STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE J. STOCKLER,

Plaintiff-Appellant,

v

SANDOR M. GELMAN and SANDOR M. GELMAN, P.C.,

Defendants-Appellees.

UNPUBLISHED
March 20, 1998

No. 199956
Oakland Circuit Court
LC No. 96-528796-FH

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiff's motions for reconsideration and for leave to amend his complaint. We affirm.

Plaintiff and his daughter, Sheila Meyers, consulted with defendant Sandor M. Gelman regarding legal representation of Meyers in her pending divorce action. As a result of these discussions, Meyers executed a retainer agreement with defendants. In the retainer agreement, defendant Gelman confirmed that he had received Meyers' retainer fee and agreed to return any unused portion of the retainer fee to her. The retainer agreement was addressed to Meyers, and plaintiff is not mentioned anywhere in the document. However, it is undisputed that plaintiff actually paid the retainer fee. Plaintiff also executed a "Guaranty of Payment of Obligation," whereby he agreed to pay defendants any unpaid balance of attorney fees and costs at the conclusion of the divorce action.

Meyers apparently became dissatisfied with defendants and released them approximately one month after they were retained. When defendants refused to tender the entire retainer fee, plaintiff filed suit alleging breach of third-party beneficiary contract and common and statutory conversion. Defendants filed a motion for summary disposition which was granted pursuant to MCR 2.116(C)(10).

On appeal plaintiff first argues that the trial court's grant of summary disposition was premature as no discovery had been undertaken in the trial court action. We disagree. A motion for summary disposition may be raised at any time, except that it is premature if granted before discovery on a

disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition may be appropriate prior to the close of discovery if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1995).

Here, plaintiff has not identified any areas where discovery could have uncovered factual support for his claims. Plaintiff may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. We decline to do so. *Check Reporting Services, Inc v Michigan Nat Bank - Lansing*, 191 Mich App 614, 628; 478 NW2d 893 (1991).

Plaintiff also argues on appeal that the trial court erred in granting summary disposition because he was a third-party beneficiary to the retainer agreement between defendants and Meyers. We disagree.

We review a grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *McGuirk Sand & Gravel, Inc, v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996). MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact." In reviewing the trial court's decision to grant summary disposition, we must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of plaintiff, granting him the benefit of any reasonable doubt, and determine whether there is a genuine issue of disputed fact. *Palazzola v Karmazin Products Corp*, 223 Mich App 141,150-151; 565 NW2d 868 (1997), lv pending.

An individual may not sue on a contract to which the individual is not a party unless it is determined that the individual was an intended third-party beneficiary of the contract. *Koenig v City of South Haven*, 221 Mich App 711, 715; 562 NW2d 509 (1997), lv pending. Third-party beneficiary law in Michigan is controlled by statute. MCL 600.1405; MSA 27A.1405, provides in pertinent 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.

The test for whether a person is a third-party beneficiary of a contract is objective; the subjective intent of the parties to the contract is irrelevant. *Alcona Community Schools v Michigan*, 216 Mich App 202, 205; 549 NW2d 356 (1996). Where a contract is primarily for the benefit of the parties thereto, the fact that a third party is incidentally benefited does not confer third-party beneficiary rights on that person. *Id*. The plaintiff has the burden of proving that he was an intended beneficiary of the contract. *Koenig, supra* at 716. The contract itself reveals the parties' intentions. *Id*.

Here, an objective reading of the retainer agreement reveals no evidence that plaintiff was an intended beneficiary. The retainer agreement outlines the obligations of Meyers and Gelman regarding Gelman's representation of Meyers in her domestic relations matter. The agreement does not mention plaintiff at all. Plaintiff argues that he benefited under the retainer agreement because when Meyers received child support and alimony, his moral, religious and parental duty to support her and her children would end. However, we find that this benefit was merely incidental to the contract. Under these circumstances, plaintiff cannot show that he was an intended beneficiary of the contract, and the trial court properly granted summary disposition for defendants on his third-party beneficiary claim.

Plaintiff continually points to the guaranty as a source of his status as a third-party beneficiary. However, the guaranty did not make plaintiff a party to, or beneficiary of, the retainer agreement. The guaranty did not create an attorney-client relationship between plaintiff and defendants, nor did it require Gelman to perform any actions that would benefit plaintiff. Moreover, the guaranty never came into effect since all fees were covered by the retainer. Despite plaintiff's arguments and protestations, the guaranty in this case is simply irrelevant.

Plaintiff also argues that there were genuine issues of fact which were disputed. While there may have been disputed issues of fact, none of them were material to the dispositive legal claims. Plaintiff stated in an affidavit that defendants made promises directly to him to provide legal services for Meyers which were directly for his benefit. However, the subjective intent of the parties is irrelevant in determining whether plaintiff was a third-party beneficiary. The intent of the parties was clearly shown in the contract. Plaintiff did not argue that he entered into an oral contract with defendants; he only argued that his conversation with Gelman showed that he was an intended beneficiary to the retainer agreement. Since this conversation was not dispositive of any legal claims, disputes over the content of the conversation are irrelevant.

Plaintiff next argues on appeal that the trial court erred in granting summary disposition because he had a viable claim for common law and statutory conversion of the retainer fee. We disagree. In Michigan, conversion is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). See also *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). "The gist of conversion is the interference with control of the property." *Prosser & Keeton, Torts* (5th ed), § 15, p 102.

Here, it is undisputed that plaintiff wrote a check for $5,000 to defendants to retain them to represent Meyers in her domestic relations matter. The retainer agreement stated, in relevant part:

> As we discussed, my charges are $225.00 per hour plus costs, to be set off against the retainer. . . . If the case is concluded without the retainer being used completely, you will receive a refund of the unused portion.

Clearly, defendants properly received the $5000 check as part of the retainer agreement. Under the agreement, Meyers was the only person who had any right to return of any portion of the retainer. Thus, the only person who can possibly sue for its return is Meyers, and plaintiff's claims must fail.

Plaintiff also argues that, by placing a lien on Meyers' share of the proceeds of the divorce action, defendants converted Meyers' property resulting in damage to plaintiff. However, because plaintiff does not have any legal interest in the property on which the lien was imposed, he has no standing to bring a claim for conversion of the property against defendants.

Next, plaintiff argues that the trial court abused its discretion in denying his motion for leave to amend. We disagree. A court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2). However, a trial court need not grant leave to amend where the amendment would be futile. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

Here, plaintiff argues that he has viable claims for return of the retainer fee. However, as previously discussed, defendant's retention of the retainer was governed by the retainer agreement. Because plaintiff has no rights under the retainer agreement, he may not maintain an action for recovery of the fee. Plaintiff also claims that mutuality of obligation between plaintiff and defendants pursuant to the guaranty entitled him to maintain an action for the return of the retainer fee. As noted above, the guaranty is irrelevant; it did not create any rights in plaintiff. In addition, plaintiff's claims for misrepresentation and fraud are all based on allegations that defendants did not adequately represent his daughter's legal interests in her domestic relations case. These claims are legal malpractice claims that plaintiff, who had no attorney-client relationship with defendants, has no standing to make. Moreover, even if he did have standing to bring these claims, they are barred by the two-year statute of limitations. MCL 600.5805(4); MSA 27A.5805(4). Therefore, we find that the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend his complaint.

Finally, plaintiff argues that the trial court abused its discretion in denying his motion for reconsideration. Plaintiff's motion merely restated the issues he discussed in his response to defendants' motion for summary disposition. Because plaintiff failed to show a palpable error, the trial court properly denied plaintiff's motion for reconsideration. See MCR 2.119(F)(3); *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly