

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COMERICA, INC.,

Plaintiff/Counter  
Defendant-Appellee,

UNPUBLISHED  
June 4, 1996

v

No. 155363  
LC No. 84-285238 CK

THERESA F. MITAN,

Defendant/Counter  
Plaintiff-Appellant,

and

FRANK J. MITAN,

Defendant.

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Before: O'Connell, P.J., and Reilly and D.E. Shelton,\* JJ.

PER CURIAM.

Defendant and counter-plaintiff Theresa Mitan ("defendant" hereinafter) appeals as of right the order of the circuit court granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) and the order denying defendant's motion to amend her answer. We affirm.

Most of the significant facts of this case are set forth in the related decision of *Comerica, Inc v Frank J Mitan and Theresa F Mitan*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 1991 (Docket Nos. 115796, 120074). Briefly, defendant and her former husband guaranteed certain loans and extensions of credit made by plaintiff to their corporation, Tel-Way Truck Sales, Inc. After Tel-Way filed for bankruptcy, plaintiff brought suit against defendant and her former husband as guarantors. Defendant then filed for bankruptcy, and the action against her was severed from that against her former husband.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Following this Court's decision in the prior action, *supra*, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) against defendant, contending that she had failed to plead a valid defense to the complaint. Plaintiff also contended that summary disposition pursuant to MCR 2.116(C)(10) was appropriate concerning the issue of damages. The circuit court granted plaintiff's motion. Defendant moved to amend her answer, but failed to submit proposed amended pleadings with her motion. The motion was denied. Defendant brought a second motion, which the court also denied after determining that defendant had either delayed unjustifiably in raising the defenses, or that the defenses themselves were futile. This appeal follows.

Defendant first contends that the circuit erred in concluding that she had failed to plead a valid defense to the complaint. More specifically, she argues that at the time she executed the loan guarantees in issue, the Married Women's Property Act, MCL 557.52; MSA 26.182, was recognized as good law in Michigan. The Act provided that a married woman is not liable for contracts entered into unless consideration inured to her separate estate. See *City Finance Co v Kloostra*, 47 Mich App 276, 284-285; 209 NW2d 498 (1973). Defendant asserts that she pleaded that no consideration inured to her separate estate as a result of her execution of the guarantees. Despite the fact that the Act was later held to have been abrogated by the adoption of the 1963 Constitution, *Michigan National Leasing v Cardillo*, 103 Mich App 427, 435; 302 NW2d 888 (1981), defendant submits that the parties are governed by the Act because it was considered to be controlling at the time the contracts were executed. Because she pleaded that no consideration inured to her separate estate as a result of her execution of the guarantees and because she pleaded the Act as an affirmative defense, she contends that the court erred in granting plaintiff's motion.<sup>1</sup>

A motion for summary disposition brought pursuant to MCR 2.116(C)(9) tests the legal sufficiency of pleaded defenses. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991). Accepting all well-pleaded allegations as true, summary disposition is appropriate where the defenses pleaded are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery. *Id.* Our review is de novo. *Kellogg v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994).

We agree with the circuit court that summary disposition was appropriate in the present case. The precise argument raised by defendant as to the effective retroactive application of the Married Women's Property Act was considered by this Court in *Citizens Commercial & Savings Bank v Raleigh*, 159 Mich App 110, 118-119; 406 NW2d 479 (1987), and was rejected. Finding no distinction between the present case and *Citizens Bank*, we affirm the court's grant of summary disposition pursuant to MCR 2.116(C)(9) for the reasons set forth in that opinion.

Defendant also contends that "even assuming, *arguendo*, that [defendant] has no defense, [plaintiff] is merely entitled to summary disposition as to liability, and not [as to] damages." While this would, in general, be true, we find that in the present case summary disposition pursuant to MCR 2.116(C)(10) was appropriate concerning the issue of damages. Defendant's argument is rather difficult to analyze conceptually because she argues, in effect, that although she will only be able to pay

approximately \$80,000 to plaintiff, the court must nevertheless determine by how much her indebtedness exceeds that amount, despite the fact that her bankruptcy limits plaintiff's recovery to \$80,000. We find defendant's argument to be without merit.

Upon plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), defendant had the burden of presenting evidence that a genuine issue of material fact existed with respect to damages. See *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). Defendant presented none. The only evidence contained in the record indicates that the bulk of defendant's indebtedness to plaintiff would be discharged in bankruptcy, with the exception of the value of a particular parcel of land in which plaintiff had previously secured a lien. Defendant's total indebtedness far exceeded the value of the property. As stated by plaintiff, "[w]hy 'argue' whether [defendant] 'owes' \$100,000, \$200,000, \$300,000, or some figure in between, when [plaintiff's] recovery was limited to" the proceeds from the sale of the property. Because defendant has presented no evidence suggesting that plaintiff's damages could be any figure other than the value of the property, summary disposition pursuant to MCR 2.116(C)(10) was appropriate.

For identical reasons, we conclude that defendant's counter-claim was properly dismissed. In her counter-claim, plaintiff sought only an accounting. However, she failed to allege any facts in her counter-claim (such as that payments had been made) challenging plaintiff's calculation of the damages. Thus, because plaintiff presented no countervailing evidence on the issue of damages as required by MCR 2.116(C)(10), the court acted properly in dismissing the counter-claim. MCR 2.116(I)(1).

Finally, defendant argues that the circuit court abused its discretion in refusing to allow her to amend her affirmative defenses. We have reviewed the thirteen additional affirmative defenses included in defendant's proposed amendments and conclude that the circuit court was correct in concluding that numbers eleven and twelve were futile and that numbers nine, ten, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty and twenty-one were unduly delayed. Therefore, we find no abuse of discretion resulting in injustice. MCR 2.118(A)(2); *Price v Long Realty, Inc*, 199 Mich App 461, 469; 502 NW2d 337 (1993). Accordingly, we affirm the order denying defendant leave to amend her defenses.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Maureen Pulte Reilly  
/s/ Donald E. Shelton

<sup>1</sup> MCL 557.52; MSA 26.182, has since been repealed. 1981 PA 216. Its successor, MCL 557.25; MSA 26.165(5), rejects the reasoning of *Kloostr*a and implicitly adopts that of *Cardillo*.