

STATE OF MICHIGAN
COURT OF APPEALS

PEARL HOWE, and BILLY HOWE,

Plaintiffs–Appellants,

v

BORMANS, INC., and EDWARD DARMANIN,

Defendants–Appellees.

UNPUBLISHED

December 6, 1996

No. 183835

LC No. 94-402871 NO

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

Plaintiffs appeal from the circuit court’s order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). Plaintiff Pearl Howe brought suit against her former employer, defendant Bormans, Inc., alleging age discrimination and constructive discharge in violation of the Elliott-Larsen Civil Rights Act, MCL 37.3202 *et seq*; MSA 3.548(101) *et seq*. Her husband alleged loss of consortium. We reverse and remand for further proceedings.

Plaintiff worked as a cashier from 1957 until defendants allegedly forced her to retire in 1992. Plaintiffs filed this age discrimination claim on February 2, 1994. On March 31, 1994, plaintiffs served their first set of interrogatories and second request for production of documents on defendants. Plaintiffs sought, *inter alia*: (1) records of discipline imposed on other cashiers at the store where plaintiff worked under defendant’s cash control shortage/overage policy, and (2) records of prior complaints of age discrimination filed against defendants.

The circuit court’s scheduling order provided a November 11, 1994 discovery cutoff date, and required that all motions be filed and heard by February 14, 1995. On November 23, 1994, defendants filed their motion for summary disposition, not having responded to plaintiffs’ interrogatories of March 31, 1994. Defendants assured plaintiffs’ counsel that the discovery would be provided before plaintiffs’ response to defendants’ motion for summary disposition was due. Plaintiffs did not file a

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

motion to compel defendants to answer, believing defendants needed more time to assemble the information and that the discovery would be provided before plaintiffs' response was due. The hearing on defendants' motion was scheduled for December 16, 1994. On December 9, defendants submitted partial answers to plaintiffs' discovery requests, but objected to producing information regarding cashiers at defendant's store 639, where plaintiff had worked, and to producing information regarding prior age-discrimination complaints against defendants. Plaintiffs responded by incorporating into their summary disposition reply brief a request that the court adjourn the summary disposition hearing until the discovery dispute could be resolved.

The circuit court granted defendants' summary disposition motion from the bench at the December 16, 1994, hearing. With respect to the discovery dispute, the court stated, "if discovery were still open, I would give [plaintiff] the benefit of the doubt and deny [summary disposition], but discovery's been closed for almost two months. I'm going to grant [summary disposition]." Plaintiffs' motion for reconsideration was denied.

While the circuit court has discretion in the area of discovery, the court may not grant summary disposition where there is a fair chance that further discovery will result in factual support for the opposing party's claim. *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d (1994). It is unclear if the requested information will, in fact, result in support for plaintiffs' claim. However, the subject matter of the unanswered requests is directly related to defendants' application of its cash control policy and may have provided support for plaintiffs' claims.

The circuit court denied discovery on the basis that "discovery's been closed for almost two months." Under the circumstances, this was an abuse of discretion. Plaintiffs submitted their discovery request months before the discovery-cutoff date. Defendants filed no motion for protective order. That defendants did not respond until five days before the hearing on their dispositive motion, and well after the discovery-cutoff date, is not a legitimate reason to preclude plaintiffs from obtaining the timely requested discovery.

The circuit court's grant of summary disposition was premature. We reverse and remand for resolution of the discovery issue. *Maerz, supra*, 116 Mich App 725.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ Helene N. White

/s/ Philip D. Schaefer