

STATE OF MICHIGAN
COURT OF APPEALS

JAMIE S. FIELDS,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee,

and

DETROIT POLICE AND FIREMEN
RETIREMENT SYSTEM,

Defendant.

UNPUBLISHED

February 5, 2013

No. 309909

Wayne Circuit Court

LC No. 11-009209-CK

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant City of Detroit on his breach-of-contract claim. We reverse and remand for further proceedings consistent with this opinion.

Although the trial court did not specify under which section it granted summary disposition, the court clearly referred to evidence outside the pleadings. Therefore, we review the order granting summary disposition under the standard for MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). Under MCR 2.116(C)(10), summary disposition is appropriate when "[e]xcept as to the amount of damages, 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." When considering a motion for summary disposition under MCR 2.116(C)(10), the trial court must view the evidence in a light most favorable to the non-moving party. *Odom v Wayne Co*, 482 Mich 459, 466-467; 760 NW2d 217 (2008).

Plaintiff received a letter from the police chief, revoking his exempt position as a deputy chief. Plaintiff then had the choice to continue his employment as a lieutenant, his rank before his promotion to deputy chief, or to retire as a deputy chief. Plaintiff chose to retire as a deputy chief on November 21, 2009, and signed paperwork to that effect on November 30, 2009. In his second amended complaint plaintiff alleged that, on December 7, 2009, he met with a City

retirement specialist and signed a document, electing to roll 25 percent of his accrued sick time into his pension. Plaintiff further alleged that, on January 7, 2010, he received a telephone call from the City's payroll department, asking him to modify his retirement date to use his accrued vacation time, making his retirement effective as of February 11, 2010. Plaintiff received regular paychecks with regular deductions until January 15, 2010. Sometime after January 15, 2010, plaintiff contacted the City about the missing checks and was told that there was no agreement to extend his retirement. According to plaintiff, he was further told that he would receive a lump-sum payout for his remaining vacation time and that he was not eligible to roll 25 percent of his sick time into his pension. On January 15, 2010, a proposal to allow non-union police employees to roll 25 percent of their accrued sick time into their pensions was approved.

Plaintiff alleged in his second amended complaint, among other claims not at issue here, that defendant City breached the contract by not extending plaintiff's retirement to February 11, 2010, thus depriving him of the ability to roll 25 percent of his accrued sick time into his pension, among other benefits. The trial court granted summary disposition for defendant City, finding that plaintiff retired as a deputy police chief effective November 30, 2009, he was paid for unused vacation time through January 15, 2010, and he was ineligible to roll his sick time into his pension because deputy police chiefs were not granted this ability until January 15, 2010.

On appeal, plaintiff argues that the trial court improperly granted summary disposition because it sua sponte decided an issue that neither party had raised or been given the opportunity to brief. With regard to whether the parties had a contract to extend plaintiff's retirement date, plaintiff alleged that payroll checks he received after his official retirement date were evidence of the agreement. He further alleged that defendant City wanted to extend the date of his retirement by having him use his vacation time before retiring so that the City could avoid a large lump-sum payment. Plaintiff contended that defendant City breached the contract by later ending the payroll payments before all his vacation time was used and sending him a lump-sum payment. Defendant City did not provide any explanation for why it issued plaintiff regular payroll checks until January 15, 2010, even though its employee manual required it to send a lump-sum payment. Plaintiff alleged that he was harmed by the breach of contract because if he was an employee on January 15, 2010, he would have been eligible to roll his sick time into his pension.

In granting summary disposition, the trial court found that the payroll checks were just for vacation time and not evidence of an agreement to extend plaintiff's retirement date; thus plaintiff was not an employee on January 15, 2010, and therefore was not entitled to roll his accrued sick time into his pension. The trial court was not permitted to make such a finding of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). It was improper for the trial court to determine that there was no contract and that the payroll checks were not evidence of an agreement to extend plaintiff's retirement date, especially where the City's employee manual prescribes a procedure requiring defendant to provide a lump-sum payment for vacation time and not to provide regular payroll checks as occurred here.

Further, we conclude that summary disposition was premature because discovery was not complete. Plaintiff argued in his response to the City's motion for summary disposition that the City had not responded to his discovery requests. The lower court file contains no indication that defendant City ever responded to plaintiff's interrogatories; nor was any deposition testimony

attached to either party's motion for summary disposition or brief in support. Generally, summary disposition is premature if discovery is not complete unless "further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992). The non-moving party who argues that summary disposition is premature must provide at least some independent evidence that a factual dispute exists. *Mich Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Plaintiff provided evidence that, in accordance with the alleged modification of the agreement, he received regular payroll checks despite the fact that the City's employee manual required it to make a lump-sum payment for unused vacation time rather than continue regular payroll disbursements. This was independent evidence of a modification of the contract. Further, plaintiff stood a fair chance of uncovering factual support for his claim. For example, plaintiff may have learned through further discovery that the payroll employee who contacted him had the authority to make such an agreement or that, although she did not have the express authority to do so, such agreements were commonly made.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Patrick M. Meter