

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

---

RENARD SLOMKA,

Plaintiff-Appellant/Cross-Appellee,

v

HAMTRAMCK HOUSING COMMISSION,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED  
October 9, 2012

No. 298025  
Wayne Circuit Court  
LC No. 02-219550-CK

---

RENARD SLOMKA,

Plaintiff-Appellee,

v

HAMTRAMCK HOUSING COMMISSION,

Defendant-Appellant.

No. 299211  
Wayne Circuit Court  
LC No. 02-219550-CK

---

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In Docket No. 298025, plaintiff appeals as of right, and defendant cross-appeals, from the trial court's judgment granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), and awarding plaintiff damages of \$207,060.19 in this action for breach of an employment contract. In Docket No. 299211, defendant appeals as of right from the trial court's order awarding plaintiff case evaluation sanctions. We affirm in both appeals.

**I. FACTS AND PROCEEDINGS**

This case is before this Court for the third time. Plaintiff was employed by defendant as a housing official pursuant to a contract that began on January 1, 1997, and was to continue for six consecutive years. After plaintiff was terminated in April 2002, he brought this action for breach of contract, seeking his remaining salary and other benefits allegedly due under the contract.

In October 2004, the trial court granted defendant's motion for summary disposition. The court concluded that plaintiff's employment contract was unenforceable because it violated regulations of the United States Department of Housing & Urban Development (HUD). In a prior appeal, this Court reversed the trial court's decision and remanded the case to the trial court for further proceedings. *Slomka v Hamtramck Housing Comm*, unpublished opinion per curiam of the Court of Appeal, issued June 22, 2006 (Docket Nos. 258699, 260015) ("*Slomka I*"). This Court determined that "because no provision in the contract itself violates the regulations, the contract itself is not unenforceable as being contrary to law." *Id.*, slip op at 3.

On remand, the trial court granted summary disposition in plaintiff's favor and set forth the amount of damages owed by defendant. Defendant appealed and this Court again reversed. *Slomka v Hamtramck Housing Comm*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2009 (Docket Nos. 279150, 280151) ("*Slomka II*"). This Court held that the trial court erred by interpreting this Court's prior decision in *Slomka I* as holding that the employment contract was enforceable as a matter of law when, in fact, this Court only decided that the contract was not unenforceable on the ground that it violated HUD regulations. *Id.*, slip op at 2. This Court remanded the case "to the trial court for a determination of whether there is a genuine issue of a material fact as to the existence of a valid enforceable contract, and, if so, whether the contract was breached." *Id.*

On second remand, the trial court again granted summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). The court concluded that there was no genuine issue of material fact regarding the validity of the contract, and agreed with plaintiff that defendant breached the contract by prematurely terminating plaintiff's employment. The court awarded plaintiff total damages of \$207,060.19, and thereafter awarded plaintiff case evaluation sanctions of \$29,501.25.

## II. INTEREST

Although the parties' contract provides that "money owed [under the contract] will be assessed at an annual interest rate of nine percent (9%)," the trial court agreed with defendant that this rate was usurious under MCL 438.31 and, accordingly, awarded interest at the reduced lawful amount of seven percent.

Plaintiff argues for the first time on appeal that defendant is not entitled to assert any defense based on MCL 438.31, because it did not raise usury as an affirmative defense. See MCR 2.111(F)(3)(a). This Court has held that usury is an affirmative defense that is waived if not raised. *Shaw Investment Co v Rollert*, 159 Mich App 575, 580; 407 NW2d 40 (1987). On appeal, the parties dispute whether the defense of usury was properly raised as part of defendant's fourth affirmative defense. Regardless of whether we agree with plaintiff's argument on appeal that defendant's fourth affirmative defense did not adequately raise a defense based on usury, the fact remains that plaintiff never challenged defendant's entitlement to raise a usury defense in the trial court. Had plaintiff properly raised the issue, defendant could have requested an opportunity to amend its affirmative defenses to assert usury as an affirmative defense to the extent the court determined that the defense had not been properly asserted previously. See MCR 2.111(F)(3). Because plaintiff did not raise the issue, it was not necessary for defendant to pursue such a request. Under these circumstances, we conclude that plaintiff's

failure to raise the issue below precludes it from now arguing for the first time on appeal that defendant was not entitled to assert the usury statute, MCL 438.31, as a defense to the nine percent interest rate specified in the parties' contract. See *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 468-469; 702 NW2d 671 (2005).

Further, we find no error in the trial court's decision to reduce the award of interest from nine percent to seven percent to comply with MCL 438.31. The statute allows parties to agree to a rate of interest "not exceeding 7% per annum." The statute broadly applies to all pre-existing debts and contracts. See *Hillman's v Em'N Al's*, 345 Mich 644, 651; 77 NW2d 96 (1956), and *Attorney Gen v Contract Purchase Corp*, 327 Mich 636, 642-643; 42 NW2d 768 (1950). The exceptions in MCL 438.31 do not apply to this case. Because the parties' contract provides for nine percent interest, an amount in excess of the statutory maximum, the trial court appropriately reduced the amount of interest to which plaintiff was entitled to seven percent, the maximum amount permitted under the statute. See *Clifford v Clifford*, 434 Mich 480, 481; 453 NW2d 675 (1990).

### III. PENSION SETOFF

Plaintiff next argues that the trial court erred by reducing his recovery for lost wages for the remaining period of his contract by the amount of pension benefits that he received for that period. We disagree. The deduction appropriately reflected the measure of damages for a breach of contract claim. In *Corl v Huron Castings, Inc*, 450 Mich 620, 623; 544 NW2d 278 (1996), the Supreme Court held that a plaintiff's unemployment compensation benefits were required to be "deducted from his breach of contract damage award" in a wrongful discharge case. The Court explained that "the remedy for breach of contract focuses making the nonbreaching party whole." *Id.* at 628. Thus, in this case, plaintiff's damages for breach of contract are limited to the amount he would have received had defendant not breached the contract. If defendant had not terminated plaintiff, plaintiff would have continued to receive his wages until the contract expired on December 31, 2002. But because plaintiff was terminated, he began receiving pension benefits, which he would not have otherwise received had he not been terminated. Because plaintiff received pension benefits sooner than he should have due to his improper termination, the trial court appropriately set off the amount of pension benefits that plaintiff received before December 31, 2002, from the total amount of wages that plaintiff otherwise would have received for that period.

Plaintiff argues that regardless of whether defendant was legally entitled to assert a setoff, defendant did not raise setoff as an affirmative defense and, accordingly, waived its right to do so. "Setoff" is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other. *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). We note that defendant did raise the affirmative defense of satisfaction and discharge in which it asserted that plaintiff had been paid "all monies legally due him." Because a claim to setoff is comparable to the affirmative defense of payment or satisfaction, plaintiff was on notice that defendant intended to assert its right to a setoff for all amounts that plaintiff had been paid. Further, plaintiff never challenged below defendant's entitlement to assert a setoff on the ground that defendant had not specifically raised the issue in its affirmative defenses. Plaintiff's failure to raise the issue below precludes it from now arguing

for the first time on appeal that defendant was not entitled to assert a setoff for the payment of pension benefits. *Harbour*, 266 Mich App at 468-469.

#### IV. DEFENDANT’S MOTION FOR SUMMARY DISPOSITION

Defendant argues on cross-appeal that the trial court erred in granting summary disposition in favor of plaintiff on his breach of contract claim. We disagree. This Court reviews a trial court’s summary disposition decision de novo. *Spiek v Dep’t of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula*, 212 Mich App at 48. See also *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

To recover for breach of contract, a plaintiff must first establish the elements of a valid contract. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). The plaintiff

must then prove by a preponderance of the evidence the terms of the contract, that the defendant breached the terms of the contract, and that the breached [sic] caused the plaintiff’s injury. [*In re Brown*, 342 F3d 620, 628 (CA 6, 2003).]

Defendant first argues that the employment contract was not enforceable because it was not properly approved or voted on at a meeting that complied with the requirements of the Open Meetings Act (OMA), MCL 15.261 *et seq.* The trial court found, and we agree, that defendant waived any OMA-based defense by failing to assert it as an affirmative defense.

A party is required to state all affirmative defenses in the first responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading. MCR 2.111(F)(3). A party may also amend its affirmative defenses. MCR 2.111(F)(3). An affirmative defense that is not asserted is waived. *Citizens Ins Co*, 247 Mich App at 241; MCR 2.111(F)(2) and (3). We disagree with defendant’s argument that it sufficiently raised the OMA as a defense to the enforceability of plaintiff’s contract in its fourth affirmative defense, in which it asserted:

Plaintiff’s contract claims are contrary to federal statutes, HUD regulations, statutes of the State of Michigan, ordinances of the City of Hamtramck, and the Bylaws of the Hamtramck Housing Commission, and accordingly have no legal merit.

Among the nonexhaustive list of affirmative defenses set forth in MCR 2.111(F)(3) is the defense “that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute.” An affirmative defense can also include any “ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.” MCR 2.111(F)(3)(c).

Defendant's general reference to "statutes of the State of Michigan" in its fourth affirmative defense did not provide plaintiff with notice that defendant intended to rely on the OMA as a defense to the enforceability of plaintiff's employment contract. Simply citing all state statutes was insufficient to notify plaintiff of any specific statutory violation that defendant believed may affect the enforceability of the employment contract. Moreover, there is every reason to believe that plaintiff likely was surprised when defendant first raised the OMA issue more than 13 years after the commencement of the employment contract, and more than seven years after plaintiff filed his action. Under the circumstances, the trial court did not err in ruling that defendant waived any OMA-based defense by failing to properly and timely raise the issue.

Defendant next argues that the contract was unenforceable because it lacked mutuality of agreement. We disagree. "Mutuality of agreement, or a meeting of the minds, means that '[t]here must be a meeting of the minds on all the material facts in order to form a valid agreement, and whether such a meeting of the minds occurred is judged by an objective standard, looking to the express words of the parties and their visible acts.'" *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 665; 658 NW2d 510 (2003). A meeting of the minds can be found from performance under a contract and acquiescence in that performance. *Id.* at 665-666.

Defendant relies on the deposition testimony of Thaddeus Tokarski, the president of defendant's housing commission, to support its argument regarding lack of mutuality of agreement. Tokarski denied being aware that plaintiff would receive pay for all six years if he was fired for cause, or that he would receive pay for unused leave days. Regardless of whether Tokarski was personally aware of all of the contract terms, it is undisputed that he signed the contract, which objectively manifests his intent to be bound. Further, the evidence showed that the parties had performed under the contract for more than five years before plaintiff was terminated. The trial court did not err in finding that there was no genuine issue of material fact concerning mutuality of agreement.

Defendant next argues that plaintiff's employment contract is unenforceable because it is for a six-year term, which is longer than the term of office for the housing commission board members charged with overseeing plaintiff's employment. In *Johnson v City of Menominee*, 173 Mich App 690, 694; 434 NW2d 211 (1988), this Court stated:

[W]here the nature of an office or employment is such as to require a municipal board or officer to exercise a supervisory control over the appointee or employee, together with the power of removal, such employment or contract of employment by the board, it has been held, is in the exercise of a government function, and contracts relating thereto must not be extended beyond the life of the board. [10 McQuillin, Municipal Corporations (3d ed, 1981 Rev), § 29.101, p 469.]

This rule was initially adopted in *City of Hazel Park v Potter*, 169 Mich App 714, 719-722; 426 NW2d 789 (1988), in which this Court explained that the rule applies to contracts of those exercising governmental powers, but not business or proprietary powers. *Id.* at 720-721. Because plaintiff's position involved the operation of public housing, the position arguably did not involve the exercise of governmental powers, but rather a business or proprietary purpose, to which the rule does not apply.

Furthermore, there is no indication that defendant ever raised this issue below, either as an affirmative defense or in response to plaintiff's motion for summary disposition. Issues that are not raised before, addressed, or decided by the trial court are not properly preserved for appellate review. *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 351; 793 NW2d 246 (2010). This Court need not consider issues that were not preserved in the trial court. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005). Accordingly, defendant is precluded from raising this issue for the first time on appeal.

Defendant next argues that the parties' contract is invalid because it violates HUD regulations. This Court previously considered and rejected this argument in *Slomka I*, slip op at 2-3, in which this Court concluded that "no provision in the contract itself violates the regulations, [so] the contract itself is not unenforceable as being contrary to law." This Court's decision in *Slomka I* is the law of the case. *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 132; 762 NW2d 178 (2009). Accordingly, we decline to revisit this issue.

Defendant raises additional arguments concerning whether there was (1) a true offer and acceptance of the contract by defendant's members, and (2) whether the contract was actually approved on January 1, 1997, as recited in the contract, when there were no minutes of a meeting on that date. Defendant argues that there is a question of fact whether there was a true offer and acceptance by the parties, because plaintiff did not advise defendant that the terms of the contract violated HUD regulations. As we have already explained, this Court previously held in *Slomka I*, slip op at 3, that "no provision in the contract itself violates the regulations, [so] the contract itself is not unenforceable as being contrary to law." Because the decision in *Slomka I* is the law of the case, defendant's argument cannot succeed. To the extent defendant is arguing that its president, Tokarski, was not personally aware of the consequences of terminating the contract early, defendant has not explained how Tokarski's lack of personal knowledge of the contract terms, which are clearly set forth in the contract itself, renders the contract unenforceable. Defendant does not claim that the contract was procured by fraud. Accordingly, we find no merit to defendant's claim that the contract is invalid on this basis.

Further, even if the contract was not actually signed or approved on January 1, 1997, as recited in the contract, defendant has not shown that the contract is therefore invalid where the submitted evidence otherwise establishes a ratification of the recited date as the effective date of the contract.

Defendant next argues that plaintiff was not entitled to summary disposition because there is a genuine issue of material fact whether plaintiff first breached the employment contract by not properly performing his job functions. One who first breaches a contract may not maintain an action against the other contracting party for his subsequent breach or failure to perform. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 613; 792 NW2d 344 (2010).

After plaintiff filed this action, defendant filed a counterclaim alleging breach of contract by plaintiff. However, that counterclaim apparently was dismissed "without prejudice to its filing as a separate lawsuit." See *Slomka v City of Hamtramck Housing Comm*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2007 (Docket No. 274537), slip op at 2 (observing, in a separate lawsuit between the parties, that defendant's counterclaim in this case was dismissed "without prejudice to its filing as a separate lawsuit"). Because defendant was permitted to file a separate case against plaintiff for breach of contract, any

arguments related to its claim that plaintiff breached the contract first are not a basis for relief in this case.

Defendant lastly argues that there is a question of fact regarding the amount of unused leave days for which plaintiff is entitled to compensation, thereby precluding summary disposition on this issue. Plaintiff had the burden of proving his damages resulting from the breach of contract. *Alan Custom Homes*, 256 Mich App at 512; *In re Brown*, 342 F3d at 628. Defendant argues that there is a genuine issue of material fact regarding damages because the only evidence of the number of plaintiff's unused leave days was supplied by plaintiff, and the credibility of that evidence is for the jury to decide. However, defendant did not present any evidence refuting the accuracy of plaintiff's records or statements regarding his unused leave. To avoid summary disposition, it was incumbent upon defendant to present evidence establishing a genuine issue of material fact for trial. *Smith*, 460 Mich at 455-456. Because defendant did not present any evidence refuting the accuracy of plaintiff's records, the trial court did not err in granting summary disposition for plaintiff with respect to this issue.

#### V. CASE EVALUATION SANCTIONS

In Docket No. 299211, defendant challenges the trial court's award of case evaluation sanctions to plaintiff. Defendant's sole argument on appeal is that plaintiff will not be entitled to an award of case evaluation sanctions if this Court reverses the trial court's grant of summary disposition in favor of plaintiff. Because we have affirmed the trial court's summary disposition decision, and defendant raises no other challenges to the trial court's case evaluation award, we affirm the award of case evaluation sanctions to plaintiff.

Affirmed.

/s/ Christopher M. Murray  
/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens