STATE OF MICHIGAN

COURT OF APPEALS

CRANDALL OFFICE FURNITURE INC,

Plaintiff-Appellee/Cross-Appellant,

v

FRED CARROLL,

Defendant-Appellant/Cross-Appellee,

and

JASON BENJAMIN a/k/a JAYSON BENJAMIN,

Defendant.

UNPUBLISHED
January 11, 2018

No. 335746
Kent Circuit Court
LC No. 15-09402-CKB

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

In the main appeal, defendant Fred Carroll[1] (Carroll) appeals by right the September 16, 2016 judgment entered by the trial court in favor of plaintiff on its breach of contract and open account claims.[2] Carroll also challenges the trial court's denial of his post-judgment motions to set aside default and for reconsideration. In the cross-appeal, plaintiff appeals the trial court's grant of summary disposition in favor of Carroll on plaintiff's fraud and statutory conversion claims. We affirm the trial court in both appeals.

[1] A default and default judgment entered were against Defendant Jayson Benjamin. He is not a party to this appeal or cross-appeal.

[2] The trial court entered the judgment after orally granting summary disposition in favor of plaintiff on those counts. Carroll failed to appear at the motion hearing and failed to respond to plaintiff's summary disposition motion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of an alleged agreement between plaintiff, a reseller of office furniture, and defendants. Plaintiff characterized the agreement as one in which defendants, doing business as Metal Solutions Chicago, agreed to purchase office chairs, on an open account, in 2015. After several deliveries of chairs, defendants paid plaintiff $97,000 of the total purchase price of $211,860—in other words, they owed plaintiff a balance of $114,860.

Plaintiff filed suit against defendants, alleging breach of contract, a claim on an open account, fraud, and statutory conversion. Plaintiff later obtained a default judgment against defendant Jayson Benjamin in February 2016 in the amount of $115,085 after Benjamin failed to answer plaintiff's complaint. Carroll, acting in pro per, answered the complaint, asserting that Benjamin was not his agent, that Metal Solutions Chicago was not his company, that he had never made an agreement with plaintiff to purchase and receive chairs before payment, and that he lacked specific knowledge of any agreement that Benjamin had made with plaintiff.

At an initial status conference in January 2016, the trial court noted that all filings in the specialized business docket of the Kent Circuit Court were filed and served electronically; however, inasmuch as Carroll was not a licensed attorney, he was not able to access the electronic system to send and receive documents. The trial court therefore advised Carroll that it was "more than happy to e-mail everything to you" and obtained Carroll's email address. The scheduling order entered in this case in February 2016 stated that "Service [of summary disposition motions and hearing notices] on opposing counsel will be deemed completed on electronic filing."

In August 2016, plaintiff moved for summary disposition under MCR 2.116(C)(8) (failure to state a valid claim for which relief may be granted)[3] and MCR 2.116(C)(10) (no genuine issue of material fact). Carroll did not appear for the motion hearing. The trial court granted summary disposition in favor of plaintiff on its claims for breach of contract and open account, but granted summary disposition in favor of Carroll on plaintiff's fraud and statutory conversion claims; it further stated that even if it were to find in favor of plaintiff on the statutory conversion claim, it would exercise its discretion and decline to award treble damages.

After the entry of the judgment, Carroll filed a motion using a Supreme Court Administrative Office (SCAO)-generated form entitled "Motion and Affidavit to Set Aside Default (Civil)." The motion asserted that a default judgment was entered against Carroll on September 16, 2016, but that Carroll had both good cause for failure to appear and a meritorious defense against plaintiff's claims. An attachment to Carroll's motion asserted that he had not appeared for the motion hearing because he had not received notice of either the filing of the motion for summary disposition or the hearing. The attachment also asserted that Carroll had never entered into a contract with plaintiff, that any alleged agreement between Carroll and

[3] This subrule is not applicable here; the pertinent subrule for failure to state a valid *defense* is MCR 2.116(C)(9).

plaintiff was void because it violated the statute of frauds, and that Carroll had never inspected, received, or paid for the chairs in question.

At an October 7, 2016 hearing on Carroll's motion, Carroll told the trial court he had not received any notices of any activity in the case since speaking with opposing counsel in "early summer" about extending discovery. The trial court noted that it had conducted a "full blown hearing" on plaintiff's summary disposition motion, and that Carroll had "won" on two of the four claims, although plaintiff had been granted summary disposition on its other two claims. The trial court also noted that no default had been entered against Carroll. Ultimately, the trial court determined that, because the time period for filing a motion for reconsideration had not passed,[4] Carroll could file a document by the end of the day containing any arguments he wished to make and the trial court would entertain it as a motion for reconsideration. The trial court also permitted Carroll to present oral argument on the issue of contract formation. The trial court then denied Carroll's motion to set aside default on the ground that no default had ever been entered in the case.

Carroll filed a motion for reconsideration that same day. In the motion, Carroll asserted that he had never received notice of the summary disposition motion or hearing, and was thus denied the opportunity to appear or answer the motion. Carroll also elaborated on his argument that he had never agreed to a contract on an open account and that he had understood that "Defendant Benjamin would pay Plaintiff upon receipt of chairs and that no credit would be extended." Carroll also raised numerous other defenses, including that the contract was void because it had been amended without his consent, that he never performed at all under the contract, that he never agreed to an open account, that he was excluded from certain email communications that plaintiff offered as the basis of the contract, and that the contract was void as violative of the statute of frauds. Carroll also challenged plaintiff's proffered documentary evidence, arguing that the emails attached to plaintiff's motion actually supported his theory that any contract was "pay as you go" rather than an open account.

The trial court denied Carroll's motion for reconsideration, noting, among other reasons, that it had granted summary disposition in favor of plaintiff on its breach of contract and open account claims because "the evidence overwhelmingly supports the plaintiff's claim that a partnership by estoppel existed between Jayson Benjamin and Defendant Carroll. . . . Indeed, Defendant Carroll sent multiple e-mails to the plaintiff referencing an agreement between himself, his company, Jayson Benjamin, and the plaintiff." With regard to Carroll's notice of the hearing, the trial court noted that plaintiff had electronically filed its notice of hearing and motion, but did not personally serve the motion or notice of hearing. The trial court did not indicate whether it had emailed copies of the filings to Carroll as it had stated that it would do. The trial court also noted that the contract was evidenced by both the e-mails between the parties and the parties' partial performance, making "the defendant's statute-of-frauds defense a non-starter." Finally, the trial court noted that Carroll had not provided the court with "any evidence

[4] The hearing was held on the last day of the initial 21-day period following the entry of the judgment.

that its ruling was incorrect" and had "failed to comply with the requirements of MCL 600.2145.[5]"

This appeal and cross-appeal followed.

II. MAIN APPEAL

A. LACK OF NOTICE

Carroll first argues that his right to due process of law was violated when he was denied the opportunity to respond to plaintiff's summary disposition motion due to lack of notice. Assuming that the trial court did not email copies of the motion and notice of hearing to Carroll, we agree that an error occurred; however, we hold that any such error was harmless.

Whether a party has been afforded procedural due process is a question of law that we review de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Due process is "a flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v LaGrant*, 286 Mich App 483, 486; 781 NW2d 853 (2009). "The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard." *Id*. When a party is adversely affected by a trial court's grant of summary disposition without an opportunity to brief the issue and present argument to the court, a violation of that party's right to procedural due process has occurred. See *Al-Maliki*, 286 Mich App at 486. However, such an error may be harmless if the trial court grants the party an opportunity to present his arguments on reconsideration, and the trial court reviews and considers those arguments. *Id*., citing *Boulton v Fenton Twp*, 272 Mich App 456, 463-464; 726 NW2d 733 (2006); see also *Paschke v Retoll Industries (On Rehearing)*, 198 Mich App 702, 706; 499 NW2d 453 (1999), rev'd on other grounds 445 Mich 502 (1994); MCR 2.119(F).

