

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

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SAMIR A. DANOU and MARY JANE DANOU,

UNPUBLISHED

October 8, 1996

Plaintiffs-Appellees,

v

No. 188377

LC No. 94-004043

COMFORT INN OF UTICA, INC. and THOMAS  
GUASTELLO,

Defendants-Appellants,

and

CITY OF UTICA,

Defendant-Appellee.

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Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,\* JJ

PER CURIAM.

In this contract action, defendants Comfort Inn of Utica and Thomas Guastello appeal as of right from the July 8, 1995, order granting summary disposition, pursuant to MCR 2.116 (C)(10), in favor of plaintiffs. We affirm.

Plaintiffs owned property located in the City of Utica. Plaintiffs' property could not be developed until water and sewer utilities were made available. In order to provide municipal utilities, Utica requested that Guastello, owner of the Comfort Inn, grant an easement through the Comfort Inn parking lot. The Comfort Inn was a budget, mid-priced motel, which was located near plaintiffs' property. Before granting Utica an easement, Guastello sought assurances that a competing budget, mid-priced hotel would not be constructed on plaintiffs' property. Guastello granted Utica an easement through the Comfort Inn property, to provide municipal water and sewer lines to the property owned by plaintiffs. Plaintiffs subsequently entered into a purchase agreement with B & G Realty who sought to

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

build a budget motel on the property. Plaintiffs filed this lawsuit seeking a declaratory judgment that their property was not burdened by a restrictive covenant prohibiting the construction of a budget motel.

Although unclear from the record, it appears that defendants assert that they are third-party beneficiaries of plaintiffs' representation to Utica that plaintiffs would refrain from constructing a budget, mid-priced motel on their property. MCL 600.1405; MSA 27A.1405 pertains to third-party beneficiaries and provides in relevant part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

Specifically, defendants argue that the trial court erroneously granted summary disposition in favor of plaintiffs because there was a genuine issue regarding whether Samir Danou represented to Utica that plaintiffs would refrain from building a budget-type, mid-priced motel on plaintiffs' property. We disagree.

This Court reviews a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 676, 678; 499 NW2d 419 (1993). A party is entitled to judgment as a matter of law when there are no genuine issues of material fact. MCR 2.116(C)(10). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Giving the nonmovant the benefit of reasonable doubt, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994).

The trial court correctly granted summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(10) because defendants presented inadmissible evidence to oppose plaintiffs' motion for summary disposition. Inadmissible hearsay does not create a genuine issue of material fact. *McCallum v Corrections Dep't*, 197 Mich App 589, 603; 496 NW2d 361 (1992). Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. MRE 801(C). Hearsay evidence is not admissible at trial unless it falls within an established exception. *McCallum, supra*, at 603. As documentary support for the proposition that Danou represented that plaintiffs would refrain from constructing a budget motel on their property, defendants submitted a letter, Guastello's deposition testimony and his affidavit. We will discuss separately the admissibility of each document submitted to oppose plaintiffs' motion for summary disposition.

The letter was written by Jason Horton, who had an interest in property not material to this action, and addressed to Utica Mayor Jacqueline Noonan. It referenced a meeting between Horton, Mayor Noonan and Guastello, where Mayor Noonan purportedly told Horton and Guastello that in consideration for defendants' granting of an easement, Danou had agreed to refrain from building a budget motel. The letter was inadmissible because it contained hearsay. MRE 805.

Guastello also offered deposition testimony that he received verification from Mayor Noonan that the letter was accurate. Even if the letter was accurate, it was inadmissible because it contained hearsay, as discussed above. Thus, the fact that Guastello received verification that the letter was accurate does not create a genuine issue regarding whether the Danou made the representation, because the letter itself was inadmissible. Moreover, there is no indication from Guastello's deposition testimony that he received verification from Danou that Danou would refrain from constructing a budget, mid-priced motel on his property, which would bring the deposition testimony out of the realm of hearsay. Consequently, Guastello's deposition did not create a genuine issue of material fact.

Finally, Guastello submitted an affidavit in opposition to plaintiff's motion for summary disposition. MCR 2.119(B)(1)(a) provides that "[i]f an affidavit is filed in support of or in opposition to a motion, it must be made on personal knowledge."

Guastello's affidavit indicated that Mayor Noonan assured him before he granted an easement across the Comfort Inn property that Danou agreed not to construct a budget motel. Guastello's affidavit is not based upon his personal knowledge, but upon the fact that Danou told Mayor Noonan and Mayor Noonan told Guastello that Danou would refrain from building a budget, mid-priced motel on his property. As discussed above, this is hearsay within hearsay. Opinions, conclusionary denials, unsworn averments and inadmissible hearsay do not satisfy MCR 2.116(C)(10). See *Remes v Duby (After Remand)*, 87 Mich App 534, 537; 274 NW2d 64 (1978). Because Guastello's affidavit was not based upon his personal knowledge, it was inadmissible evidence.

Furthermore, plaintiffs presented the admissible testimony of Danou and Mayor Noonan. Danou denied at his deposition that he had represented that he would refrain from building a budget, mid-priced motel on his property. Mayor Noonan testified at her deposition that she did not believe that Danou had agreed to refrain from constructing a budget, mid-priced motel.

Since defendants did not present any admissible evidence to oppose plaintiffs' motion for summary disposition, together with the fact that plaintiffs presented the depositions of Samir Danou and Mayor Noonan, which indicated that no representation had been made, the trial court did not err in granting summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(10), because defendants failed to demonstrate the existence of a genuine issue of material fact.

Next, defendants argue that the trial court erred by failing to consider their defense of equitable estoppel. We decline to review this issue because defendants failed to raise the defense of equitable estoppel in their answer to plaintiffs' complaint or plaintiffs' first amended complaint. See MCR 2.111(F).

Affirmed.

/s/ Mark J. Cavanagh

/s/ William B. Murphy

/s/ Charles W. Simon, Jr