

STATE OF MICHIGAN
COURT OF APPEALS

DETROIT LAND DEVELOPMENT &
HOLDINGS, LLC,

Plaintiff-Appellant,

v

MLK-BUCHANAN COMMUNITY
DEVELOPMENT CORPORATION and NRP
HOLDINGS, LLC,

Defendants-Appellees.

UNPUBLISHED
January 29, 2013

No. 307629
Wayne Circuit Court
LC No. 11-009141-CK

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motion for summary disposition. We affirm.

Plaintiff's complaint alleged that (1) plaintiff and defendants entered into a Development Agreement by which the parties would jointly participate in the construction and operation of a housing development, (2) plaintiff was entitled to 20 percent of the development fee paid to the defendants, (3) the development fee was estimated to be \$1,000,000, (4) plaintiff received only \$94,052.23 and was entitled to \$200,000, and (5) defendants breached the agreement by failing or refusing to make the full contractual payments. Plaintiff sought judgment in the amount of \$105,947.77, the remaining balance allegedly due under the agreement.

Defendants moved for summary disposition under MCR 2.116(C)(5), (C)(8), and (C)(10), arguing that plaintiff's fee for services was based on a percentage of the amount received by defendants as a development fee for the project. Defendants argued that the agreement estimated that the development fee would be \$1,000,000, but that only \$520,260 was ever paid to defendants. Accordingly, defendants argued that plaintiff's 20 percent fee was only \$104,520 and that this was the amount paid to plaintiff. Defendants argued that plaintiff's claim for additional funds was not ripe unless and until they received payment of additional development fees. Defendants asserted that there existed no genuine issue of material fact and that they were entitled to judgment as a matter of law. Defendants also argued that plaintiff lacked standing to bring the claim because it has not filed an annual report since 2005 as required of limited liability companies.

In support of their position, defendants filed the affidavit of Theodore Einhorn, in which he averred that (1) he was general counsel for NRP Holdings, (2) his investigation had revealed that plaintiff had not filed an annual report since 2005, (3) the agreement provided that plaintiff would receive 20 percent of the fees to be paid to the partnership, (4) the partnership received \$520,260 to date and plaintiff was paid exactly 20 percent of that amount, and (5) plaintiff incorrectly alleged that it was paid only \$94,052.23 when in fact it was paid \$104,052. Canceled checks made out to plaintiff were attached to the affidavit.

The trial court granted summary disposition for defendants. We review de novo the trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Because the court considered facts outside the pleadings in deciding defendants' motion, we treat the dismissal of plaintiff's claim as having been based on MCR 2.116(C)(10). *Mitchell Corp v Dep't of Consumer & Ind Servs*, 263 Mich App 270, 275; 687 NW2d 875 (2004). Summary disposition is proper if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

The interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). If contract language is clear and unambiguous, its meaning presents a question of law for the court. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

As an initial matter, defendants cite the incorrect statutory provisions in support of their contention that plaintiff lacked standing to sue. Relying on MCL 450.1922(1), defendants argue that plaintiff did not have standing because it had failed to file its annual reports for at least two consecutive years and had been automatically dissolved. Specifically, defendants assert that "pursuant to MCL 450.1922(1), [plaintiff] had dissolved automatically" and "[a]s a nonexistent corporation . . . [plaintiff] had no legal status and no capacity to sue." Of course, the problem with defendants' reliance on § 922(1) of the Business Corporation Act is that plaintiff is a limited liability company—not a corporation. Unlike the Business Corporation Act, the Limited Liability Company Act does *not* provide for automatic dissolution as a penalty for a company's failure to file its annual statements. See MCL 450.4207; MCL 450.4207a(2) and (3). Although a limited liability company that fails to file its annual statements for a period of two consecutive years and fails to cure this defect "is not in good standing," it "remains in existence and may continue to transact business in this state." MCL 450.4207a(3).¹ Plaintiff's past noncompliance with the annual filing requirement of MCL 450.4207 did not divest it of standing to sue.

Nevertheless, the trial court properly granted summary disposition because there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law. Plaintiff argues that it was entitled to fees in addition to those it had already received under the

¹ At any rate, plaintiff has cured all defects in the filing of its past annual statements and has returned to good standing. MCL 450.4107a(4).

contract. However, the contract clearly stated that plaintiff was entitled to receive 20 percent of the development fees paid to defendants. While the agreement stated that the total amount of the development fees was estimated to be \$1,000,000, this figure was merely a projection. When summary disposition was granted, plaintiff had received 20 percent of the development fees actually paid to defendants at that time. Plaintiff failed to demonstrate the existence of a genuine issue of disputed fact.

Furthermore, summary disposition was not premature. “Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete.” *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). “However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party’s position.” *Id.* at 25. Mere speculation that additional discovery might produce evidentiary support is not sufficient. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540-541; 687 NW2d 143 (2004). The party contending that summary disposition was premature based on incomplete discovery is not entitled to relief without providing “some independent evidence that a factual dispute exists.” *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004).

In this case, plaintiff failed to provide any evidence that a factual dispute existed or establish how discovery would produce independent evidence that a factual dispute existed. Although defendants moved for summary disposition before the discovery cutoff date and the trial court granted the motion before this date, further discovery did not stand a reasonable chance of uncovering factual support for plaintiff’s position. Given the plain and unambiguous contractual language, there was quite simply no need for further factual development. Therefore, we cannot conclude that summary disposition was premature. The trial court did not err by granting summary disposition in favor of defendants.

In light of our resolution of the issues, we need not consider whether plaintiff’s claim was ripe for adjudication.

Affirmed. As the prevailing party, defendants may tax costs pursuant to MCR 7.219.

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