

STATE OF MICHIGAN
COURT OF APPEALS

MARK W. DUPUIS,

Plaintiff/Garnishee Plaintiff-
Appellant,

v

VARIOUS MARKETS, INC.,

Defendant,

and

PONTA, CASTLE & INGRAM AGENCY, INC.,

Garnishee Defendant-Appellee.

UNPUBLISHED

May 30, 2006

No. 266443

Oakland Circuit Court

LC No. 1999-016013-CK

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff and garnishee plaintiff, Mark W. Dupuis (hereafter “plaintiff”), appeals as of right from the trial court’s order granting summary disposition under MCR 2.116(C)(10) in favor of garnishee defendant, Ponta, Castle & Ingram Agency, Inc. (hereafter “PCI”). We reverse and remand for further proceedings.

I. FACTS

On April 1, 1999, plaintiff, Mark Dupuis¹, loaned defendant, Various Markets, Inc. (VMI) the sum of \$367,035.06. VMI, an insurance agency, then executed a promissory note to plaintiff. Plaintiff subsequently loaned VMI an additional \$25,000, bringing the total outstanding sum owed to plaintiff by VMI to \$392,035.06. On April 29, 1999, VMI entered into an “account service agreement” with PCI, under which VMI would transfer its client accounts to PCI for servicing. PCI was to receive commissions from insurers on premiums to be paid by

¹ Plaintiff was an employee of VMI as well as the son of VMI’s president and sole shareholder, Wayne Dupuis (Wayne).

clients of VMI. As part of this account service agreement, Independence Insurance Services Agency, Inc. (ISSA), a property and casualty insurance company owned by Richard Glanda and Wayne Dupuis² (Wayne) entered into an identical arrangement with VMI. Additionally under this account service agreement, Michigan National Bank was an assignee of the rights of Wayne, pursuant to a forbearance and assignment agreement executed by IISA, Michigan National's borrower, and guarantors Wayne and Glanda. However, the assignment specifically excluded monies due VMI.

Plaintiff alleged that Wayne was liable for the debt as the guarantor of the promissory note. In July 1999, plaintiff filed suit against VMI for breach of the promissory note. On September 17, 1999, Wayne was dismissed, without prejudice, pursuant to a stipulation between plaintiff and Wayne. Plaintiff then obtained a default judgment on September 29, 1999 of \$392,035.06 against VMI. Plaintiff attempted to collect on the judgment by serving PCI with writs of garnishment issued in November 1999 and December 2003.

The sole issue on appeal concerns the latter writ, which was dated December 8, 2003 and served on PCI on February 2, 2004. In its responsive garnishee disclosure, dated August 15, 2004, PCI claimed that it was not indebted to VMI because, "[a]ny money owed was paid to [VMI] or Michigan National Bank before the garnishment was served." Plaintiff therefore argues that the trial court erred in granting summary disposition under MCR 2.116(C)(10) in favor of PCI because plaintiff established genuine issues of material fact regarding whether PCI was indebted to VMI.

II. STANDARD OF REVIEW

We review de novo a trial court's grant of summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 120. The trial court considers affidavits, pleadings, depositions, admissions, and other evidence, to the extent that the content or substance would be admissible as evidence, in a light most favorable to the nonmoving party. *Id.* at 120-121; MCR 2.116(G)(6). The moving party has the initial burden of presenting evidence in support of the motion. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358; 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to establish a genuine issue of material fact. *Id.* If the proffered, admissible evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120-121.

III. GARNISHMENT PROVISIONS AND PROCEDURES

Postjudgment garnishment actions are governed by MCR 3.101. *Nationsbanc Mortgage Corp v Luptak*, 243 Mich App 560, 564; 625 NW2d 385 (2000). Under this court rule, if there is a dispute regarding a garnishee defendant's liability or another person claims an interest in the

² Wayne was a defendant in this case until he was dismissed by stipulation on September 17, 1999.

garnishee's property or obligation, the issue is tried in the same manner as other civil actions. MCR 3.101(M)(1); *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582; 584 NW2d 372 (1998) (hereafter *Waatti I*). The plaintiff's verified statement made in support of a request for a writ of garnishment serves as the complaint, and the garnishee's disclosure serves as the answer. MCR 3.101(M)(2); *Nationsbanc, supra* at 565. The garnishee must reveal its liability to the principal defendant in the disclosure, but a general denial of liability is sufficient. MCR 3.101(H)(1); *LeDuff v Auto Club Ins Ass'n*, 212 Mich App 13, 18; 536 NW2d 812 (1995). The garnishee may claim a setoff against the principal defendant, except for claims for unliquidated damages for wrongs or injuries. MCR 3.101(H)(1); see also *Waatti & Sons Electric Co v Dehko*, 249 Mich App 641, 647-649; 644 NW2d 383 (2002); *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 298; 517 NW2d 319 (1994).

In general, the plaintiff may not recover against a garnishee defendant unless the principal defendant has a right to recovery. *Poelman v Payne*, 332 Mich 597, 52 NW2d 229 (1952). But MCR 3.101(G)(1) provides, in pertinent part:

Subject to the provisions of the garnishment statute and any setoff permitted by law or these rules, the garnishee [PCI] is liable for

* * *

(d) all debts, whether or not due, owing by the garnishee [PCI] to the defendant [VMI] [at the time] the writ is served on the garnishee [PCI], except for debts evidenced by negotiable instruments or representing the earnings of the defendant.

IV. ANALYSIS

A. Timing of Debt Owed by Garnishee PCI to Defendant VMI

Here, the appeal does not involve any claim of setoff.³ Hence, applying MCR 3.101(G)(1)(d) to the disputed issue in this case, plaintiff could avoid losing a motion for summary disposition under MCR 2.116(C)(10) only by providing factual support for its claim that PCI owed an existing debt to VMI on February 2, 2004, which was the date the writ of garnishment was served on PCI. See *Waatti I, supra* at 587-589. We note that the trial court erred to the extent that it identified December 8, 2003, as the relevant date for determining the existence of the debt, but that the error is not material to the resolution of this appeal.

B. Account Service Agreement

³ In general, a setoff is a legal or equitable remedy that may arise when parties apply mutual debts against each other. *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). It constitutes a counter-demand arising out of a transaction extrinsic to the plaintiff's claim. *Roelmeyer v Roelmeyer's Estate*, 219 Mich 322, 330-331; 189 NW 83 (1922).

Plaintiff claims that evidence regarding the April 29, 1999, account service agreement between PCI, as a licensed insurance agency, and four “transferors,” VMI, Wayne Dupuis, Richard Glanda, and IISA established a genuine issue of material fact. We agree. The agreement was executed by each of the four transferors, with Wayne signing the agreement on his own behalf and as an officer of VMI and IISA. It required PCI to service accounts transferred to it from VMI and IISA for a period of not more than three years ending on April 30, 2002. Wayne and Glanda agreed to assist PCI service the transferred accounts under separate independent contractor agreements.

Although providing for an advance payment of \$15,000 to the transferors upon satisfaction of specified conditions, the ultimate amount payable to VMI and IISA depended on the amount of commissions collected by PCI and adjustments that PCI was authorized to make against the payments, all of which was to be reflected in monthly accountings. Pursuant to the account service agreement between PCI and VMI “PCI agreed to pay (on a retention basis) to VMI 55% of net commissions collected by PCI on each Transferred Account identified as business placed through IISA but owned by VMI, or as business of VMI . . . for a period of 3 years from and after the Effective Date, so long as TRANSFERORS have not breached this Agreement” Additionally, PCI was authorized to make certain adjustments against monies due VMI for commission changes and payments to insurers.

However, plaintiff also asserts that the \$15,000 advance payment provided in this agreement should be treated as an entitlement to a “bonus.” We disagree. An appellant may not merely announce a position and leave it to this Court to discover and rationalize its basis. *Peterson Novelty, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). The agreement at issue here clearly indicates that \$15,000 was intended only as an advance payment.

We agree with plaintiff that there was no evidence of any direct payments made by PCI to VMI under this agreement. Even PCI’s president, Daniel Castle, indicated in his deposition that payments were not made directly to VMI, but rather would be made to Wayne Dupuis and Glanda personally. But with the exceptions of PCI’s payments to Michigan National Bank, plaintiff failed to raise any genuine issue of material fact regarding whether PCI made authorized payments out of the commissions due VMI.

Plaintiff further asserts that a genuine issue of material fact was established by Castle’s inability to explain the reason for PCI’s June 14, 1999 check to Armanda Insurance, and two June 14, 1999 checks to I. C. Risk Services, Inc., when confronted with copies of the checks during his deposition. We disagree. The various items of correspondence submitted by PCI in support of its motion for summary disposition establish that PCI wrote letters to Wayne and Glanda during the relevant time period in 1999, which summarized the earned commissions of IISA and VMI, referred to the producer reports on which they were based, and specifically gave notice that the earned commissions would be paid to unpaid insurance companies, brokers, and insureds, as agreed, except that the December 15, 1999, statement for the month of November 1999 claimed a deficiency to be deducted from future earned commissions.

Further, while plaintiff submitted evidence of Wayne’s response to PCI regarding the statement for June 1999, Wayne’s only complaint was a lack of accounting for a portion of renewal business. Additionally, while Wayne denied in his affidavit that he ever authorized payments to a person or entity other than VMI, the account service agreement itself authorized

PCI to make certain adjustments against monies due VMI for commission changes and payments to insurers.

Viewing the evidence in a light most favorable to plaintiff, we conclude that plaintiff offered nothing more than speculation that the three checks written by PCI constituted unauthorized payments out of VMI's earned commissions. Parties opposing a motion for summary disposition must present more than conjecture and speculation to establish a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

We also conclude that plaintiff has not established the relevancy of his attorney's answer to PCI's interrogatory regarding the amount of debt that plaintiff intended to prove. The problem with allowing a party to introduce his own answers to interrogatories is the hearsay rule. *Hanlon v Firestone Tire & Rubber Co*, 391 Mich 558, 574-575; 218 NW2d 5 (1974) (opinion of Coleman, J.). A genuine issue of material fact must be established by substantively admissible evidence. MCR 2.116(G)(6). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership, supra* at 364.

C. Payments by PCI to Michigan National Bank

With respect to plaintiff's claim concerning PCI's payments to Michigan National Bank, we agree that there was no evidence that VMI itself owed money to Michigan National Bank, and we conclude that the trial court erred in finding no genuine issue of material fact regarding plaintiff's theory that VMI did not authorize the payments by PCI.

The correspondence from PCI's president, Castle, between January 26, 2000, and May 30, 2002, to the bank's representatives indicates that PCI paid earned commissions due both IISA and VMI to Michigan National Bank, subject to certain adjustments. The payments began before PCI's execution of the settlement agreement with Michigan National Bank in February 2001, in the lawsuit brought by Michigan National Bank against IISA, Premium Financial Corporation, PCI, Glanda, and Wayne.

Michigan National Bank was then an assignee of Wayne's rights under the account service agreement pursuant to the forbearance and assignment agreement executed by its borrower, IISA, and two guarantors, Glanda and Wayne, in June 2000, but the assignment specifically excluded monies due VMI. Stated otherwise, that agreement defined the relevant proceeds under the account service agreement as "all proceeds, net of offsets, currently being held and received by PCI in the future for the benefit of Borrower and Guarantors, specifically excluding any monies being held for the benefit of Various Markets, Inc." Likewise, the settlement agreement executed by PCI and Michigan National Bank in February 2001 only obligated PCI to tender proceeds that IISA would be entitled to receive under the account service agreement to Michigan National Bank.

Neither the settlement agreement nor the assignment agreement authorized PCI to pay earned commissions due VMI to Michigan National Bank. Therefore, we must examine the other proofs to determine if there was a genuine issue of material fact. A corporation may only act through its officers and agents. *In re Kennison Sales & Engineering Co, Inc*, 363 Mich 612,

717; 110 NW2d 579 (1961). Here, it is necessary to look to Wayne's actions to determine if VMI approved the payments. An agent's authority to bind a principal may be actual or apparent. *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992).

Viewed in a light most favorable to plaintiff, the evidence established that Wayne had dual interests in his various dealings with PCI, as an officer of VMI and in an individual capacity as an independent contractor. Wayne's affidavit indicates that he was the president and sole shareholder of VMI and VMI's subsidiary, American Yacht Society. Wayne averred that he "never authorized or approved PCI or its principal, Daniel Castle, to make payments of any sums of money owed to VMI under the [Account Service] Agreement to Michigan National Bank." Conversely, Castle stated in his deposition that Wayne authorized PCI's payment to Michigan National Bank out of the commissions due VMI.

Ordinarily, conflicting testimony on a material factual matter would be sufficient to preclude summary disposition, inasmuch as it is inappropriate for a court to resolve credibility issues when deciding a motion for summary disposition. *SSC Assoc Ltd Partnership, supra* at 365. But in this case, PCI submitted additional evidence regarding Wayne's conduct in a supplemental reply brief in support of its motion for summary disposition. "Summary disposition cannot be avoided by conclusory assertions that are at odds with . . . actual historical conduct of a party." *Aetna, Cas & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993). Although neither Wayne nor his principal, VMI, is a party to this garnishment proceeding, we find this general principle applicable to Wayne's conduct.

In this regard, PCI submitted evidence of a July 28, 2000 check for \$15,610.65, from PCI to Michigan National Bank, on which Wayne relied in January 2001 when responding to a motion for partial summary disposition brought by Michigan National Bank in the litigation concerning IISA's debt. Wayne, through his attorney, sought credit for the full amount of the check against the indebtedness. This was the same amount that Castle, in a July 28, 2000, letter to Michigan National Bank, indicated was paid out of commissions for a period between April 1999 and June 2000, after adjustments for certain boat policies paid in June 1999 and commissions held by Citizens Insurance Company.

PCI's payment to Michigan National Bank was not, however, mentioned in the various monthly letters written by PCI to Wayne and Glanda, which summarized IISA's and VMI's earned commissions, based on producer reports, during the relevant time period in 1990. The letters simply advised Wayne and Glanda to retain the records for verification of the business renewed through PCI. Also, the statement of Wayne's attorney in a response to Michigan National Bank's motion that its calculation of damages was erroneous because "it fails to give credit for the sums received . . . on account of liquidation of collateral securing the subject loan," suggests that Wayne's attorney was acting on the basis of an understanding that the check only represented commissions attributable to IISA under the account service agreement. There was no evidence that VMI commissions secured IISA's loan.

Therefore, viewed in a light most favorable to plaintiff, the evidence offered by PCI did not contradict Wayne's averment that he did not authorize PCI to pay earned commissions due VMI to Michigan National Bank. The circumstances of this case are complicated by the various interests that Wayne possessed when dealing with different entities, including PCI. We further note that there is evidence of a significant period of time elapsing between PCI's final payment

to Michigan National Bank in or about May 2002, and Wayne's averment in his September 2, 2005 affidavit that he did not authorize the payments. Under some circumstances, a party's course of conduct may constitute a waiver. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373-374; 666 NW2d 251 (2003) (discussing the waiver of contractual terms).

D. Conclusion

We conclude that because a genuine issue of material fact was shown with respect to whether Wayne authorized PCI to pay earned commissions due VMI to Michigan National Bank, summary disposition was inappropriate. Whether plaintiff can actually prove his claim, as well as the amount of PCI's payments to Michigan National Bank that are attributed to VMI, must be resolved at trial.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello