of his duties and responsibilities hereunder; and (v) Employee's conviction for any felony.

The letter from Brian Smith, defendant's President, terminating plaintiff's employment, stated in relevant part:

As you are very well aware, you have voluntarily ceased any meaningful employment relationship with the T.M. Smith Tool International Corporation ("Company") at a period of time dating at least two (2) years ago. By doing so, you have violated ¶ 8(c) of your employment contract.

As a result of your actions, the Company has conducted a thorough investigation of your financial affairs associated with the Company and is completely satisfied that material misrepresentations have been made regarding your actions as an employee on behalf of the Company, as well as engaged in substantial financial improprieties. These are additional violations of ¶ 8(c) of your employment contract. Accordingly, your employment and association with the Company is terminated, effective September 26, 2007.

Plaintiff commenced this litigation, asserting that defendant violated the Employment Agreement because he had not himself violated any of its provisions. Defendant generally denied plaintiff's assertions and filed a counterclaim alleging that during plaintiff's employment, defendant discovered that plaintiff failed to perform his duties, misappropriated funds, and submitted false expense claims.

Plaintiff moved for summary disposition essentially on the argument that defendant had failed to provide any evidence that he had violated ¶ 8(c) and also arguing that defendant had not afforded him the requisite 30 days' notice and opportunity to remedy specified in that paragraph. Plaintiff provided no supporting evidence or documentation other than the undisputed contracts

and letter.<sup>1</sup> Defendant responded that it was entitled to summary disposition in its favor, and in support it submitted an affidavit from Smith that stated in its entirety as follows:

1. I am over the age of eighteen (18) and have personal knowledge of the facts set forth below.

2. I am currently employed as the President of T.M. Smith Tool International Corporation (“T.M. Smith”).

3. In June 2006, T.M. Smith promoted me to the position of “Chief Operating Officer” (“COO”).

4. Given declining profitability at T.M. Smith, in early 2007, I began to review and/or audit T.M. Smith’s financial records and discovered they were way out of line attributing approximately 50% of all company expenses to pay for administrative expenses.

5. As a result, in or around May 2007, I instituted across the board budget reductions.

6. With T.M. Smith’s profitability continuing to decline, during the Summer of 2007, I began to investigate more thoroughly the job performance, company expenditures, as well as internet and e-mail usage of T.M. Smith’s Executive, Gerald R. Norton.

7. At that time, I discovered Norton’s blatant, atrocious abuse of company finances.

8. Specifically, I discovered that Norton failed to perform his executive duties and responsibilities required under his Employment Agreement dated October 31, 1998 (as amended in the Agreement dated 11/08/02).

9. I also discovered that Norton misappropriated funds from T.M. Smith by requesting and receiving reimbursement for fraudulently submitted non-work related expenses, including, but not limited to: meals; internet purchases; gifts; personal items; automotive parts, cable access, cellular telephones, computer supplies, gasoline and lease payments.

7. [sic] If called upon as a witness, I could competently testify as to the truth and accuracy of the foregoing statements, basing my testimony upon actual knowledge, except as to those statements that are based upon information and belief, and, as to those statements, I have reason to believe that they are true.

Apparently, plaintiff was deposed, but neither the deposition nor any of the documents used at that deposition were made part of the record. The trial court held a hearing, and it found that the jury could find in favor of defendant and could not find in favor of plaintiff, so it denied

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<sup>1</sup> Plaintiff included defendant’s interrogatory responses, which generally were that the documents should speak for themselves.

plaintiff's motion for summary disposition and granted summary disposition in favor of defendant.

We observe first that the trial court correctly denied plaintiff's motion for summary disposition. Plaintiff simply did not support it. As defendant points out, plaintiff provided no evidence showing that he did *not* engage in any "material misrepresentations" or "financial improprieties." Because the gravamen of his motion is that he did not, in fact, violate ¶ 8(c),<sup>2</sup> he was obligated to provide some evidence supporting that assertion. MCR 2.116(G)(3)(b). Plaintiff could even have submitted an affidavit stating that defendant was solely in possession of the relevant facts. MCR 2.116(H)(1). Plaintiff did not do so.<sup>3</sup> While the evidence did not ultimately show that plaintiff actually *had* engaged in any violations, it did show that defendant believed plaintiff had done so. Consequently, there remained a genuine question of material fact: whether plaintiff violated any of the prohibitions in ¶ 8(c). The trial court properly declined to grant plaintiff's motion. *Patterson*, 447 Mich at 432.

Defendant provided an affidavit in support of its position. An affidavit submitted in support of, or in opposition to, a motion for summary disposition pursuant to MCR 2.116(C)(10) must set forth specific facts beyond merely reasserting the allegations. See *Rose*, 466 Mich at 470; see also, *Quinto v Cross & Peters Co*, 451 Mich 358, 370-372; 547 NW2d 314 (1996). However, the most specificity found in Smith's affidavit is clarification that defendant claims plaintiff violated ¶ 8(c)(i) in particular. Otherwise, the affidavit contains conclusory statements that plaintiff's expenditures were "out of line," that he "abused company finances," and "failed to perform his executive duties and responsibilities." It is no more explicit than the counter-complaint, which in relevant part alleged that:

12. During the course of [plaintiff's] employment, [defendant] discovered that [plaintiff] failed to perform the executive duties and responsibilities required under the Employment Agreement dated October 31, 1998 (as amended by the parties in November 2002 and May 2003).

13. [Defendant] also discovered that [plaintiff] misappropriated funds from [defendant] by requesting and receiving reimbursement for fraudulently submitted non-work related expenses, including, but not limited to: meals; internet purchases; gifts; personal items; automotive parts, cable access, cellular telephones, computer supplies, gasoline and lease payments.

Of note, the particular combination of semicolons and commas in the list in ¶ 13 is *identical* to the same combination of semicolons and commas in the affidavit. Smith's affidavit not only

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<sup>2</sup> Plaintiff's assertion that defendant violated ¶ 8(c) by failing to afford him notice and an opportunity to remedy is misplaced. Although we find defendant's arguments equally unsupported, it is apparent that plaintiff allegedly violated ¶ 8(c)(i), not ¶ 8(c)(iii), so the notice and opportunity to remedy provision would not apply.

<sup>3</sup> We do not hold that doing so would necessarily have been sufficient. We mention this possibility only as an example of something that would have been more than nothing.

fails to provide more detail than defendant's pleading, it appears to be literally no more than a copy of some of the contents of the pleading. While that might not be fatal per se, it provides no specific instances of conduct. See *Quinto*, 451 Mich at 370.

Defendant's tautophonical and largely conclusory affidavit would in most other cases be a wholly inadequate basis for either granting or denying summary disposition. However, under the unique circumstances of this specific case, particularly because plaintiff provided *no* evidence of *any* kind on point, even in his own motion, we find it sufficiently detailed that plaintiff was required to come forward with evidence to dispute the claims. As discussed, plaintiff did not even assert that the defendant had sole access to the relevant evidence. Consequently, we find that defendant prevails.

Affirmed.

/s/ Christopher M. Murray

/s/ E. Thomas Fitzgerald

/s/ Amy Ronayne Krause