As a threshold issue, we note that plaintiff abided by the scheduling order and filed its motion for summary disposition and notice of hearing electronically within the time periods prescribed by the trial court and court rules. The trial court did not explicitly state whether it had, in fact, emailed copies of the motion and notice of hearing to Carroll as it had indicated it would do. Giving Carroll the benefit of the doubt and assuming that these documents were not electronically delivered, Carroll was indeed denied procedural due process. See *Al-Maliki*, 286 Mich App at 486. However, the trial court reviewed Carroll's arguments as contained in his motion to set aside default and allowed him to present oral argument at the hearing on that motion. At the trial court's invitation, Carroll also filed a motion for reconsideration presenting

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[5] MCL 600.2145 governs proofs in an action on an open account or account stated. If a plaintiff annexes both an affidavit of the amount alleged due on an account and a copy of the account to his complaint pursuant to MCL 600.2145, the statute shifts the burden to the defendant to submit with his answer an affidavit denying the amount allegedly due. See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 435; 683 NW2d 171 (2004), reversed in part on other grounds 472 Mich 192 (2005). The trial court stated that no such affidavit accompanied Carroll's answer to plaintiff's complaint.

his counter-arguments to plaintiff's motion for summary disposition, and the trial court considered and discussed those arguments in a multi-page opinion and order. We therefore conclude that any error regarding defendant's lack of notice of the summary disposition motion and hearing was harmless. *Id*. Further, by the time of the summary disposition hearing, Carroll had already answered plaintiff's complaint and failed to attach an affidavit denying the assertions of plaintiff's affidavit of open account. See MCL 600.2145. Had Carroll received notice of the summary disposition motion and hearing, it would not have affected the outcome of plaintiff's open account claim. See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 435; 683 NW2d 171 (2004), reversed in part on other grounds 472 Mich 192 (2005).

We note further that although Carroll argues that the trial court denied him reasonable time to prepare his motion for reconsideration, Carroll did not ask the trial court for additional time; nor does defendant explain what additional information or argument his motion for reconsideration would have contained if he had received additional time. Carroll's argument that the trial court erroneously believed that it lacked the power to extend the reconsideration period is meritless when Carroll did not ask the trial court to extend the time for filing such a motion or even express concern over the deadline.

B. DENIAL OF CARROLL'S MOTION TO SET ASIDE DEFAULT

Carroll argues that the trial court erred by failing to treat his motion to set aside default as a motion for relief from judgment under MCR 2.612. We disagree. We review a trial court's refusal to set aside or modify a judgment for an abuse of discretion. See *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 392, 394; 573 NW2d 336 (1997).

Carroll argues that his motion included his statements that he had not received notice of the summary disposition motion and hearing, and that therefore the trial court should have treated his motion as one asserting that he should receive relief from judgment by virtue of "mistake, inadvertence, surprise, or excusable neglect", extrinsic fraud, the fact that the judgment was void, or other reasons justifying relief. See MCR 2.612(C)(1)(a), (c), (d), (f). Carroll ignores the fact that (1) his motion asserted that a default judgment had been entered against him on September 16, 2016, and (2) his motion stated "I ask the court to set aside the default/default judgment in this case." The only reference to MCR 2.612(C) is found in small print on the bottom-right corner of the SCAO form, which again is entitled "Motion and Affidavit to Set Aside Default." The citation to MCR 2.612(C) reflects the fact that the court rule governing the setting aside of defaults and default judgments, MCR 2.603(D), states that the court "may set aside a default and a default judgment in accordance with MCR 2.612." See MCR 2.603(D)(3). It does nothing to aid Carroll's argument that the trial court should have, on its own initiative, rehabilitated his motion into one seeking relief from judgment under MCR 2.612(C). The trial court's decision to deny the motion while instructing Carroll about how to assert his arguments in a motion for reconsideration was not an abuse of discretion. *Limbach*, 226 Mich App at 392, 394.

C. PLAINTIFF'S DOCUMENTARY EVIDENCE

Carroll also challenges the documentary evidence submitted with plaintiff's summary disposition motion, arguing that the exhibits submitted with plaintiff's motion were not

authenticated under MRE 901. Carroll never raised this issue with the trial court. In fact, he argued in his motion for reconsideration that certain of the emails attached to plaintiff's motion supported his position that any contract between the parties was "pay as you go." Carroll further argued that the emails showed that he was not involved in communications between the parties during the period in which the contract was breached, and that an email exchange between Carroll and plaintiff demonstrated that any invoice submitted by plaintiff was inaccurate. Carroll thus based many of his arguments to the trial court on evidence that he now argues was inadmissible and should not have been considered by the trial court in granting summary disposition.[6] MCR 2116(G)(6). Carroll's conduct goes beyond forfeiture and into waiver; we decline to consider this issue further. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 96; 693 NW2d 170 (2005) (declining to address an issue where doing so would allow the plaintiff to harbor error as "an appellate parachute").

D. GENUINE ISSUE OF MATERIAL FACT

Finally, Carroll argues that his motion to set aside default and motion for reconsideration raised triable issues of material fact, and that the trial court thereby erred by upholding its grant of summary disposition in favor of plaintiff on its breach of contract and open account claims. We disagree. We review de novo a trial court's decision on a motion for summary disposition.[7] *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

A valid contract requires "(1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015). Carroll argues that his motions raised triable issues of material fact about whether a contract was formed by mutuality of agreement ("meeting of the minds"), whether Carroll was party to the contract, and whether Carroll

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[6] Again we note that the trial court granted summary disposition in favor of Carroll on two of plaintiff's claims.

[7] Although we generally review for an abuse of discretion a trial court's grant or denial of reconsideration, *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008), in light of our decision in Section II(A), as well as the trial court's in-depth analysis of Carroll's arguments, we will review those arguments as though they were made in response to plaintiff's motion for summary disposition.

breached the contract. However, Carroll did not present any documentary evidence of his own to support these arguments, but merely made conclusory allegations, which are not sufficient to survive a properly supported motion for summary disposition. See *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). Further, the documentary evidence provided by plaintiff, even when viewed in the light most favorable to Carroll and drawing reasonable inferences in his favor, *Liparoto Constr*, 284 Mich App at 29, *Dextrom*, 287 Mich App at 415, belies Carroll's position.

Although Carroll argues that there were genuine issues of material fact concerning whether a contract was formed and whether he was a party to it, the record reflects that Carroll emailed plaintiff on August 7, 2015 requesting confirmation regarding "our agreement" to purchase approximately[8] $200,000 worth of office chairs. In a later email to plaintiff, Carroll specifically stated, "There are 588 Aerons [office chairs] we are buying from your San Antonio project. . . . We are paying you $300 per chair equaling $176,400." And although Carroll argues that he never did business as "Metal Solutions Chicago," he provided that company's name and address when asked by plaintiff for "your company information & contact information" and later told plaintiff that payment for the chairs would be coming by bank wire from Metal Solutions Chicago. The documentary evidence thus overwhelmingly supports plaintiff's allegation that a contract existed and that Carroll was a party to it.

Regarding Carroll's claim that any agreement he made was "pay as you go" (and thus that Carroll is not liable for any chairs delivered without prior payment), the documentary evidence shows that plaintiff sent Carroll a $176,400 invoice stating that the "50% deposit comes out to $88,200," in contrast to Carroll's "pay as you go" argument. Plaintiff later sent Metal Solutions Chicago another invoice for $211,860 that listed additional chairs that had been delivered. This invoice contained the phrase "due on pickup" under a section labelled "Terms," and additionally stated that the invoice was due within 30 days of the invoice date and that balances not paid by the due date would be subject to a late fee. Later, Carroll emailed plaintiff stating that he would wire payment for two scheduled deliveries "24 hours in advance." However, there was no indication that the agreement provided that plaintiff would not ship the chairs until it had received payment; in fact, Carroll emailed plaintiff on August 18, 2015 to apologize for a payment delay and stated that "Our next transaction will be in a more timely manner" which at least suggests that the agreement contemplated payment after or contemporaneously with the delivery of the chairs, rather than payment being a necessary precondition for plaintiff shipping the chairs.

Regarding Carroll's claim that he was not included on certain email communications between plaintiff and Benjamin, although Carroll is correct that some emails concerning the payments for delivered chairs were only between plaintiff and Benjamin, it is clear from later emails that Carroll was aware of and personally involved in resolving the issue; Carroll emailed

[8] The number of chairs specified in this email was "1000 +/-" for one brand of chair and "200 +/-" for another brand. The only logical reading of the "plus or minus" symbol was that the precise amount of chairs was not set at the time the email was sent.

plaintiff asking if payment had been received, and sent several emails to Benjamin asking if he had resolved the payment issue and encouraging him to make it his "number 1 priority." Nothing in the evidence submitted to the trial court supports Carroll's argument that the agreement with plaintiff was amended without his knowledge or consent, or that he was unaware of events that formed the factual basis of plaintiff's lawsuit. Rather, the documentary evidence submitted to the trial court makes clear that Carroll entered into an agreement with plaintiff to purchase office chairs, that Carroll represented his company as Metal Solutions Chicago, and that Carroll and Benjamin were working together in some capacity on the deal. Carroll was aware of the amount he promised to pay, the amounts that had been paid, and the amounts that remained owed. He repeatedly urged Benjamin to pay plaintiff what was owed, even offering, after Benjamin claimed that repeated bank errors were delaying the payment, to receive funds from Benjamin and to wire them to plaintiff himself.

In light of this evidence, the trial court did not err by concluding that reasonable minds could not differ regarding the existence of a contract, Carroll status as party to the contract, or the breach of that contract. See *Allison*, 481 Mich at 425. The evidence similarly supports plaintiff's claim on an open account; the emails reflect that Carroll made sporadic payments on the amount owed and that a credit relationship arose as part of the course of dealings between the parties. See *Fisher Sand & Gravel Co v Neal A. Sweebe, Inc*., 494 Mich 543, 567-568; 837 NW2d 244 (2013) (noting that the elements of an open account claim include (1) an underlying transaction or transactions, (2) an outstanding debt arising from that transaction, and (3) a credit relationship between the parties that was not an integral part of the underlying transaction or transactions, but arose from the parties' course of dealings). And again, Carroll failed to rebut the presumption of indebtedness that arose from plaintiff's affidavit under MCL 600.2145. Finally, even if the trial court erred by granting summary disposition on plaintiff's open account claim rather than merely on the claim for breach of the underlying contract, the resulting damages would have been the same and that error would be harmless. See MCR 2.613(A).

III. CROSS APPEAL

In the cross appeal, plaintiff argues that the trial court erred by granting summary disposition in favor of Carroll on plaintiff's claims for fraud and statutory conversion. We disagree. Again, we review de novo a trial court's grant or denial of summary disposition. *Moser*, 284 Mich App at 538.

Plaintiff essentially argues that because it supported its summary disposition motion with documentary evidence, and Carroll failed to appear or answer, the trial court was required to grant summary disposition in its favor on all of its claims. We disagree. MCR 2.116(I)(1) permits a trial court to grant summary disposition to either party based on either the pleadings alone or the "the affidavits or other proofs" submitted to the trial court. MCR 2.116(I)(2) specifically permits the trial court to render judgment in favor of the non-moving party if it appears that the party is entitled to judgment as a matter of law.

The elements of a fraud claim are:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any

> knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992) (citations omitted).]

Plaintiff argues that Benjamin made false statements concerning difficulties with wire transfers and false promises to pay amounts owed, and that Carroll fraudulently induced plaintiff into a large transaction by holding Benjamin out as his partner. Viewing the documentary evidence in the light most favorable to Carroll, *Liparoto Constr*, 284 Mich App at 29, we conclude that the trial court did not err by determining that the evidence showed a business deal gone bad, but not a scheme to defraud plaintiff. For example, there is no evidence that Carroll prevailed upon an established relationship with plaintiff in order to induce it into the deal, or indeed that plaintiff was so induced. And the emails reflect Carroll's increasingly urgent pleas to Benjamin to pay the amounts owed. Although plaintiff is correct that partnership liability may arise by estoppel, see MCL 449.16, and that therefore a defendant may be jointly liable for the representations of another that he has held out as his partner, in this case the documentary evidence does not show that either Carroll or Benjamin made representations to plaintiff that they knew to be false or to which they were recklessly indifferent to their truth or falsity, in order to induce plaintiff to ship them chairs for which they had no intention of paying. We conclude that the trial court did not err by granting summary disposition in favor of Carroll on plaintiff's claim of fraud. MCR 2.116(I)(2).

Regarding plaintiff's claim for statutory conversion, we note that, unlike common-law conversion, statutory conversion under MCL 600.2919a(1) requires that a plaintiff "must show that the defendant employed the converted property for some purpose personal to the defendant's interests." See *Aroma Wines & Equip, Inc*, 497 Mich 337, 355-357, 359; 871 NW2d 136 (2015). Here, plaintiff offered the trial court no evidence that Carroll (or Benjamin) employed the office chairs for some personal purpose, rather than simply wrongfully exerting dominion over another's personal property (as is sufficient for common-law conversion). *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). Put another way, plaintiff offered the trial court no evidence of what Carroll did with the chairs, only that he did not pay for them. We conclude that the trial court did not err by granting summary disposition in favor of Carroll on plaintiff's claim for statutory conversion. MCR 2.116(I)(2).

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra