

STATE OF MICHIGAN
COURT OF APPEALS

DESMER G. WALCH and APRIL R. KIGGINS,
Plaintiffs-Appellants,

UNPUBLISHED
July 26, 2011

v

WILLIAM P. WALCH, CYNTHIA WALCH,
SANDRA KILBOURNE, and NORTHERN
LABEL, INC.,

No. 296626
Oceana Circuit Court
LC No. 09-007513-CZ

Defendants-Appellees.

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent.

Plaintiffs asserted fraud against defendants. The trial court barred plaintiffs from conducting any discovery and then dismissed the case on the grounds that plaintiffs had failed to present sufficient proofs to create a question of fact. I would reverse because the trial court failed to apply the appropriate standard under MCR 2.116(C)(10) and improperly foreclosed discovery.

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and all reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *White v Taylor Distributing Co*, 275 Mich App 615, 625; 739 NW2d 132 (2007).

Desmer's¹ verified complaint stated a cause of action for fraudulent misrepresentation, accounting, and other related claims. The complaint was supported by a detailed multi-page affidavit executed by Desmer stating that, at a time he was seriously ill, defendant William P. Walch, his son and minority business partner in Northern Label, Inc., falsely stated to him that the company was in danger of collapse and the only way to save it was for Desmer to sell his shares back to the company for a sum that was below market value and below the amount of money Desmer had personally loaned the company so that the company could immediately obtain a loan using the shares as collateral. In granting defendants' motion under MCR 2.116(C)(10), the trial court simply ignored Desmer's affidavit. The court stated that Desmer had asserted "groundless allegations without any support" and dismissed his complaint noting, "I don't see any smoking gun here that – you know, any force or violence or anything that forced the signatures on those documents." The trial court did allow for the complaint to be amended.

In the amended complaint, Kiggins was added as a plaintiff, and both plaintiffs alleged that their signatures on the resignation and waiver of claims documents that they were purported to have signed were forgeries. Desmer also alleged that his signature was forged on the consent (as majority shareholder) for the company to buy back his shares. Plaintiffs submitted an affidavit prepared and signed by Robert Kullman, a forensic document examiner from the offices of Speckin and Associates who had served for over 15 years as a document examiner for the Michigan State Police. Kullman averred that it was "highly probable" that the signatures purporting to be that of Desmer and Kiggins on these two documents were forgeries.² This was particularly significant since it was defendants William and his wife, Cynthia, who had signed the documents as witnesses, thus asserting that they saw Desmer and Kiggins signing documents that forensic review revealed they had not signed.

Defendants offered no evidence to contradict the Kullman affidavit. Indeed, an affidavit executed by William in support of the motion did not even assert that he actually witnessed the documents being executed. Defendants also refused to provide a date for William's deposition and refused to produce any of the requested discovery or to answer requests to admit. Instead, defendants filed a motion for protective order³ asking that the court "strike Plaintiffs' discovery request or at the minimum stay our obligation to answer until such time as the Court rules on our pending Motion for Summary Disposition." At the hearing defendants did not raise any grounds set forth in MCR 2.302(D), such as embarrassment, oppression, or undue expense as grounds to

¹ Because several parties share a last name, they will be referred to by first name.

² Kullman's affidavit set forth a rating system indicating the certainty of his opinion based on the evidence and stated that his conclusion that the signatures were forgeries was the highest level of certainty other than absolute certainty.

³ The motion is not contained in the lower court record transmitted to this Court. However, it is referenced in the docket sheet and there is a transcript of a hearing on that motion.

bar discovery.⁴ Despite the lack of an argument grounded in the court rules and despite the fact that the only evidence produced to date appeared to demonstrate a forgery in which defendants participated. This was plainly contrary to the principle that the Michigan court rules establish “an open, broad discovery policy.” *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005).

On December 21, 2009, the trial court heard defendants’ motion for summary disposition of the amended complaint. The trial court concluded that Kullman’s affidavit did not create a question of fact because “he talked about probabilities” and failed to “ever come out and allege forgery.” This, like the trial court’s earlier reference to the lack of a “smoking gun,” misstates the summary disposition standard, which requires that the trial court review all the evidence and inferences therefrom in the light most favorable to the non-moving party and deny summary disposition if there is any question of material fact. Plaintiff is not required to produce a “smoking gun.” Moreover, it is an inaccurate description of the Kullman affidavit, which on its face is credible proof of forgery in which defendants either acquiesced or participated. The trial court similarly ignored the affidavit from the CPA retained by plaintiffs averring that, based on the limited company records available to him, the company was indebted to Desmer.

The majority affirms the trial court on the narrow grounds that “plaintiffs failed to show reasonable reliance on the alleged misrepresentations.” This limited ruling implicitly recognizes that the trial court erred in finding no question of fact on the other elements of fraudulent misrepresentation. The majority concludes that, because plaintiffs could have requested an accounting before agreeing to the request to sell their shares, their claimed reliance could not have been reasonable, but, according to plaintiffs, they were told that it was necessary to act promptly to save the company. Ultimately, what statements were made and whether those statements gave rise to reasonable reliance are questions of fact and, in light of plaintiffs’ affidavits and the apparent forgery on several documents there are material issues as to those facts that must be determined.⁵

The majority’s conclusion that the redemption agreement was “unambiguous” and so “must be enforced as written” is a red herring. The issue is not whether the redemption agreement is subject to varying interpretations as to its content; rather the issue is whether the

⁴ A protective order is proper to protect a litigant from “excessive, abusive or irrelevant discovery requests.” *Hartmann v Shearson Lehman Hutton, Inc*, 194 Mich App 25, 29; 486 NW2d 53 (1992). Absent the presence of such extreme discovery demands, “any document which is relevant and not privileged is freely discoverable upon request.” *Eyde v Eyde*, 172 Mich App 49, 55; 431 NW2d 459 (1988). Given the extent of the requested discovery, I would agree that the trial court could properly have ruled that it was excessive and required plaintiff to substantially narrow the sought discovery. However, a complete bar to discovery was improper.

⁵ Given that the trial court’s protective order barred plaintiffs from access to company records, I similarly cannot agree that plaintiffs should be faulted, at this stage, for failing to prove what the company’s actual financial state was at the time in question.

agreement to its terms was obtained by fraudulent misrepresentation.⁶ If non-ambiguity were a defense to intentional misrepresentation, then no matter what falsehoods were told to a victim in order to have him agree to a transaction, the perpetrator would be immunized so long as the written document accurately stated the bare terms of the transaction.

In my view, the trial court concluded that plaintiffs were not credible and that no fraud occurred and rendered a decision on the merits of the case under the guise of a (C)(10) ruling. The trial court's view that this was a non-meritorious claim may be correct, but, under our rules, that is a matter to be determined after discovery and, if a material question of fact exists, after trial.

/s/ Douglas B. Shapiro

⁶ Although I agree with the majority that a party cannot avoid enforcement of a contract alleging failure to read or claiming the terms were different, contracts can be avoided on the basis of fraudulent statements made to induce the party into signing it. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995).