

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF HART,

Plaintiff-Appellee,

v

JAMES KLOOSTER, CYNTHIA KLOOSTER,
and J & B LAND, LLC,

Defendants-Appellants.

UNPUBLISHED

June 19, 2007

No. 274750

Oceana Circuit Court

LC No. 06-005854-CH

Before: Kelly, P.J., and Markey and Smolenski, JJ.

MEMORANDUM.

Defendants James and Cynthia Klooster and J & B Land, LLC appeal as of right the trial court's order granting summary disposition in plaintiff City of Hart's favor. We affirm.

Defendants' appeal consists solely of two procedural issues: (1) whether the trial court erred in treating defendants' motion as one brought under MCR 2.116(C)(10) instead of 2.116(C)(8) and, if it did not, (2) did the trial court err in not allowing defendants time to respond to or rebut the assertions made in Douglas Springstead's affidavit. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

Defendants' first issue is without merit. It is well established that even if a motion is brought pursuant to MCR 2.116(C)(8), if the trial court considers evidence outside the pleadings, this Court treats the motion as having been decided under MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Furthermore, a court may dismiss a case pursuant to MCR 2.116(I) if "the pleadings show that a party is entitled to judgment as a matter of law" or "the affidavits or other proofs show that there is no genuine issue of material fact." *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006). The rule does not expressly require a motion under MCR 2.116(C) to grant summary disposition, nor does it forbid summary disposition absent a motion under MCR 2.116(C). *Id.* Accordingly, regardless whether defendants mislabeled their motion, this Court treats the motion as having been decided under MCR 2.116(C)(10) because the trial court considered evidence outside the pleadings. Moreover, the trial court had authority to grant summary disposition pursuant to MCR 2.116(C)(10) regardless what type of motion defendants filed or indeed whether they filed one at all.

Defendants' second issue is also devoid of merit because the trial court did give defendants an opportunity to contest the facts in Springstead's affidavit. When the trial court asked whether defendant had anything to counter the affidavit, defense counsel responded on the record:

For today's purposes, and really for all purposes, Mr. Springstead can be counted on to tell – to tell the truth. I'm not contesting his Affidavit for today's purposes; but, Judge, I will submit that it doesn't make any difference.

"A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Accordingly, because defense counsel stated on the record that "for all purposes" Springstead's affidavit could be considered "to tell the truth," defendants cannot assert on appeal that the trial court should have given them an opportunity to prove that the contents of the affidavit were untrue.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski