

STATE OF MICHIGAN
COURT OF APPEALS

ROCKWOOD DEVELOPMENT CORPORATION,

UNPUBLISHED
February 28, 1997

Plaintiff-Appellant,

v

No. 189359
Kalamazoo Circuit Court
LC No. 94-002087-CK

ALAMO TOWNSHIP,

Defendant-Appellee.

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiff filed this action against defendant claiming that defendant wrongfully denied plaintiff's rezoning request. Kalamazoo Circuit Judge William G. Schma granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff now appeals by right. We reverse and remand.

Plaintiff first claims that the trial court erred when it accepted and relied upon affidavits that defendant submitted in support of its summary disposition motion only three days before the summary disposition hearing. This issue presents a question of law regarding whether the trial court properly applied the time constraints provided in the court rules, which we review de novo on appeal. *Oakland Hills Development Corp v Lueders Drainage District*, 212 Mich App 284, 294; 537 NW2d 258 (1995).

Under MCR 2.116(G)(1), a written motion for summary disposition along with supporting brief and any affidavits must be filed and served at least twenty-one days before the date of the hearing. MCR 2.116(G)(1)(a)(i). If the trial court sets a different time for filing and serving a motion, its authorization must be endorsed in writing on the face of the notice of the hearing or made by separate order. MCR 2.116(G)(1)(b). The trial court clearly erred when it accepted defendant's affidavits outside of these time constraints in contravention of MCR 2.116(G)(1)(b); consequently, the trial court's decision that defendant was entitled to summary disposition on the basis of these affidavits was erroneous. Moreover, without the support of the affidavits, there existed no basis for granting summary

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

disposition pursuant to MCR 2.116(C)(10). Therefore, we reverse and remand for entry of an order denying defendant's motion for summary disposition.

Defendant argues that the unusual factual context of this case justified the trial court's disregard of the time constraints stated in MCR 2.116(G)(1)(b). Pursuant to MCR 2.110(B)(5), defendant demanded a reply to affirmative allegations it made in its answer to plaintiff's second amended complaint. Because plaintiff failed to file a response within twenty-one days as required by MCR 2.108(A)(5), plaintiff's failure to deny defendant's allegations constituted an admission under MCR 2.111(E)(1). When defendant first moved for summary disposition, it intended to rely on plaintiff's admissions as factual support to demonstrate that it was entitled to relief as a matter of law under MCR 2.116(C)(10), in accordance with MCR 2.116(G)(3)(b). However, the trial court subsequently permitted plaintiff to file a belated reply pursuant to MCR 2.108(E). Defendant claims that the trial court erroneously granted such permission, and that defendant was therefore entitled to submit belated affidavits.

The question of whether the trial court erred in granting plaintiff extra time to reply to defendant's demand is not before this Court, however. If defendant believed that it had been wronged by the trial court's decision to grant plaintiff extra time to reply, defendant could either have sought this Court's leave to file an interlocutory appeal pursuant to MCR 7.103 or filed a cross appeal in the instant case. In the absence of a cross appeal, an error claimed to be prejudicial to the appellee cannot be considered, nor may the appellee be granted an enlargement of relief. *McCardel v Smolen*, 404 Mich 89, 95, n 6; 273 NW2d 3 (1978), quoting *Pontiac Twp v Featherstone*, 319 Mich 382, 390; 29 NW2d 898 (1947). Because defendant has not availed itself of these means of addressing the trial court's purported error, we will not consider whether defendant is entitled to relief.

Plaintiff next claims that the trial court erred in refusing to consider its pleadings in determining whether a question of fact existed for purposes of deciding a motion for summary disposition under MCR 2.116(C)(10). It is a well-established rule that "an adverse party [in a (C)(10) motion] may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Thus, the trial court did not err in refusing to consider the allegations in plaintiff's pleadings in determining whether there was a genuine issue for trial. Because the trial court properly refused to consider plaintiff's pleadings in determining whether a factual issue remained for trial, we need not consider whether those pleadings, if taken as true, would have created a question of fact.

Plaintiff also claims that the trial court erred in deciding defendant's summary disposition motion prior to the completion of discovery. This issue presents a question of law that we review de novo on appeal. *Oakland Hills Development Corp, supra* at 284.

Summary disposition under MCR 2.116(C)(10) ordinarily should not be granted until discovery is completed. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1994). Summary disposition may be proper prior to the completion of discovery, however, if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Id.* If the party opposing a motion for summary disposition cannot present competent evidence of a disputed fact because discovery is incomplete, the party must at least assert that a dispute does indeed exist and support the allegation by some independent evidence, even if hearsay. *Rosenboom v Vanek*, 182 Mich App 113, 119; 451 NW2d 520 (1989).

In the instant case, defendant agreed to extend discovery to July 25, 1995. The summary disposition motion was heard on June 19, 1995. Prior to the motion, defendant moved for a protective order, which may have stalled plaintiff's efforts to depose defendant's officials. Under these circumstances, we believe that the trial court prematurely heard the motion for summary disposition. Should defendant move for summary disposition again after remand, the trial court should not hear the motion until the parties have completed discovery.

Reversed and remanded for entry of order denying defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Michael J. Kelly

/s/ Michael J. Talbot