STATE OF MICHIGAN

COURT OF APPEALS

SHARON SLAVIK, Plaintiff-Appellant,	UNPUBLISHED December 26, 2013
v THE BASKIN LAW FIRM, and HENRY BASKIN, Defendants-Appellees.	No. 311905 Oakland Circuit Court LC No. 2012-125776-CZ

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

In this action alleging breach of contract, unjust enrichment, conversion, and breach of fiduciary duty against her former attorney and his law firm, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

In 2008, plaintiff hired defendants to represent her in a divorce action. Defendants provided plaintiff with a fee agreement, dated September 9, 2008, which stated, in relevant part:

> The final bill, in addition to the time expended, will be based upon the extent to which preparation is required for accomplishment of discovery proceedings, mediation, and/or trial, the degree to which outside expertise, such as accounting, appraisal or other assistance is needed, the skill and experience brought to this case by me, the time involved, the results obtained and other factors which are used to determine reasonableness, as contained in Section 1.5(a) of the Code of Professional Responsibility, which is attached.

On October 30, 2009, the parties in the divorce action reached a settlement, and on January 12, 2010, a consent agreement was entered in the divorce, which incorporated by reference the terms of the properly settlement. According to the terms of the divorce judgment, plaintiff was to receive, among other things, a $2.8 million initial payment from her now ex-husband on or before November 1, 2009, an additional $800,000 payable in two annual installments, and the deed to the marital home (appraised at $1.7 million) after the ex-husband paid off the remaining mortgage on the same.

Relevant to defendants' attorney fees, defendant Henry Baskin averred that plaintiff "agreed that $500,000 was an appropriate fee for" defendants' services, and that "I should deduct

my fee from the . . . initial payment . . . ." Baskin also averred that plaintiff "did not request an itemized statement of my time and expenses" when discussing defendants' fee, that he "had incurred over $88,000 in expenses and expert fees," and "had also spent hundreds of hours litigating the divorce," by that point. Defendants prepared and plaintiff signed, a document titled "Final Invoice," dated October 30, 2009, which stated the total "Attorney, Expert Fees and Costs to November 2, 2009," was "$500,000," and that "[plaintiff] does acknowledge receipt of this Invoice and agrees that the above will be deducted from the funds wire transferred . . . pursuant to the parties divorce Settlement Agreement." When plaintiff's ex-husband made the $2.8 million payment, deposited to an account in plaintiff's name, Baskin's fee was paid from those funds, and the balance was transferred to plaintiff.

Plaintiff sent defendants a letter dated December 20, 2011, in which she requested "a detailed billing statement." Defendants did not respond, and plaintiff thereafter filed the instant complaint against defendants.

In lieu of answering plaintiff's complaint, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's claim is barred by what they refer to as "the voluntary payment doctrine." In support of the motion, defendants attached several documents establishing the expenses accrued by defendants in litigating the divorce and the earlier referenced affidavit. Plaintiff responded and attached an amended complaint that no longer contained breach of fiduciary duty claim. Plaintiff, however, did not include an affidavit or any documentary evidence. Two days after a hearing held on defendant's motion for summary disposition, plaintiff filed an emergency motion to permit the filing of a supplemental brief and affidavit, which the trial court denied. The trial court thereafter issued its opinion and order, finding that plaintiff failed to show any genuine issues of disputed fact, and "that plaintiff understood and voluntarily paid defendants' fee as evidenced by her signature on the Final Invoice" and thus granted summary disposition in defendants' favor.

On appeal, plaintiff first argues that she was under no obligation to present responsive affidavits or evidence to defendants' summary disposition motion because the affidavit defendants presented was self-serving and failed to address the inherent ambiguities in the contract. Plaintiff argues that due to defendants' failure to properly support their own motion, the trial court erred in granting summary disposition in defendants' favor. We disagree.

"A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim, and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 506; 802 NW2d 712 (2010) (citation omitted). "Summary disposition is proper if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (quotation omitted). 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." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Review is limited to the evidence that was presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). Once the moving party has supported its motion by producing evidence alleging that there is no genuine issue of material fact, the non-moving party has the burden of producing evidence that genuine issues of material fact exist for

trial. *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 666; 645 NW2d 50 (2002); *Quinto v Cross & Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996).

The trial court correctly considered defendants' affidavit, contrary to plaintiff's argument. While a defendant cannot support a motion for summary disposition by submitting an affidavit that merely states a conclusory denial of the allegations, *Durant v Stahlin*, 374 Mich 82, 84-85; 130 NW2d 910 (1964), absent such conclusory denials, the properly executed affidavit of a party "must be considered when the ground stated for summary disposition is that there is no genuine issue of material fact." *Bergen v Baker*, 264 Mich App 376, 388; 691 NW2d 770 (2004). Plaintiff's argument focuses on the alleged ambiguity of the Fee Agreement, and the failure of defendants' affidavit to resolve this aspect. However, the basis of defendants' motion for summary disposition was that plaintiff's claim was barred by the voluntary payment doctrine. Under this doctrine, "[w]here money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying." *Montgomery Ward & Co v Williams*, 330 Mich 275, 285; 47 NW2d 607 (1951) (internal quotation omitted). "[A] voluntary payment is one made with a full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud, or deception on the part of the payer, or duress of the person, or goods of the person making the payment." *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895).

Defendants supported their motion for summary disposition on this basis with Baskin's affidavit, wherein he stated that plaintiff voluntarily agreed to the fee. Defendants further provided some documentary evidence in support of this claim by virtue of the "Final Invoice" signed by plaintiff. The affidavit and Final Invoice were not flat, conclusory denials, and their presentation to the trial court triggered plaintiff's "duty to rebut with documentary evidence defendant's contention that no genuine issue of material fact existed." *Quinto*, 451 Mich at 371. Plaintiff failed to do so in a timely manner.

Plaintiff next asserts that the trial court should have considered her tardy affidavit. We disagree. "This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005), citing *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997). Plaintiff has not shown how the trial court abused its discretion in choosing to enforce the scheduling order, see *EDI v Lear*, 469 Mich 1021; 678 NW2d 440 (2004); MCR 2.116(G)(1)(a)(ii), and has failed to support her argument that the trial court should have considered her untimely affidavit with any meaningful authority, thereby abandoning it. See *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 106; 776 NW2d 114 (2009).

The remainder of plaintiff's argument revolves around alleged ambiguities in the original Fee Agreement, and in how the final fee was calculated. However, as referenced above, a voluntary payment cannot be recovered when it is made with "full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud, or deception on the part of the payer," even when such a payment "was made under a misapprehension of the legal rights and obligations of the person paying." *Montgomery Ward & Co*, 330 Mich at 284-285, quoting *Pingree*, 170 Mich at 157. Ambiguities of the underlying Fee Agreement are irrelevant if plaintiff voluntarily agreed to pay the fee described in the Final Invoice for defendants' legal services. Plaintiff argues that the Final Invoice "does not state—in any way—that [plaintiff]

agrees with the amount of the value enhancement fee," but Baskin's affidavit stated that plaintiff freely agreed to the amount listed, and plaintiff presented no affidavit or evidence disputing this sworn statement. Additionally, while the voluntary payment may be overcome by showing duress, *Pingree*, 107 Mich at 157, to succeed on a claim of economic duress, parties "must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Farm Credit Services, PCA v Weldon*, 232 Mich App 662, 681-682; 591 NW2d 438 (1998) (quotation omitted). Nothing in the record properly before this Court establishes such a claim. In sum, plaintiff has not shown that the trial court erred in granting defendants' motion for summary disposition.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto