

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN B. HAFFNER & ASSOCIATES,

Plaintiff/Counter Defendant-
Appellee,

v

MARSHALL STILLMAN, ROCHELLE
STILLMAN, BRANCH BUILDING COMPANY,
d/b/a BR FINANCIAL, 2257 WATERMAN LLC,
and 2257 WATERMAN OPERATING
COMPANY LLC,

Defendants/Counter Plaintiffs-
Appellants.

UNPUBLISHED
October 19, 2006

No. 269762
Oakland Circuit Court
LC No. 2005-065340-CK

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order granting plaintiff summary disposition. We reverse and remand for further proceedings.

This case arose after plaintiff provided defendants with attorney services over the course of several years and on several different legal matters. Plaintiff's records reflect that defendants paid several thousand dollars in attorney fees, but defendants remained over \$47,000 in arrears. Defendants did not dispute that plaintiff provided the services, but they claim that they provided several payments that plaintiff's records do not reflect.

Defendants first argue that the trial court erred when it granted plaintiff summary disposition on the issue of their liability. We agree. Defendant Marshall Stillman submitted an affidavit attesting that he had made payments to plaintiff with checks and with \$21,000 in cash, and that plaintiff's records failed to account for the payments. The record also reflected that defendant Marshall Stillman answered several interrogatory questions denying his receipt of any invoices, denying liability for any arrearages, and positively asserting that his account with plaintiff was current. Although plaintiff raised several objections to these documents below, the trial court never addressed the objections and never struck the documents. Plaintiff has not challenged the documentation on appeal and acknowledges their existence and content. Although we seriously doubt the validity of defendants' claims given the vague nature of defendant Marshall Stillman's affidavits and the substantial documentary evidence presented by

plaintiff, defendants nevertheless requested a jury trial, and Marshall Stillman has yet to take the stand. The trial court improperly weighed the credibility of the litigants on the sole basis of the documents presented and found that defendants owed plaintiff money.

Plaintiff argues that defendants failed to plead payment as an affirmative defense under MCR 2.111(F)(3), and that the defense was not supported by legally admissible evidence, such as receipts. We first note that defendants did specifically raise the issue of payment in their answer, so they directly challenged plaintiff's claims of liability on this ground, and any informality in the pleadings should have been raised and resolved in a motion under MCR 2.116(C)(8). Regarding the need for documentary evidence, an affidavit is documentary evidence of future testimony, and their content is what must be admissible. MCR 2.116(G)(6). Plaintiff acknowledges that the content of defendant Marshall Stillman's affidavits asserts that defendants are not liable and that no obligation remains outstanding. Plaintiff's citations do not support its assertion that affidavits are insufficient, so we reject this unfounded contention.

The trial court has several avenues of sanction available to it if it later finds that defendants' documents were improperly presented or the result of perjury, and we do not foreclose the use of those sanctions on remand, if need be. However, the court erred when it opined that, after reviewing all the documentary evidence, plaintiff was entitled to summary disposition on the issue of liability. Plaintiff's theories of liability were founded on defendants' failure to pay, and defendant Marshall Stillman insisted that he had paid all of defendants' legal debts, so liability was not an undisputed issue. See *Nasser v Auto Club Ins Ass'n*, 435 Mich 33; 457 NW2d 637 (1990). There is precedent for the proposition that payment is an affirmative defense whose burden of proof is carried by defendants, see *Bednarsh v Winshall*, 374 Mich 667, 671; 133 NW2d 202 (1965), so they must *specifically* support their claim with documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Nevertheless, a motion for summary disposition necessarily requires the movant to demonstrate initially that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law. MCR 2.116(C)(10). In this case, defendants' lack of payment was an essential element to all of plaintiff's claims. Nonpayment was consistently, albeit somewhat generally, refuted in the record, creating a genuine issue of material fact regarding plaintiff's entitlement to judgment as a matter of law. This approach is consistent with *Bednarsh, supra*, in which the issue of nonpayment, although undocumented, went to trial.

There were no glaring admissions, retractions, or other internal inconsistencies in any of defendants' affidavits or answers to interrogatories, so plaintiff's only argument was the unlikelihood that its records were wrong or that defendant Marshall Stillman was right. Viewing the documentary evidence in the light most favorable to defendants, *Quinto, supra*, a genuine factual dispute exists regarding defendants' payments, and the trial court erred when it granted plaintiff's motion for summary disposition. MCR 2.116(C)(10). Our disposition on this threshold issue effectively resolves the appeal, but we leave plaintiff's other motions to the trial court and do not foreclose later review of this matter after those motions are resolved. Nor do we prevent the trial court from sanctioning defendants for any abuses that may later come to light.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood