

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN J. RIEMAN,

Plaintiff-Appellant,

v

KENDALL W. RIEMAN,

Defendant-Appellee.

UNPUBLISHED

November 18, 2021

No. 352197

Tuscola Circuit Court

LC No. 19-030597-CK

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

PER CURIAM.

In this contract dispute, plaintiff appeals as of right the circuit court order granting defendant summary disposition of plaintiff’s claim that he and defendant had an oral agreement regarding their respective interests in certain real property. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The parties are brothers, and this lawsuit arises from plaintiff’s assertions that he had oral agreements with defendant regarding the ownership, development, and sale of certain real property in Tuscola, Huron, and Kalkaska Counties.

Plaintiff alleges that he and defendant had entered into a “business venture” by “oral agreement” to invest in, develop, use for recreational purposes, and transfer real estate interests to third parties for profit. Defendant, on the other hand, denied the existence of any such business venture, but acknowledged “that on a few occasions independent of each other the parties did purchase property together.” Plaintiff asserts that he transferred an interest in a parcel of real property in Huron County to defendant in exchange for a promise from defendant that plaintiff would be paid back for the interest in the Huron parcel out of defendant’s share of any proceeds from any sale of real property plaintiff and defendant (and their wives) co-owned in Tuscola County. In other words, plaintiff’s claim is that the parties had an oral agreement to exchange part of plaintiff’s alleged interest in the Huron County property for part of defendant’s interest in the Tuscola County property.

With respect to the alleged Huron County property, plaintiff admitted in his discovery responses that he had no evidence or documentation to support any of his claims of any ownership interest in any such property. Defendant, through his counsel, explained that he had never had any interest in any property in Huron County, and that the property he owned in Kalkaska County was sold in 1999.

Plaintiff claimed that defendant paid plaintiff \$50,000 toward the interest defendant allegedly “borrowed” from the alleged Huron property, but then asked plaintiff to return it; defendant allegedly sought to obtain this \$50,000 by refinancing the Tuscola property, but told plaintiff that because of “issues” in plaintiff’s personal life, defendant needed to remove plaintiff’s name from the property. Plaintiff claimed that the parties had an oral agreement that plaintiff would nevertheless retain his half interest in the Tuscola property and thus the right to receive half of the proceeds of any future sale.

Defendant’s explanation of the Tuscola conveyance is that defendant had lent money to plaintiff when he began to have legal troubles in 2015 related to his felony charges for embezzling from clients as a former attorney. According to defendant, he lent plaintiff \$50,000, and then plaintiff, needing additional funds for his criminal defense, approached defendant seeking another loan. Fearing that plaintiff would be unable to repay either the original loan or any additional one, defendant instead proposed that plaintiff and his wife sell their interest in the Tuscola property to defendant in exchange for defendant’s forgiving the outstanding balance of the loan as well as paying plaintiff an additional \$50,000. The parties signed a written purchase agreement under which defendant and his wife agreed to purchase plaintiff’s and plaintiff’s wife’s interest in the Tuscola property for \$98,700. The agreement explicitly allocated the funds as follows: \$48,500 credit to defendant to satisfy “aggregate principal and interest outstanding on obligation owing to [defendant] by [plaintiff] to satisfy said obligation;” \$800 for plaintiff’s half of rental income collected on the property; a deduction of \$600 for mortgage interest owed prorated to closing; and \$50,000 cash to plaintiff to be financed by a mortgage loan obtained by defendant. The agreement provided that plaintiff and his wife were conveying their entire interest in the Tuscola property to defendant and defendant’s wife. Plaintiff and his wife executed a general warranty deed to the property granting their interest to defendant and defendant’s wife. Plaintiff acknowledged the authenticity of the purchase agreement, deed, and related documents.

Plaintiff initiated the present case seeking damages from defendant for his alleged failure to pay him the proceeds he claimed he was entitled to from the sale of the Tuscola, Huron, and Kalkaska properties. In 2018, three years after plaintiff sold his share of the Tuscola property to defendant, defendant sold a portion of the Tuscola property to J & L Gremel Farms, LLC. Despite his having undisputedly executed documents conveying his entire interest in the property to defendant, plaintiff claimed that he was entitled to proceeds from that sale on the basis of an interest in the property created by the alleged oral agreement with defendant. Plaintiff asserted claims of “fraudulent concealment” and “slander.”

Defendant moved for summary disposition, arguing that plaintiff fully conveyed all of his interest in the Tuscola property before the sale to J & L Gremel Farms, and thus was not entitled to any portion of the proceeds. In support of these arguments, defendant submitted the purchase agreement, deed, and related paperwork, as well as an affidavit from plaintiff’s wife at the time relevant stating that she and plaintiff did not have any interest in the Tuscola property after the sale

of their interest to defendant and defendant's wife. Defendant also argued that because plaintiff had no further interest in the Tuscola property, defendant could not have "fraudulently concealed" anything from plaintiff regarding the subsequent sale, and that his statements to the J & L Gremel Farms' owner could not be slander.

Plaintiff responded with an affidavit outlining the alleged business venture between the parties, and the alleged oral agreement according to which plaintiff would continue to be entitled to proceeds from the Tuscola property after conveying it. He also submitted an affidavit from the parties' mother as evidence of the parties' alleged agreement, but it consisted mostly of her accounts of out-of-court statements purportedly made by plaintiff and others. Plaintiff argued that there was caselaw supporting oral agreements regarding the disposition of real estate proceeds, and thus that his and defendant's alleged oral agreement under which defendant claims to have retained an interest in the Tuscola property was enforceable.

The trial court heard defendant's motion on October 17, 2019. At the outset, plaintiff, representing himself, claimed that the parties had reached a binding settlement agreement, though he acknowledged that there remained a point of disagreement, upon which defendant's counsel responded that there was not actually an agreement. The trial court agreed, stating, "Apparently you don't have an agreement and we're doing a motion for summary disposition" At the hearing, plaintiff acknowledged the deed and purchase agreement, and admitted that the only evidence he had to contradict it was his own affidavit and that of his mother, both of which plaintiff offered as evidence of an oral agreement between plaintiff and defendant regarding their respective interests in the Tuscola property. After hearing the parties' respective arguments, the trial court granted defendant's motion, ruling that the evidence submitted supported defendant's position as a matter of law. This appeal followed.

II. STANDARD OF REVIEW

Appellate courts review decisions on motions for summary disposition *de novo*. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition under MCR 2.116(C)(10) is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 224; 911 NW2d 493 (2017) (quotation marks and citation omitted). "When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties." *Miclea v Cherokee Ins Co*, 333 Mich App 661, 668; 963 NW2d 665 (2020).

III. ANALYSIS

Plaintiff argues that the trial court improperly granted defendant summary disposition on the basis that plaintiff had no claim to any profits from the sale of the Tuscola property. The statute

of frauds specifies that certain contracts must be in writing to be enforceable. MCL 566.106 provides as follows:

No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

In this case, plaintiff claims that he had an oral agreement to retain an interest in the Tuscola property, despite his having signed a purchase agreement and warranty deed both of which explicitly stated that plaintiff was conveying his interest in that property to defendant “free and clear of all encumbrances.” Defendant’s reliance on a supposed oral agreement to avoid the terms of the written purchase agreement and warranty deed fails as a matter of law because the statute of frauds conditions the validity of agreements of that sort on being in writing.

Plaintiff also argues that the trial court erred by granting summary disposition with respect to plaintiff’s entire complaint, when defendant’s motion focused only on one portion of it. But MCR 2.116(D)(1) provides that, “[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.” This Court, citing MCR 2.116(D)(1), has affirmed a trial court’s sua sponte grant of summary disposition where no party moved for summary disposition. *Boulton v Fenton Twp*, 272 Mich App 456, 459, 462; 726 NW2d 733 (2006). Here, plaintiff’s “fraudulent concealment” claim fails as a matter of law because plaintiff did not allege that defendant had concealed plaintiff’s potential cause of action. See *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 642, 646; 692 NW2d 398 (2004). And because the only pertinent documentation plainly establishes that plaintiff had no ownership interest in the Tuscola property, his slander claim fails as a matter of law because defendant’s alleged statements to a subsequent purchaser that plaintiff had no interest in the property were, in fact, true. See *TM v MZ*, 326 Mich App 227, 242; 926 NW2d 900 (2018).

Finally, plaintiff’s claim that the trial court erred when it ruled that the parties had not reached a binding settlement agreement fails as a matter of law because the parties did not state in open court that they had reached such an agreement, and because there was no evidence of such a written agreement, as required by MCR 2.507(G). *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 483-485; 637 NW2d 232 (2001).¹

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra

¹ This provision was designated MCR 2.507(H) at the time this Court issued its opinion in *Mich Mut Ins Co*.