

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

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HOMETOWN USA, INC.,

Plaintiff-Appellant,

V

STONECO, INC.,

Defendant-Appellee.

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UNPUBLISHED

November 16, 2006

No. 269301

Monroe Circuit Court

LC No. 03-017144-CK

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. Because plaintiff's response to the motion for summary disposition lacked requisite support and focus, we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

Plaintiff sued defendant for breach of contract, asserting that it was a third-party beneficiary of defendant's contract with Lorton Trucking & Excavating, Inc. Defendant moved for summary judgment pursuant to MCR 2.116(C)(8), asserting that it did not have a contract with Lorton. Plaintiff argued that defendant was judicially estopped from denying the existence of a contract with Lorton.<sup>1</sup> The trial court ruled that there was no genuine issue of material fact that a written contract between defendant and Lorton did not exist and granted defendant's motion pursuant to MCR 2.116(C)(10). We review the trial court's ruling on a motion for

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<sup>1</sup> We reject plaintiff's reliance on judicial estoppel because the mere assertion of inconsistent positions is not sufficient to invoke the doctrine and plaintiff failed to show that the court in the prior action ruled as a matter of law that defendant had an express contract with Lorton. *Paschke v Retool Industries*, 445 Mich 502, 510; 519 NW2d 441 (1994). We also reject defendant's argument that plaintiff's suit is barred by res judicata because defendant was not a party to the suit between plaintiff and Lorton and has not shown that it was in privity with Lorton. *Dearborn Heights Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 127; 592 NW2d 408 (1998); *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999).

summary disposition de novo on appeal. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

Defendant filed its motion under MCR 2.116(C)(8). Such a motion considers whether the plaintiff has stated a valid claim for relief; it is determined with reference to the pleadings alone, and documentary evidence is not considered. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002); *Rorke v Savoy Energy, LP*, 260 Mich App 251, 253; 677 NW2d 45 (2003). Defendant never denied that plaintiff had stated a claim for breach of contract. Rather, the crux of its argument was that plaintiff could not prove that it was a third-party beneficiary to a contract between defendant and Lorton. Thus, the trial court should properly consider the motion under MCR 2.116(C)(10). “It is well-settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled.” *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005).

Plaintiff’s complaint is short and concise, alleging only one count of breach of contract.<sup>2</sup> The basic allegations were that plaintiff contracted with Lorton Trucking and Excavating Inc (Lorton) for Lorton to install an asphalt parking lot. In turn, Lorton then “purchased its supplies, such as asphalt and stone, from defendant.” The complaint then concludes, without elaboration, “Plaintiff is an intended third party beneficiary of the contract by and between Lorton and defendant.”

The parties dispute whether defendant had a written contract with Lorton and whether defendant knew that Lorton was buying the aggregate for use in paving plaintiff’s parking lot. The existence of a written contract between defendant and Lorton is not a necessary element of a third-party beneficiary claim. See *Kisiel v Holz*, 272 Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 267487, issued August 29, 2006), slip op at 3. Further, “[a]bsent clear contractual language to the contrary, a property owner does not attain intended third-party beneficiary status merely because the parties to the subcontract knew, or even intended, that the construction would ultimately benefit the property owner.” *Id.* The relevant inquiry surrounds the agreement between defendant and Lorton, even if oral, and if the agreement included an express promise by defendant to perform for plaintiff’s benefit or whether its primary purpose was for the benefit of defendant and Lorton making performance to plaintiff incidental. *Id.*; MCL 600.1405(1).

After discovery was completed,<sup>3</sup> defendant filed a motion for summary disposition under MCR 2.116(C)(8), arguing that defendant never undertook any obligation on behalf of, or towards plaintiff, such that plaintiff could have been identified as a third party beneficiary.<sup>4</sup> After arguments on the motion, the trial court granted defendant’s motion. The trial court

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<sup>2</sup> No written contract was attached or referenced in the complaint. MCR 2.113(F).

<sup>3</sup> Apparently, no depositions were taken, and the only discovery was through interrogatories and requests for production of documents.

<sup>4</sup> The only documents submitted with the motion, response and reply were pleadings - copies of a motion to consolidate and response thereto filed in a prior action.

concluded that plaintiff had not established a legal theory to support its breach of contract claim because no contract existed between defendant and Lorton and the material was merely sold as an account stated transaction.

Whether our de novo review is considered under MCR 2.116(C)(8) or (10), defendant's motion was properly granted. Pursuant to MCR 2.116(C)(8), the trial court was correct in concluding that plaintiff's complaint was legally deficient. Although Michigan law does not require any sort of detailed factual allegations within the complaint, it does require something more than a mere conclusory statement. MCR 2.111(B)(1). See, also, *Davis v Detroit*, 269 Mich App 376, 379 n 1 ; 711 NW2d 462 (2006). Here, plaintiff's complaint was deficient. There are no allegations setting forth *how* plaintiff was a third party beneficiary; there is no allegation as to what the contract said, whether it was oral or in writing,<sup>5</sup> or what *any* of the terms were within the alleged contract. Instead, plaintiff merely set forth a legal conclusion that it was a third party beneficiary, and that does not suffice under MCR 2.116(C)(8). *Davis, supra*.

Additionally, if we (unlike the parties or the trial court) construe the motion as more properly considered under MCR 2.116(C)(10), plaintiff again failed to establish a genuine issue of material fact. Plaintiff had the burden of proof at trial, and thus was required to point out to the trial court admissible evidence creating a genuine issue of material fact on whether it was a third party beneficiary. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).<sup>6</sup> However, plaintiff could not submit a copy of any contract (because there was no written contract), and submitted no evidentiary support to refute defendant's denial that an oral contract existed. Indeed, plaintiff's counsel admitted before the trial court that it would *develop* such testimony at trial, but that is not the time to determine if a genuine issue exists when a motion for summary disposition has been filed challenging the factual support for the complaint. *Maiden, supra*. Finally, plaintiff's theory of recovery is clear as the complaint asserts that it incidentally benefited from the contract between defendant and Lorton. Such an allegation is legally insufficient to support plaintiff's contract claim. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003).

We affirm.

/s/ Karen M. Fort Hood  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio

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<sup>5</sup> Though plaintiff's counsel conceded in arguments before the trial court that no written contract existed.

<sup>6</sup> Because there was neither a written contract nor an oral one declaring plaintiff a third party beneficiary, defendant had no evidence to submit in support of its motion. Thus, it would have been a proper motion (assuming it had been brought under MCR 2.116(C)(10)).