STATE OF MICHIGAN

COURT OF APPEALS

LINDA KOZFKAY, TINA ROFF, LYNDA GRAVES and JAMES BOWERMAN,	UNPUBLISHED November 22, 2016
Plaintiffs-Appellees,	
v	No. 329116 Sanilac Circuit Court
COUNTY OF SANILAC,	LC No. 14-035947-CK
Defendant-Appellant.	

Before: BECKERING, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

This case involves a contract dispute between plaintiffs, four current and former elected or appointed officials of Sanilac County, and the defendant county. On June 4, 2015, the circuit court ordered summary disposition in favor of plaintiffs under MCR 2.116(C)(10) (no genuine issue of material fact, and moving party entitled to judgment as a matter of law), and on August 17, 2015, the court entered a judgment in favor of plaintiffs. Defendant appeals as of right from the August 17, 2015 judgment. For the reasons stated below, we affirm.

I. STATEMENT OF FACTS

The relevant facts are undisputed. On October 31, 2000, defendant's board of commissioners agreed to pay "full premium" to provide comprehensive health, dental, and vision insurance benefits to full-time and regular part-time appointed and elected officials, retirees, and their spouses and legal dependents.[1] When a dispute arose regarding interpretation of the 2000 agreement, the parties entered into a second agreement on May 18, 2005 (hereinafter the "2005 Agreement"), which provides in relevant part:

> Whereas a difference of opinion has arisen concerning the interpretation of a certain document dated October 31, 2000 relative to health insurance benefits for current and retired Elected and Appointed Officials of the County of Sanilac;

[1] The commissioners also agreed to certain pension provisions, but these are not in dispute.

and whereas the parties have discussed in good faith and each having given up certain claims in return for the establishment of others;

IT IS HEREBY ACKNOWLEDGED by and between the Sanilac County Board of Commissioners and the undersigned Elected and Appointed Officials of Sanilac County as follows:

The County will pay the full premium to provide Blue Cross Blue Shield CB12 150/300—10/20/30 RX co-pay. The dental and vision plan in effect in 2004 will continue. This benefit will be provided to all full-time elected and appointed officials, spouses and dependents, as well as retirees who were employed as an elected or appointed official between January 1, 2000 and July 1, 2005.

Those current or retired elected and appointed officials who do not participate in the health, dental and vision plan shall be entitled to a buyout equal to fifty percent (50%) of the appropriate premium for which they are eligible *i.e.*: single, two person, full family.

The Board of Commissioners will provide to retirees of this group health insurance under the terms of whatever respective health plan is in place at that time for current employees. The Board, from time to time, may change deductibles and co-pays and changes in plans in accordance with accepted procedures. Whatever plan is in effect for any full-time employees of Sanilac County covered by a collective bargaining agreement will be provided to the retiree. If a plan and/or its coverage is changed for these employees, it will also change for those elected and appointed retirees.

The Board may change the carrier at any time even though a specific carrier has been identified previously. The coverages resulting from any change in carriers must be equivalent to or better than any bargaining unit plan should they be different that [sic] the Blue Cross Blue Shield CB12 150/300, 10/20/30 Rx. No change in a health plan may occur unless the elected and appointed officials have been consulted.

* * *

Future modifications of this accord requires the consent of the parties. Changes in health insurance plans shall not require a modification of this accord. Consent of the Elected and Appointed Officials shall be established by a majority vote of said officials who are employed in that capacity between January 1, 2000 and July 1, 2005 and the Board of Commissioners by resolution.

The 2005 Agreement was executed by the Chairman of the Sanilac County Board of Commissioners and all full-time elected and appointed officials who served between January 1, 2000 and July 1, 2005, including plaintiffs.[2]

On July 1, 2014, defendant modified the 2005 Agreement's buyout provision unilaterally, limiting the post-employment health, dental, and vision buyout provision to $1,200 per year ($100 per month) for single coverage, and $2,400 per year ($200 per month) for double and family coverage. In a letter to those affected by the modification, defendant explained that the change aligned the Agreement's buyout provision for retirees and former employees with the buyout provision available to "active elected and appointed officials and TPOAM[3]bargaining unit members." The modification became effective on August 1, 2014, after which defendant began compensating plaintiffs accordingly.

Plaintiffs filed a complaint on December 19, 2014. In Count I, they alleged breach of contract based on defendant's unilateral modification of the buyout provision in violation of the 2005 Agreement's express terms regarding modification. In Count II, they asked the court for declaratory relief in the form of a judgment concluding that the terms of the 2005 Agreement prohibited defendant from unilaterally modifying the buyout provision relative to retiree's vested contractual rights. In its January 9, 2015 answer, defendant denied that modification of the buyout provision in the 2005 Agreement was improper, that modification constituted a breach of its promises to plaintiffs, and that the modification has harmed plaintiffs. In addition, defendant asserted as affirmative defenses that plaintiffs had failed to state a claim upon which relief could be given, and that their claim may be barred in whole or in part by the doctrines of waiver, estoppel, the applicable statute of limitations, or the doctrine of laches.

On March 2, 2015, plaintiffs filed a motion and supporting brief for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs alleged that defendant's answer admitted the existence of the 2005 Agreement and that defendant was no longer adhering to the terms of the Agreement, and they asserted that because there was no genuine issue of material fact, it was a matter for the court to determine whether a breach of contract had occurred. In their supporting brief, plaintiffs argued that neither the buyout provision nor the modification provision was ambiguous, that defendant had not asserted that the 2005 Agreement was invalid, that the reduced payments to plaintiffs represented a modification of the 2005 Agreement, and that plaintiffs had not consented to the modification. Plaintiffs attached a copy of the 2005 Agreement as exhibit A, and a July 1, 2014 letter from defendant to plaintiff Tina Roff informing her of the modification that was to take effect on August 1, 2014, as exhibit B.

Defendant responded to plaintiffs' summary disposition motion with two arguments. Defendant first asserted that, in a conversation with County Administrator Kathleen Dorman prior to modification of the Agreement, plaintiff Linda Kozfkay "conceded and impliedly

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[2] Plaintiffs are a subset of the elected and appointed officials who signed as parties to the agreement.

[3] Technical, Professional, and Officer Workers Association of Michigan.

admitted" that defendant could modify the Agreement unilaterally.[4] Defendant also pointed to a provision in the contract that it claimed suggested that the parties' intention was for retirees to receive the same benefits as current elected and appointed officials. In combination, defendant contended, these two statements created a genuine issue of material fact with regard to the Agreement's meaning. Defendant next asserted that summary disposition was premature because discovery had not begun, and that there was a fair likelihood that discovery would produce evidence favorable to defendant's position regarding the parties' intent and the Agreement's latent ambiguity.

The parties reiterated their positions at the April 6, 2015 hearing on plaintiffs' summary disposition motion. In a written opinion issued subsequent to the hearing, the trial court found the language of the 2005 Agreement to be unambiguous: plaintiffs were entitled to 50% of the healthcare premiums for which they were eligible, and modification of the method of compensating those who opt out of the health insurance plan required the consent of the parties. The court rejected defendant's argument that plaintiff Kozfkay's statement suggested a latent ambiguity, finding that "no ambiguity arose from the contract at issue when applied to the parties involved." The court stated that, "[t]he accord is a clear, coherent whole, both on the face of the document and when applied to the parties, and Defendant breached the plain terms of the agreement." Regarding defendant's argument that summary disposition was premature because discovery had not occurred, the trial court acknowledged that summary disposition generally is not warranted prior to the close of discovery, but, here, "[t]he terms of the agreement are clear, and discovery would not aid in interpretation."

II. ANALYSIS

A. STANDARD OF REVIEW

Defendant first contends on appeal that the trial court erred in granting summary disposition because an ambiguity in the 2005 Agreement created a genuine issue of material fact as to its meaning, and because summary disposition was improper given that discovery had not occurred. We disagree.

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[4] According to an affidavit signed by Dorman, then-County Clerk Kozfkay was present at closed-door commissioners meetings between July 9, 2013 and October 8, 2013, when reducing the healthcare buyout for current elected and appointed officials of the county was discussed. Dorman attested that, subsequent to a July 9, 2013 meeting, Kozfkay told her that she intended "to retire rather than continue as a Sanilac County official under the proposed change in the buyout for current Elected and Appointed Officials." Defendant contended that Kozfkay's statement constitutes an implied admission that defendant could modify the buyout provision in the 2005 Agreement unilaterally. Defendant reasoned that, because Kozfkay's statement indicated her belief that she would be subject to modification of the buyout provision if she remained an active employee, she impliedly admitted that defendant could modify the agreement unilaterally.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v. Burchell,* 249 Mich App 468, 479; 642 NW2d 406 (2002). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). "[T]he moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence," and then the burden shifts "to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citations omitted). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363.

B. AMBIGUITY

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *City of Grosse Pointe Park v Michigan Muni Liab & Prop Pool*, 473 Mich 188, 197; 702 NW2d 106 (2005) (quotation marks and citation omitted). "[I]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *Id*. at 198 (quotation marks and citation omitted). Courts "will not create ambiguity where the terms of the contract are clear." *Id*.

"An ambiguity may either be patent or latent." *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). A patent ambiguity is one that clearly appears on the face of the document at issue and "arises from the defective, obscure, or insensible language used." *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983) (quotation marks and citation omitted). A latent ambiguity, however, is one "that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Shay*, 487 Mich at 668 (quotation marks and citation omitted). Extrinsic evidence is admissible to prove and to resolve the existence of a latent ambiguity. *City of Grosse Pointe Park*, 473 Mich at 198. Thus, "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract." *Id*. (quotation marks and citation omitted).

In re Kremlick illustrates the principles at work in determining and resolving latent ambiguities. The case involved the interpretation of a will in which the testator instructed the executor to divide the residue of his estate equally between the Michigan Cancer Society and the Salvation Army. *In re Kremlick*, 417 Mich at 239. Although the language of the will was clear on its face, a dispute arose concerning whether, by "Michigan Cancer Society," the testator had meant an entity of the same name affiliated with the Michigan Cancer Foundation, or the American Cancer Society, Michigan Division. *Id*. at 239, 241. Extrinsic evidence was admissible to prove the existence of and to resolve this latent ambiguity, and the American Cancer Society presented an affidavit from the executor of the Kremlick estate in which she "asserted that the intended beneficiary was the American Cancer Society, Michigan Division, instead of the Michigan Cancer Society . . . ." *Id*. at 241. The affiant further recounted "she had

discussed the provisions of Mr. Kremlick's will with him on many occasions, and that he frequently had mentioned that the American Cancer Society was to be a beneficiary." *Id*. The American Cancer Society "also sought to establish that Mr. Kremlick previously had made substantial direct contributions to the American Cancer Society, that the society had helped his wife when she was dying of cancer, and that at the time of her death he requested memorials to the American Cancer Society." *Id*. at 241. The Supreme Court observed that this was "the very kind of information that may be used both to establish an ambiguity and to help resolve it," and concluded that the American Cancer Society "should have been given the opportunity to do that." *Id*.

In the instant case, defendant does not argue that adherence to the language of the 2005 Agreement reveals that it is susceptible to more than one meaning. Nor does Kozfkay's purported statement reveal an undetected ambiguity in the language of the contract, as did the evidence submitted by the American Cancer Society to show that Mr. Kremlick had intended a portion of the residue of his estate to benefit the Society's Michigan Division. *In re Kremlick*, 417 Mich at 241. Rather, defendant's use of Kozfkay's statement constitutes an attempt to subvert the intent expressed in the 2005 Agreement's unambiguous language. However, before extrinsic evidence can be admitted to prove the parties' intent, there first must be shown that the language of the document, when applied, is susceptible to more than one meaning. *City of Grosse Pointe Park*, 473 Mich at 198. Defendant has not shown that Kozfkay's statement of her intent to retire rather than be subject to the board's proposed changes establishes that the 2005 Agreement's provision stating that "[f]uture modifications of this accord requires the consent of the parties" might mean something other than what it says.

Defendant also argues that the 2005 Agreement is latently ambiguous because words are susceptible to multiple meanings, and "parties to a contract may adopt a glossary that completely alters the meaning of the words utilized." However, in order to survive a (C)(10) summary disposition motion, defendant had to do more than theorize about language and speculate about the parties' possible use of a code. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) (stating that "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact"). It had to present specific documentary evidence that created a genuine issue of material fact that the parties had drafted the contract using language in a nonobvious way. *Quinto*, 451 Mich at 362. Defendant presented no such evidence.

Further, Kozfkay's statement arguably is not an "implied admission." An admission is an acknowledgment that facts are true, and an "implied admission" is an admission that may be reasonably inferred from a party's actions or statements. *Black's Law Dictionary*, (10th ed), p 56. Defendant's argument fails because the implied admission it infers from Kozfkay's statement is speculative rather than reasonable. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) (stating that "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact").

In their brief to this Court, plaintiffs accurately note that Dorman's affidavit says nothing regarding the means by which the board planned to modify the buyout provision for elected and

appointed officials. Dorman attested that, at the closed-door meetings attended by her and Kozfkay, the board "discussed reducing the healthcare buyout for current Elected and Appointed Officials of Sanilac County[,]" and that Kozfkay intended "to retire rather than continue as a Sanilac County official under the proposed change in the buyout . . . ." Nothing in Dorman's affidavit signals that the board intended to modify the buyout provision of the 2005 Agreement unilaterally. The affidavit permits the reasonable inference that Kozfkay preferred to retire and continue receiving as a buyout 50% of the insurance premium for which she was eligible instead of to continue working and receive the flat buyout amount, regardless of how the board sought to bring about the change in the buyout amount. Because it would be reasonable to assume that the board intended to comply with the modification provision in the 2005 Agreement, one might also reasonably infer that Kozfkay thought her colleagues would consent to the board's proposed modification. Even if Kozfkay knew that the board intended a unilateral modification, one cannot reasonably infer from her statement that she thought the board within its rights to do so. Defendant's interpretation of Kozfkay's statement as an "implied admission" that defendant could unilaterally modify the Agreement may be "consistent with known facts or conditions, but [it is] not deducible from them as a reasonable inference." *Libralter Plastics, Inc* 199 Mich App at 486. Such conjecture cannot provide evidence of a genuine issue of material fact. *Id*.

Defendant further argues that the Agreement is patently ambiguous because it contains no express duration. Because defendant did not preserve this issue in the trial court, it is not properly before us and we need not address it. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 411; 622 NW2d 533 (2000). Even if we *were* to address it, we would find no merit in defendant's argument. A patent ambiguity is an ambiguity that appears on the face of the document at issue and "arises from the defective, obscure, or insensible language used." *In re Kremlick Estate*, 417 Mich at 240 (quotation marks and citation omitted). Accordingly, it is illogical to conclude that an absent provision could create a patent ambiguity. In addition, although defendant contends that the contract's operation for nine years is "more than enough time," defendant fails to provide any rationale or authority to support this assertion. Further, even if nine years is "more than enough time," this Court has recently held that " ' "vested retirement rights may not be altered without the [retiree's] consent." ' " *Harper Woods Retirees Ass'n v Harper Woods*, 312 Mich App 500, 511; 879 NW2d 897 (2015), quoting *Butler v Wayne Co*, 289 Mich App 664, 672; 798 NW2d 37 (2010), quoting *Allied Chem & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 181 n 20; 92 S Ct 383; 30 L Ed 2d 341 (1971) (alteration omitted). Under this ruling, even if defendant could alter the 2005 Agreement's buyout provision unilaterally, it could not unilaterally alter the provision relative to those retirees with a vested contractual right in the disputed benefit. See *id*. In short, defendant has produced no evidence to create a genuine issue of material fact with respect to whether the contract is ambiguous.

C. REMAINING ISSUES

Defendant next argues that the trial court erred in granting summary disposition to plaintiffs because the 2005 Agreement is not for a proper subject matter, was entered into by parties incompetent to contract, and lacked legally valid consideration, and, therefore, is void, voidable, or unenforceable. Because defendant did not raise these issues in the trial court, they come to this Court unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (indicating that an issue is preserved for appeal if it was "raised in and decided by the trial

court"). In addition, because these are affirmative defenses that defendant failed to raise in accordance with MCR 2.111(F)(3),[5] they are also waived.

Defendant's contention that the issues are not waived because defendant implicitly incorporated them into its failure-to-state-a-claim affirmative defense overlooks the purpose of pleading affirmative defenses in accordance with MCR 2.111(F), which is to provide for factual pleadings sufficient to give the plaintiff notice of the affirmative defenses alleged. *Hanon v Barber*, 99 Mich App 851, 855-856; 298 NW2d 866 (1980).[6] Employing "failure to state a claim" as an umbrella under which all other affirmative defenses find shelter fails to put plaintiffs on notice regarding precisely which affirmative defenses are alleged. See *id*. Further, "failure to state a claim" is an exception to the general rule that affirmative defenses not timely raised are waived. MCR 2.111(F)(2). This distinction between affirmative defenses that are waived if not pled, and the failure-to-state-a-claim exception strongly suggests that the latter does not serve as an umbrella for the former. Were it otherwise, the exception would swallow the rule. For these reasons, we reject defendant's argument that these specific affirmative defenses were included in its general affirmative defense of failure to state a claim upon which relief can be granted.

Even if defendant had not waived these issues, we would find them to be without merit. Defendant contends that the 2005 Agreement is not for a proper subject matter because it extends beyond the term of the board that approved it and restricts the current board's exercise of its governmental function. Governmental function refers to "[a] government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public." *Black's Law* Dictionary (10th ed), p 812. Examples of governmental functions include passing, enacting, or repealing legislation or fixing salaries, *Atlas v Wayne Co Bd of Auditors*, 281 Mich 596, 599; 275 NW 507 (1937), and selecting and appointing certain administrators, see *City of Hazel Park v Potter*, 169 Mich App 714, 722; 426 NW2d 789 (1988). A governing body may not enter into contracts that restrict subsequent bodies in the exercise of their governmental powers. See *id*. at 719-722. By contrast,

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[5] MCR 2.111(F)(3) states in relevant part:

> Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting
>
> (a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; *want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery.* [Emphasis added.]

[6] *Hanon* refers to GCR 1963, 111, the basis for MCR 2.111.

a governing body may enter into contracts that bind its successor(s) in the exercise of its proprietary and business powers. See *Harbor Land Co v Grosse Ile Twp*, 22 Mich App 192, 205-206; 177 NW2d 176 (1970). Although defendant asserts that the 2005 agreement involves a governmental function, its point is not supported by the examples of governmental functions in the authorities defendant quotes, nor does defendant offer any persuasive rationale as to how the agreement benefits the general public. Defendant fails to provide any evidence that would create a genuine issue of material fact on this issue, or the authority necessary for us to conclude that plaintiffs' were not entitled to summary disposition as a matter of law.

Equally unavailing is defendant's claim that the agreement is voidable because plaintiffs were not competent to contract because they engaged in collective bargaining in violation of MCL 423.2(e), which expressly excludes "executives" from the definition of "employee" as used by the Michigan Employment Relations Commission (MERC). "Collective bargaining" is the performance of the mutual obligation of the employer and representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising under a collective bargaining agreement. MCL 423.15(1). Defendant offers no evidence in support of its claim that plaintiffs engaged in "collective bargaining" as described by this statute. There is no evidence that plaintiffs were part of or attempted to form a recognized collective bargaining unit. The only record evidence relative to defendant's claim is the 2005 Agreement bearing the individual signatures of each party. As plaintiffs aptly observe, to accept defendant's argument would be to assume that all multi-party contracts are the result of "collective bargaining" as that term is used in the Labor Mediation Act, MCL 423.1 *et seq*. Given that defendant has produced no evidence indicating that the 2005 agreement was anything other than an agreement negotiated by defendant with the signatories to the agreement, its argument that the 2005 agreement is void because plaintiffs were incompetent to contract fails.

Finally, defendant argues that the Agreement fails for lack of consideration.

> "To have consideration there must be a bargained-for exchange. There must be a benefit on one side, or a detriment suffered, or service done on the other. Courts do not generally inquire into the sufficiency of consideration. It has been said a cent or a pepper corn, in legal estimation, would constitute valuable consideration. [*Gen Motors Corp v Dep't of Treasury, Revenue Div*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (quotation marks and citations omitted).]

A recital of consideration in a contract creates a rebuttable presumption that consideration has passed. See *Bd of Control of Eastern Mich Univ v Burgess*, 45 Mich App 183, 185-186; 206 NW2d 256 (1973). The presumption of consideration may be rebutted by evidence showing a lack of consideration, *Hobbs v Brush Electric Light Co*, 75 Mich 550; 42 NW 965 (1889), or showing what the real consideration was, *Higgins v McGill*, 207 Mich 570; 175 NW 410 (1919).

The record shows that the parties entered into the 2005 Agreement in order to resolve differences of opinion regarding the interpretation of their 2000 agreement. Our brief comparison of the two contracts reveals that elected and appointed officials gave up any claim to a specific carrier and plan created by the 2000 agreement, as well as to employer-paid coverage for their dependents, while ensuring that they would continue to have at least comparable

coverage. Plaintiffs also obtained the benefit of the modification clause. In exchange, defendant obtained cost savings and greater freedom in making changes to the health benefits offered to elected and appointed officials, while giving up any claimed right to modify the Agreement unilaterally. Both parties continued to enjoy the benefits and suffer the detriments of the buyout provision; plaintiffs received money but gave up health insurance coverage, while defendant paid out money, but only half of what healthcare premiums would have cost. Based on the forgoing, we cannot say that defendant has rebutted the presumption that valid consideration supports the Agreement. See *Gen Motors Corp*, 466 Mich at 238-239.

We conclude that defendant has not presented evidence sufficient to create a genuine issue of material fact regarding the 2005 Agreement's alleged ambiguity. Generally, a motion for summary disposition brought under MCR 2.116(C)(10) is not properly granted before the close of discovery. *Comerica Bank v Cohen*, 291 Mich App 40, 54; 805 NW2d 544 (2010). However, "summary disposition may . . .be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id*. (quotation marks and citation omitted). Such is the case here, where the language of the modification clause of the 2005 Agreement is clear and unambiguous. Consequently, we affirm the trial court's order.

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Donald S. Owens