

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

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J. WILL PAULL, CLARK F. COLTON,  
WILLIAM GREGG, DENNIS BROWN,  
ROBERT BOONE and KENNETH D.  
WARNICK,

Plaintiffs-Appellees,

v

LEWIS J. UNDERHILL III, KENNETH  
HUNTER and DOROTHY HUNTER,

Defendants-Appellants.

UNPUBLISHED  
May 1, 2003

No. 236436  
Oakland Circuit Court  
LC No. 01-029347-CZ

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MARINER FINANCIAL SERVICES, INC.,

Plaintiff-Appellee,

v

LEWIS J. UNDERHILL III, KENNETH  
HUNTER, DOROTHY HUNTER, SALLY  
HUNTER, KENNETH ORLOWSKI, DIANN  
ORLOWSKI and SAFETY ANALYSIS INC.  
EMPLOYEES PLAN & TRUST,<sup>1</sup>

Defendants-Appellants.

No. 240045  
Oakland Circuit Court  
LC No. 01-034855-CZ

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Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

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<sup>1</sup> Appellants assert that defendants Kenneth Orłowski, Diann Orłowski and Safety Analysis, Inc. Employees Plan & Trust are not part of this appeal because they have abandoned their claims against Mariner.

In these consolidated appeals, defendants obtained participation certificates in the Mortgage Corporation of America (“MCA”) through the brokerage services of Mariner Financial Services, Inc (“Mariner”). After defendants lost their investments due to the failure of the MCA, they filed arbitration claims with the National Association of Securities Dealers (“NASD”) against Mariner and its officers and directors.<sup>2</sup> Mariner commenced the instant cases to bar the arbitrations on the ground that the claims were filed after the one-year limitation period provided by the Michigan Business Corporations Act (“BCA”).<sup>3</sup> Defendants appeal as of right from the court’s incorporated orders granting, in Docket No. 236436, summary disposition in favor of plaintiffs and denying defendant Lewis Underhill’s motion for summary disposition, and granting, in Docket No. 240045, declaratory relief in favor of plaintiff, Mariner. We affirm.

### I. Standard of Review

The only motions for summary disposition that were submitted to the circuit court in these consolidated cases were those filed by Underhill and plaintiffs in Docket No. 236436. The court expressly asserted that it determined Underhill’s motion under MCR 2.116(C)(10), and plaintiffs’ motion under MCR 2.116(C)(7) (the claim is barred because of the statute of limitations).

This Court reviews de novo a trial court’s decision to grant summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). When deciding a motion for summary disposition under MCR 2.116(C)(10), “the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial.” *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmoving party cannot simply rest on allegations or denials, but must present evidence showing that a material issue of fact is in dispute requiring resolution at trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Id.* at 455-456, n 2.

Under MCR 2.116(C)(7), we must accept the well-pleaded allegations of the nonmoving party as true and construe them most favorably to the nonmoving party. *Grazia v Sanchez*, 199 Mich App 582, 583; 502 NW2d 751 (1993). If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Asher v Exxon Co, USA*, 200 Mich App 635, 638; 504 NW2d 728 (1993).

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<sup>2</sup> “Plaintiffs” in this opinion refers to Mariner’s former officers and directors named in Docket No. 236436.

<sup>3</sup> MCL 450.1841a and 1842a.

## II. Analysis

Defendants first argue that the circuit court failed to determine the eligibility of the arbitration claims under Rule 10101 of the NASD Code of Arbitration Procedure, and that the court improperly determined the merits of the case in violation of the NASD Code.

The existence and enforceability of an arbitration agreement are questions of law for a court to determine de novo. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). An arbitration agreement is in the nature of a release or a statute of limitations, narrowing a party's legal rights to pursue a particular claim in a particular forum, and the party asserting an arbitration agreement defense to litigation must timely assert that defense. *Hendrickson v Moghissi*, 158 Mich App 290, 298; 404 NW2d 728 (1987). An agreement to arbitrate does not deprive a circuit court of subject matter jurisdiction over a controversy unless a constitutional provision or the statute pursuant to which the parties agreed to arbitrate clearly and unambiguously provides for such a divestiture. *Id.* A party's right to assert arbitration as a defense may be waived by certain conduct, and each case is to be decided on the basis of its particular facts. *Id.* at 299-300. Such conduct may include the filing of a motion for summary disposition. *North West Michigan Constr Inc v Stroud*, 185 Mich App 649, 652; 462 NW2d 804 (1990) (quotations omitted).

In their motion for summary disposition, plaintiffs argued that Underhill failed to show the existence of an arbitration agreement. Underhill responded by merely asserting, in his own motion for summary disposition, that the circuit court lacked jurisdiction to address the merits of the case because he sought to have his claims submitted to the NASD for arbitration. Underhill failed to cite to any NASD Code rule or legal authority, or produce any arbitration agreement in support of this claim. Moreover, as the proceedings in this case developed with the inclusion of the Hunters as defendants in Docket No. 236436, neither Underhill nor the Hunters answered plaintiffs' motion for summary disposition nor did they supplement their argument with any authority or documentary evidence.<sup>4</sup> We conclude that the court properly determined that there was no evidence of the existence of an agreement to arbitrate and that the court had jurisdiction to summarily determine the issues pursuant to MCR 3.602(B)(2).

<sup>4</sup> In a subsequent motion for reconsideration of the court's order and opinion, Underhill argued for the first time on this record that Rule 10101 of the NASD Code mandated arbitration in this case. Recently, in *Gregory J Schwartz & Co, Inc v Fagan*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 229389, issued January 31, 2003), slip op p 3, this Court held that the question whether a defendant's claims are eligible for arbitration under Rule 10304 of the NASD Code is a question for the arbitrator, not for the court. *Id.* However, unlike defendants in this case, the parties in *Schwartz* provided the circuit court with the NASD Code rule at issue, and they produced an arbitration contract. *Id.* The contract did not include a provision specifically indicating that a court would apply Rule 10304. *Id.* In reaching its decision, this Court relied on the decision in *Howsam v Dean Witter Reynolds, Inc*, \_\_\_ US \_\_\_; 123 S Ct 588, 590-591; 154 L Ed 2d 491 (2002), where the parties had produced the standard client service agreement's arbitration clause in that case. Accordingly, we conclude that the court properly declined to address this legal theory that could have been raised in Underhill's motion for summary disposition. See MCR 2.119(F)(3); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Defendants next argue that the Michigan Securities Act, MCL 451.810(b), imposes liability on plaintiffs individually and separately from the corporate entity. Specifically, defendants request this Court to read the above provision in conjunction with the notice of dissolution provisions of the Business Corporation Act, MCL 450.1841a and 1842a. Although defendants raise on appeal a properly briefed argument related to legislative intent and public policy considerations with respect to whether the above provision of the Michigan Securities Act would trump notice of dissolution provisions of the Business Corporation Act, Underhill raised this issue only cursorily in his motion for summary disposition, without any legal analysis or supporting authority. Because the issue was neither properly briefed nor argued before the circuit court, defendants have waived their right to pursue relief on this basis. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). Moreover, Underhill did not dispute plaintiffs' argument that his action was barred by the four-year limitation period provided by MCL 451.810(e), and defendants do not dispute this on appeal. *Asher, supra*. Therefore, we do not address this claim.

Defendants finally argue that their claims against plaintiffs are not barred by the notice of corporate dissolution provisions of the Business Corporation Act, MCL 450.1841a and 1842a, because Mariner knew of defendants' existing claims but failed to provide them with written notice of Mariner's dissolution. Specifically, defendants request this Court to read into the BCA the manner in which written notices of dissolution should be made. We decline to address this issue for the same reasons discussed above. On appeal, defendants present a new legal theory that was not raised before the circuit court and defendants improperly expand the record by asserting facts that were not before the circuit court. *Morales, supra; Severn, supra; Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App 643, 648; 482 NW2d 474 (1992). Therefore, we decline to address this issue.

Affirmed.

/s/ Patrick M. Meter  
/s/ Kathleen Jansen  
/s/ Michael J. Talbot