

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT W. BAIRD & COMPANY, INC.,

Plaintiff-Appellee,

v

MARGARET KNAPE DAVIS,

Defendant-Appellant.

UNPUBLISHED

September 24, 1996

No. 186467

LC No. 95-000056-CK

Before: MacKenzie, P.J., and Markey and J.M. Batzer,* JJ.

PER CURIAM.

Defendant Margaret Knapé Davis appeals as of right from the trial court's grant of summary disposition to plaintiff Robert W. Baird & Company, Inc. under MCR 2.116(C)(10). We affirm.

Davis opened a margin account with Baird, securing the account with a stock certificate that indicated she owned 62,736 shares of Knapé & Vogt stock. Baird loaned Davis \$308,594.96 on the margin account but subsequently became suspicious upon learning that Davis was the subject of a federal securities fraud investigation. Baird sought to authenticate Davis' stock certificate and discovered that the stock certificate was bogus. Baird filed suit after Davis did not pay the margin account's balance due or secure the account with other genuine marketable securities. The trial court granted Baird's summary disposition motion, concluding that the undisputed facts showed that Davis had breached her contract with Baird and that Davis had misrepresented her stock ownership to Baird. Davis argues on appeal that the trial court improperly granted summary disposition on the breach of contract count because the court made findings of fact, resolved doubts against her and precluded any discovery. Davis also argues that the trial court improperly granted summary disposition on the misrepresentation count because the court resolved a credibility issue and neglected to address each element of misrepresentation. We disagree.

A motion for summary disposition is reviewed de novo on appeal, *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994), and tests a claim's factual support, *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d

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

155 (1993). The trial court gives the benefit of all reasonable doubt to the non-moving party, and the court must determine whether a record could be developed to show a material factual dispute. *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

With respect to the breach of contract count, Davis failed to sustain her burden to produce evidentiary materials raising a genuine, material factual issue as to either her stock ownership or the stock certificate's validity. *Skinner v Square D Co*, 445 Mich 153, 160-161; 516 NW2d 475 (1994). Davis submitted an affidavit asserting that she owned the stock and that the stock certificate was genuine, but her affidavit failed because it lacked the evidentiary basis required to successfully challenge Baird's facts or data. See, e.g., *Amorello v Monsanto Corp*, 186 Mich App 324, 330-331; 463 NW2d 487 (1990). In addition, Davis' affidavit was also deficient because she could not testify as to the stock certificate's genuineness based upon her personal knowledge given that she did not have access to or control of corporate stockholder records. MCR 2.119(B); *Regualos v Community Hospital*, 140 Mich App 455, 465-466; 364 NW2d 723 (1985).

The trial court correctly inferred that evidence supporting Davis' claims did not exist because she failed to produce facts or documents in her possession to demonstrate that she owned the stock or that the stock certificate was genuine. *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989). In addition, the trial court properly evaluated the evidence before it, noted that the evidence was undisputed, and did not resolve reasonable doubts against Davis. See, e.g., *Farm Bureau, supra* at 184-185. Furthermore, the trial court correctly determined that additional discovery would not provide factual support for Davis' claims because she failed to identify specific circumstances where discovery would be likely to reveal facts supporting either her stock ownership claim or her claim that the certificate was genuine. *Neumann v State Farm Mutual Automobile Ins Co*, 180 Mich App 479, 485-486; 447 NW2d 786 (1989). Consequently, the court correctly determined that the undisputed evidence showed that Baird was entitled to summary disposition as a matter of law because Davis had breached her margin account agreement when she failed to repay the loans or provide adequate security for the margin account as the contract required.

Regarding the misrepresentation count, Davis argues that the trial court improperly resolved a credibility issue when it determined that she knew the stock certificate was not genuine and that the court failed to address each element of misrepresentation. Again, we disagree.

Misrepresentation requires proving that the defendant made a material representation, that it was false, that the defendant knew it was false or made the representation without any knowledge of its truth, that the defendant made the representation intending the plaintiff to rely on it, that the plaintiff did rely on it, and that the plaintiff suffered injury due to the reliance. *Price v Long Realty, Inc*, 199 Mich App 461, 470; 502 NW2d 337 (1993).

Davis admitted in her affidavit that she entered into the margin account agreement, that she secured the account with the stock certificate, and that she borrowed money on the account. These admissions show that Davis claimed to own the stock and that she intended that Baird would rely on her stock ownership when it loaned money to her. *Price, supra* at 470. The transfer agent's unrefuted

affidavit recited facts showing that the stock certificate was not genuine and that Davis never actually owned the stock, thereby demonstrating the falsity of her representation. *Id.* Baird's injury occurred when Davis failed to repay the loans and when the stock certificate that secured those loans was shown to be bogus. *Id.*

The remaining element concerns whether Davis knew that her stock ownership representation was false or whether she made that representation without knowledge of its truth. *Id.* The general rule is that summary disposition is rarely appropriate in cases involving intent, *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). Our Supreme Court has affirmed summary disposition orders, however, when the facts are uncontroverted and the remaining questions concern the legal conclusions to be drawn from those facts. *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993).

Davis' affidavit failed to provide any facts to support her stock ownership assertion, permitting the trial court to infer that such evidence was not produced because it did not exist. *Grossheim, supra* at 715. Furthermore, Davis did not refute the evidence Baird introduced to show the falsity of her stock ownership claim. Baird produced Davis' deposition and interrogatories from her prior divorce proceedings in which she did not list this stock as one of her assets. Baird also introduced the complaint by Citizens and Inter-City banks against Davis and the subsequent settlement in that case to demonstrate her intent, plan or scheme to defraud. The unrefuted evidence led the trial court to the correct legal conclusion that Davis knew she did not own the stock when she opened the margin account, thereby satisfying the last misrepresentation element and making summary disposition appropriate as a matter of law. *Moll, supra* at 27-28; *Price, supra* at 470; *Borman, supra* at 678.

Moreover, pursuant to MCR 7.216(C), this Court on its own initiative may assess actual and punitive damages when it determines that an appeal was vexatious because it was taken without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. Such is the case here. Defendant's appeal has no merit. Defendant has never filed any proof of her ownership interest in the stock.. Further, defendant, through her counsel who has represented her in the civil and criminal matters involving bogus securities, made admissions in open court during her divorce proceeding that she never affirmatively stated in her affidavit that she *owned the stock* referenced in the certificate but instead that she owned the piece of paper that described the stock. Also, as an officer of the court, defendant's attorney had a duty to dismiss the appeal given counsel's apparent knowledge that defendant could not establish her ownership of the stock shares. Accordingly, we assess against defense counsel those costs and expenses that plaintiff incurred as a result of this vexatious appeal, including reasonable attorney fees and punitive damages in an added amount not to exceed plaintiff's actual damages. We remand this case to the trial court for a determination of reasonable attorney fees and actual damages and for entry of an order comporting with our decision.

Affirmed; remanded for further proceedings consistent with MCR 7.216.

/s/ Barbara B. MacKenzie

/s/ Jane E. Markey

/s/ James M. Batzer