STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER OETTING,

Plaintiff-Appellant,

v

NABIL WEHBE, D.O. and WOODLAND PHYSICIANS, P.C.,

Defendants-Appellees.

UNPUBLISHED
February 14, 1997

No. 187692
LC No. 92-446829

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for partial summary disposition. We affirm.

This case arose from plaintiff's inherited deformity of her upper and lower jaw, which caused a cross bite of her teeth and problems with her temporomandibula joint. Plaintiff experienced excessive pain in her jaw after the natural disc from her temporomandibula jaw was replaced with a proplast nylon implant. Plaintiff selected Dr. Nabil Wehbe, an internal medicine physician, of Woodland Physicians (Woodland), to treat her jaw problems. Plaintiff's main contention is that Dr. Wehbe failed to refer her to a specialist for her jaw problems.

Because this case arises out the contractual relationships between plaintiff's health insurer, Blue Care Network of Southeast Michigan (BCN), a health maintenance organization (HMO), Woodland, and Dr. Wehbe, it is necessary to detail the foregoing parties' relationships. Plaintiff, through her employer, had health insurance through BCN. A patient enrolled in BCN selects a primary care provider who is responsible for referring the patient to a specialist, whenever necessary. BCN entered into a Medical Services Agreement with Woodland, where Woodland agreed to serve as the primary care physician group. BCN also entered into a Physician Affiliation Agreement with Woodland and Dr. Wehbe, where Dr. Wehbe agreed to affiliate with BCN and provide health services to enrollees in BCN's health plan. Thus, plaintiff selected Dr. Wehbe, an internal medicine physician at Woodland, as

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

her primary care provider. Plaintiff saw Dr. Wehbe several times, for various ailments, over the course of four years.

I

Plaintiff first argues that she was a third-party beneficiary of the Medical Services Agreement between BCN and Woodland and the Physician Affiliation Agreement between defendants and BCN. Plaintiff contends that because she was a third-party beneficiary of these contracts, she may enforce Dr. Wehbe's contractual duty to refer her to a specialist. Therefore, she claims that the trial court erred when it granted summary disposition in favor of defendants. 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) affirmed 446 Mich 482; 521 NW2d 266 (1994). 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).

Summary disposition was proper because plaintiff was not a third-party beneficiary of either the Medical Services Agreement or the Physician Affiliation Agreement. MCL 600.1405; MSA 27A.1405, which defines third-party beneficiaries, 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 for said person.

We discuss each agreement separately.

MEDICAL SERVICES AGREEMENT

As noted above, plaintiff argues that she was a third-party beneficiary of the Medical Services Agreement. The only provision in the medical services agreement plaintiff contends supports her position is the following:

1.11 Primary Care Physician Group or PCG

> A group of physicians which is affiliated with BCN for the purpose of providing, arranging, and managing medical care and services provided to Members.

When determining whether the parties to a contract intended to make a third person a third-party beneficiary, a court should examine the contract using an objective standard. *Dynamic v Barton Malow*, 214 Mich App 425, 427; 543 NW2d 31 (1995). If a contract's language is clear, its construction is a question of law for the court. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). An examination of the medical services agreement reveals that plaintiff was not a third party beneficiary of the agreement. Section 9.5 of the medical services agreement states the following:

> This Agreement is not intended to confer benefits or rights upon any person or entity not a party to it, and it shall not be interpreted or construed to give rise to any right or benefit on behalf of any third party. A Member's rights under a Certificate does not give rise to any rights on behalf of the PCG or Primary Care Physician or other health professionals, facilities, or agencies not otherwise specifically set forth in the Agreement.

Viewing the contract objectively, the clear language of the foregoing section clearly evidences the parties' intention not to create any third-party beneficiary rights. Because the parties did not intend to create any third-party beneficiary rights, the trial court's grant of summary disposition on plaintiff's claim for breach of contract was proper. *Kammer Asphalt v East China Twp Schools*, 443 Mich 176, 189-190; 504 NW2d 635 (1993).

PHYSICIAN AFFILIATION AGREEMENT

Plaintiff also argues the following provision of the Primary Care Physician Affiliation Agreement (PCPAA) together with the Manual establish that she is an intended beneficiary of the PCPAA between BCN and defendants. The PCPAA states in pertinent part:

> 4. I [Wehbe] agree to be bound by and accept the terms and conditions of this Agreement, the Medical Service Agreement and the Manual and all amendments or modifications thereto.

The Manual states in pertinent part:

> 0.8 BCN is a managed care system in which the primary care physician is directly responsible for providing or managing all health care services for the BCN member. The objective of this system is to provide the member with quality health care in a cost-effective manner, while avoiding unnecessary services.
>
> 0.9 PCP's are organized into physician groups which are contracted by BCN for the delivery of health services to BCN members.

Under the PCPAA, Dr. Wehbe agreed to be bound by the "terms and conditions" of the Manual. A reference by contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose so specified. *Berkel & Co v Christman Co*, 210 Mich App 416, 419; 533 NW2d 838 (1995); *Hinshaw v Blue Cross*, 142 Mich App 280, 282; 369 NW2d 221 (1985). Sections 0.8 and 0.9 of the manual do not appear to be a "term or condition" of the agreement. The language in §§ 0.8 and 0.9 is found in the introductory portion of the manual. Section 0.8 merely outlines the objective of the managed care system. Section 0.9 provides the structure of the system. Neither of these sections imposes any obligation on the physician, which would rise to the level of a "term or condition" of the agreement. Thus, construing the manual with the PCPAA, we find that there were no third-party beneficiary rights created in the PCPAA. Because plaintiff was not a third-party beneficiary of the Medical Services Plan and the Physician Affiliation Agreement, the trial court properly granted summary disposition in favor of defendants on plaintiff's breach of contract claim.

II

Plaintiff next argues that the exculpatory provision of the Medical Services Agreement, which expressly indicated that the contract did not create rights for a third-party beneficiary, is void as against public policy. We disagree.

Whether § 9.5 of the medical services agreement violates public policy is a question of law and is reviewed de novo. *Vicencio v Ramirez*, 211 Mich App 501; 536 NW2d 280 (1995). In support of her argument, plaintiff relies on the reasoning of *Cudnik v William Beaumont Hosp*, 207 Mich App 378; 525 NW2d 891 (1994). In *Cudnik*, this Court reversed the trial court's grant of summary disposition in favor of the defendants and held that the exculpatory provision in the defendants' contract was contrary to public policy. In holding that the exculpatory provision was contrary to public policy, this Court noted that "defendant hospital presented plaintiff's decedent with the standardized contract of exculpation without any provision for some other type of protection against negligence." *Id.* at 387.

The instant case is distinguishable from *Cudnik*. Unlike *Cudnik*, plaintiff was merely precluded from asserting a third-party beneficiary action under one specific contract: the contract between BCN and Woodland. Plaintiff was not precluded from asserting third-party beneficiary status under the contract between BCN, Woodland and Dr. Wehbe. Furthermore, § 9.5 did not preclude other avenues of recourse, such as an action in tort against Woodland and Dr. Wehbe. Because the instant case is distinguishable from *Cudnik*, the trial court did not erroneously uphold the validity of § 9.5. We also find that plaintiff's citation of *Courtright v Design Irrigation, Inc*, 210 Mich App 528; 534 NW2d 181 (1995), is inapt because *Courtright* involved a tort claim and did not involve a situation where the contract disclaimed third-party rights. Accordingly, summary disposition in favor of defendants was proper.

III

Plaintiff next argues that defendants did not have a common law duty to refer plaintiff to a specialist. Since this issue was not properly preserved, as it was not raised or addressed in the trial court, we decline to review it. See *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). In any event, plaintiff's argument is in error. See, e.g., *Morgan v Engles*, 13 Mich App 656, 659; 164 NW2d 702 (1968).

IV

Plaintiff's final argument is that the trial court abused its discretion in permitting defendants to file a motion for summary disposition eight months after a deadline in the trial court's scheduling order. Because plaintiff has failed to supply supporting authority, we decline to review this issue. *Hover v Chrysler Corp*, 209 Mich App 314, 319; 530 NW2d 96 (1995). Moreover, because plaintiff was not entitled to recovery as a matter of law, we find no abuse of discretion. See MCR 2.401(B)(2). Further, MCR 2.116(B)(2) provides that a motion for summary disposition, with exceptions not applicable here, may be filed "at any time." We find no error. MCR 1.105.

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo