

STATE OF MICHIGAN
COURT OF APPEALS

FLAGSTAR BANK,

Plaintiff-Appellee,

v

GREENSTONE INVESTMENTS LLC,
FAIRFIELD INVESTMENTS LLC, ALLEN
POINTE INVESTMENTS LLC,

Defendants,

and

PETER J. CUBBA, and the PETER J. CUBBA
REVOCABLE LIVING TRUST,

Defendants-Appellants.

UNPUBLISHED
May 21, 2013

No. 309110
Oakland Circuit Court
LC No. 2010-107474-CK

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

In this dispute over the validity of a payment guaranty, defendants Peter J. Cubba and the Peter J. Cubba Revocable Living Trust appeal by right the trial court's opinion and order granting summary disposition in favor of plaintiff Flagstar Bank against the Trust. On appeal, Peter J. Cubba and the Trust argue that the trial court erred when it determined that there was no material factual dispute that Peter J. Cubba had the capacity to execute the payment guaranty. They also argue that, even if Peter J. Cubba had the capacity to execute the guaranty, the trial court nevertheless erred when it granted summary disposition as to the amount due under the guaranty even though Flagstar failed to support its motion with evidence to support that amount. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

This case has its origins in the development of three real estate projects by three separate but related entities: defendants Greenstone Investments, LLC, Fairfield Investments LLC, and Allen Pointe Investments, LLC. Each of these companies obtained financing for its underlying real estate development by borrowing funds from, Cubba Capital, LLC. Cubba Capital raised its funds by selling taxable adjustable rate notes to investors through its trustee, Huntington

National Bank. Flagstar agreed to secure the development projects by issuing irrevocable letters of credit to cover the value of the notes sold to investors.

Greenstone's development was the most expensive of the three developments. Greenstone borrowed \$28,100,000 from Cubba Capital to purchase an apartment complex with 256 units in Auburn Hills, Michigan, and convert the units into condominiums. In March 2005, Flagstar issued a letter of credit for \$28,854,466 to secure the Greenstone development, which included the \$28,100,000 principal on the notes as well as interest for 98 days. At the same time, Greenstone entered into a reimbursement agreement with Flagstar and granted Flagstar a first position mortgage over the development's real property to secure repayment. Additionally, the Trust, Peter J. Cubba, and Peter's son, Peter C. Cubba, each executed a Payment Guaranty to cover all of Greenstone's indebtedness to Flagstar.

Flagstar entered into similar agreements with Fairfield and Allen Pointe to secure the notes sold to investors to finance those developments. However, the Trust and Peter J. Cubba did not guarantee Fairfield and Allen Pointe's obligations.

Flagstar sued Greenstone, Fairfield, and Allen Pointe in February 2010 after those entities failed to perform under their reimbursement agreements with Flagstar. In the same complaint, Flagstar also sued the Trust, Peter J. Cubba, and Peter C. Cubba for breach of their payment guaranties.

The trial court appointed a receiver to manage the real properties at issue. The receiver eventually sold the Greenstone and Fairfield properties and Flagstar sold the Allen Pointe note. Peter J. Cubba died in December 2010, and the trial court stayed the proceedings against Peter C. Cubba after he filed for bankruptcy protection.

In March 2011, Flagstar moved for summary disposition under MCR 2.116(C)(10) on its guaranty claim against the Trust. In support of its motion, Flagstar attached the guaranty that Peter J. Cubba had executed on his own behalf and as the Trust's trustee. In the guaranty, the Trust unconditionally guaranteed Greenstone's obligations to Flagstar:

(a) Guaranty Obligation. Each Guarantor [the Trust, Peter J. Cubba, and Peter C. Cubba] hereby unconditionally, absolutely and irrevocably, as a primary obligor and not merely as a surety, guarantees to [Flagstar] the punctual and complete payment when due, whether at or after maturity, upon acceleration or otherwise, of all present and future indebtedness of [Greenstone] to [Flagstar] under any and all of the Letter of Credit Documents, in each case as such indebtedness and other obligations may from time to time be supplemented, modified, amended, renewed and extended, whether evidenced by new or additional documents, including, without limitation (the "Obligations"):

(i) all reimbursement and payment obligations under the Agreement;

(ii) all interest payable under the Letter of Credit Documents, including, without limitation, interest accruing after maturity, acceleration or the realization of any collateral or interest that would otherwise have been owed by [Greenstone] under the Letter of Credit Documents but the payment of which is unenforceable or not

allowable due to the existence of a bankruptcy, reorganization or similar proceeding involving [Greenstone], and any late charges, fees or other amounts due by reason of any later payment of interest;

(iii) all of [Flagstar's] cost of enforcing this Guaranty, including reasonable attorney fees[;]

* * *

(v) Failure to pay taxes or assessments prior to delinquency, or to pay charges for labor, materials or other charges which can create liens on any portion of the Premises;

(vi) Costs incurred by [Flagstar] to protect and preserve the subject property and/or to prevent waste;

* * *

Flagstar noted, however, that the Trust was only obligated to pay 40% of Greenstone's adjusted liability:

(b) **Limitation and Reduction of Guaranty.** It is the intent of [Flagstar] and [the Trust, Peter J. Cubba, and Peter C. Cubba] that notwithstanding the limitations set forth below, the cumulative Guaranty of [Peter C. Cubba] and [the Trust and Peter J. Cubba] shall equal 100% of the applicable amount guaranteed below.

(i) Initially, the Guaranty with respect to [Peter C. Cubba] shall be limited to 60% of an amount equal to 100% of the Available Credit minus the balance of funds in (i) the Reserve and Reimbursement Account and (ii) the Project Fund Account (as defined in the Reimbursement Agreement).

(ii) Initially, the Guaranty with respect to [the Trust and Peter J. Cubba] shall be limited to 40% of an amount equal to 100% of the Available Credit minus the balance of funds in (i) the Reserve and Reimbursement Account and (ii) the Project Fund Account, (as defined in the Reimbursement Agreement).

Flagstar also supported its motion with an affidavit by Nikolaus Maguire. Maguire averred that he was a vice president with Flagstar and that he had reviewed Flagstar's "books and records" concerning Greenstone's obligations to Flagstar. He stated that Greenstone had breached various loan agreements by—in part—failing to make required payments and failing to pay the real property taxes due on the real estate involved in the development. He further stated that the Trust had breached its agreement to guarantee Greenstone's payments. He then averred that Greenstone's outstanding debt to Flagstar under the reimbursement agreement, after adjustments, was \$17,369,995.24 and that the Trust's share (40%) of that debt was \$6,947,998.10.

In response to Flagstar's motion, the Trust argued that Peter J. Cubba lacked the capacity to execute the payment guaranty in March 2005. The Trust supported that contention with affidavits by Peter J. Cubba's daughter, Jill A. Cubba, his nurse, Willie Mae Greenwood, and the deposition of his son, Stephan Cubba.

Jill Cubba averred that her father was "suffering from years of debilitating neurological impairment because of his Parkinson's disease" at the time he executed the guaranty. She stated that he was confined to a wheelchair and was dependent on his nurse to perform daily life activities. He also "could not always read and write as a result of his physical impairment." Finally, she averred that "his medication and disease caused sporadic periods of hallucinations, confusion, inability to focus his mental attention and difficulty understanding conversation."

Greenwood's affidavit mirrored many of the averments that Jill Cubba had made; she averred that Peter J. Cubba "suffered from debilitating neurological impairment because of his Parkinson's disease", suffered "severe physical deterioration" including the loss of bodily functions such as the ability to write, was dependent on assistance from others to perform life activities, and suffered from "sporadic periods of hallucinations, confusion, inability to focus his mental attention and difficulty understanding conversation." She also averred that Peter J. Cubba's eyesight had deteriorated to the point where he had to have long documents read to him.

Greenwood stated that she recalled the day that Peter J. Cubba executed the guaranty and noted that Peter J. Cubba appeared to be tired and agitated; moreover, she stated that "it appeared" that Peter J. Cubba did not understand where he was being taken and did not want to leave. Greenwood stated that, after Peter J. Cubba returned from the meeting where he executed the guaranty, he remained agitated, and "repeatedly said that he did not know what he agreed to and wanted to cancel whatever agreement he had signed." On the basis of his observations, Greenwood stated that she did not believe Peter J. Cubba "had the ability to understand what he [was] signing or the scope of his agreement."

Stephan Cubba testified at his deposition that, although he was not at the meeting where his father executed the guaranty, his father had told him before that he had no intention of signing the guaranty. He also stated that his father spoke to him the day after the meeting and regretted having signed the guaranty and told Stephan that he wanted to "stop the deal."

The Trust also argued that Flagstar failed to present sufficient evidence to establish the amount of any money that the Trust might owe under the guaranty. Specifically, the Trust cited the guaranty provisions that limited the amount that the Trust was liable to pay on the basis of the value of certain accounts and argued that, because Flagstar failed to present evidence concerning the amounts in those accounts, it did not establish the amount due. Finally, the Trust argued that it did not appear that Flagstar presented evidence concerning the adjustments that the Trust was entitled to have credited against any amount that it owed.

Flagstar responded to the Trust's claim that Peter J. Cubba lacked the capacity to execute the guaranty by arguing that the Trust failed to establish that Peter J. Cubba actually lacked the mental capacity to enter into a contract. Flagstar noted that it was not enough to show that Peter J. Cubba was enfeebled or old, but rather it had to show that he had no reasonable perception of the contract's nature or terms. Flagstar argued that the undisputed evidence showed that Peter J.

Cubba had the capacity to execute the guaranty. In support of its contention, Flagstar cited the evidence that Peter J. Cubba signed a series of agreements at the meeting and was represented by a lawyer who formally witnessed his signature and submitted an opinion letter on the same day asserting that each of the guarantors—including Peter J. Cubba—had “duly executed and delivered” the guaranty, which, in his opinion, was “a valid and binding” obligation. Flagstar also relied on evidence that Peter J. Cubba executed various deeds and sent a letter requesting information about a commercial loan to Flagstar in the months after he executed the guaranty. Finally, Flagstar argued that Maguire’s affidavit adequately established the amount due under the guaranty and, because the Trust failed to present any evidence to establish that Maguire inaccurately stated the amount, the trial court should conclude that there is no material dispute as to the amount of damages either.

At the hearing on Flagstar’s motion, the trial court determined that the Trust failed to present evidence to establish a question of fact as to whether Peter J. Cubba lacked the capacity to contract. It noted that the Trust did not present any medical documentation or physician testimony to establish Peter J. Cubba’s condition. The court also determined that the evidence that Peter J. Cubba was represented by a lawyer at the closing, who did not express any concerns about his capacity to execute the guaranty, and that he executed a variety of documents in the months following the closing belied the evidence that Peter J. Cubba lacked the mental capacity to contract at the time in question.

The trial court similarly determined that the Trust failed to establish a question of fact as to the amount of damages. The court explained that the Trust could not rely on bare allegations to refute Flagstar’s properly supported motion. Notwithstanding that, the Trust “provide[d] no alternate calculation and provide[d] no proof to rebut the amount set forth in [Flagstar’s] affidavit.” Because the Trust failed to rebut Flagstar’s evidence, the court determined that there was no material dispute as to the amount owed under the guaranty. For these reasons, the trial court granted Flagstar’s motion for summary disposition.

The trial court entered an order granting Flagstar’s motion on January 11, 2012. The trial court entered judgment in the amount of \$6,947,998.10, with continuing per diem interest of \$2,872.67, against the Trust on January 23, 2012.

After the trial court denied the Trust’s motion for reconsideration, the Trust and Peter J. Cubba appealed to this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court’s decision to grant a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court construes contracts of guaranty like any other contract. *In re Landwehr’s Estate*, 286 Mich 698, 702; 282 NW 873 (1938). If the contract is not ambiguous, its construction is a matter of law for the court. *Id.*

B. DAMAGES

In its motion for summary disposition, Flagstar argued that there was no material factual dispute that the Trust and Peter J. Cubba had agreed to unconditionally guarantee Greenstone's obligations to Flagstar by executing the payment guaranty, had breached that agreement, and owed Flagstar \$6,947,998.10—after adjustments—plus an additional per diem sum. Flagstar supported its motion by attaching the guaranty and citing the guaranty's relevant terms. It also supported its motion with Maguire's affidavit, in which he stated that he had reviewed Flagstar's records and determined that the Trust breached the guaranty and owed Flagstar the identified amount.

In response to Flagstar's motion, the Trust and Peter J. Cubba did not challenge Flagstar's claims regarding the guaranty's terms or its claims that the Trust and Peter J. Cubba failed to perform under the guaranty. Instead, the Trust and Peter J. Cubba argued that the guaranty was invalid because Peter J. Cubba did not have the mental capacity to execute the guaranty on his own behalf or as the Trust's trustee. They also argued that, even assuming that Peter J. Cubba had the capacity to execute the guaranty, Flagstar failed to establish its damages with the requisite specificity.

In order to establish its claim that the Trust breached the guaranty, Flagstar had to present evidence that established by a preponderance of the evidence that there was a valid contract, that the Trust breached the contract, and that Flagstar suffered damages. *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). The guaranty's terms are not ambiguous and—assuming for the moment that Peter J. Cubba was competent to execute it—obligate the Trust to pay Flagstar certain sums in the event that Greenstone failed to meet its obligations under its reimbursement agreement with Flagstar. In addition, Maguire's affidavit was sufficient to establish that the Trust breached the guaranty by failing to pay the required sums after Greenstone failed to meet its obligations. Thus, Flagstar's evidence, if left un rebutted, minimally established the existence of a valid guaranty and that the Trust breached the guaranty.

As for the damages, Maguire averred that the Trust had to pay 40% of Greenstone's "outstanding indebtedness (as adjusted to reflect the credits described below)." It is evident from the context that Maguire determined the amount of Greenstone's indebtedness from Flagstar's records and applied the guaranty's terms to that amount after making certain adjustments. Flagstar did not have to itemize its damages or conduct a line-by-line analysis of the sums due under the guaranty in order to properly support its motion for summary disposition. See *Auto Electric & Service Corp v Rockwell Int'l Corp*, 111 Mich App 292, 298-299; 314 NW2d 592 (1981) (stating that the plaintiff need only present evidence to establish the damages on a reasonably certain basis). It only had to present evidence that, if left un rebutted, established its damages. See MCR 2.116(G)(4); *Barnard Mfg*, 285 Mich App at 369-372 (explaining and analyzing shifting burdens under MCR 2.116(C)(10)). And Maguire's calculations appeared on its face to comport with the guaranty's terms; as such, the affidavit was minimally sufficient to establish Flagstar's damages.

Because Flagstar properly supported its motion as to the amount of its damages under the guaranty's terms, the burden shifted to the Trust to establish a question of fact as to the amount of damages. *Barnard Mfg*, 285 Mich App at 374. In order to meet that burden, the Trust had to come forward with evidence that demonstrated that Flagstar improperly calculated its damages. *Id.* But it did not come forward with such evidence. Instead, the Trust merely speculated that Flagstar's calculations might be wrong because it failed to present evidence concerning the value of certain accounts and might have missed or misapplied some credits.¹ These allegations were insufficient to establish a question of fact on the damages. MCR 2.116(G)(4).

The Trust also argued that it was entitled to have its obligations under the guaranty reduced to zero after the receiver sold the property involved in Greenstone's development. The Trust cited and relied on an agreement in which it (along with Flagstar and the other defendants to the original suit) consented to the sale of the property.

In that agreement, the Trust consented to the amendment of a prior agreement to permit the sale of the property. The prior agreement was amended to reduce the asking price by "\$250,000.00" and also to "not provide a real property tax reimbursement for Summer 2010 taxes, and to assign the benefits of a pending 2010 property tax appeal to the purchaser." The Trust agreed to these changes on condition that it (along with the other defendants) "receive full credit against the Greenstone Investments, LLC indebtedness or Defendants' guaranty thereof, as applicable, of the net proceeds that would have been generated under the [original consent] Agreement, if not amended" This agreement is also unambiguous and does not provide that the Trust (or anyone else) shall have their guaranty obligations reduced to zero after the sale; rather, it is clear that, in exchange for permitting the amendments to the original consent to sell the property, Flagstar would have to absorb the loss in proceeds occasioned by the amendment.

In his affidavit, Maguire summarized this same information and stated that he credited these amounts against the outstanding debt. He also listed a credit of \$474,304.05 that reflected the change in the total proceeds resulting from the amendment.² Therefore, this argument too did not establish a question of fact as to whether Flagstar accurately calculated its damages under the guaranty.

Flagstar properly supported its motion for summary disposition on its claim against the Trust for breach of the payment guaranty; it presented evidence that, if left unrebutted, established the existence of a valid contract, breach of that contract, and the amount of its damages. In response to Flagstar's motion, the Trust failed to establish a material question of fact as to the guaranty's terms, its breach of those terms, and the amount of damages. Accordingly, to the extent that there was no material factual dispute that Peter J. Cubba was

¹ The Trust did identify the relevant formula, but failed to present any evidence that—when the formula is applied to the indebtedness at issue—it came to less than 40% of that indebtedness.

² Flagstar submitted a supplemental affidavit by Maguire with its brief in reply to the Trust's response to its motion for summary disposition. In that affidavit, Maguire explained that Flagstar had reduced Greenstone's indebtedness by the amount of the sale of condominium unit.

competent to execute the guaranty, the trial court properly granted Flagstar's motion for summary disposition of this claim.

C. COMPETENCY

As already noted, the Trust's primary argument in opposition to Flagstar's motion for summary disposition involved whether Peter J. Cubba was competent on the day he executed the guaranty on his own behalf and as the Trust's trustee. Specifically, the Trust argued that the undisputed evidence showed that Peter J. Cubba was not competent and, for that reason, the contract was void.

In order for there to be a valid and enforceable agreement, the parties must be competent to contract. *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939). A challenge to the validity of a contract on the grounds that one of the parties was incompetent to contract is an affirmative defense that must be pleaded and proved. See MCR 2.111(F)(3); *Applebaum v Wechsler*, 350 Mich 636, 648-649; 87 NW2d 322 (1957) (stating that a challenge to the validity of a contract on the grounds of incompetency must be affirmatively pleaded and stating that the chancellor correctly refused to consider this defense because it was not properly pleaded). Moreover, the party asserting the defense bears the initial burden of producing evidence tending to show that the person was incompetent by a preponderance of the evidence. *Palenkas v Beaumont Hosp*, 432 Mich 527, 549; 443 NW2d 354 (1989) (stating that the burden of production is generally on the party raising an affirmative defense); *In re Erickson Estate*, 202 Mich App 329, 333; 508 NW2d 181 (1993) (stating that the party raising the defense of incompetence must prove it by a preponderance of the evidence).

The test for mental competency is whether the "person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged." *Id.* at 332. To establish mental incompetency, the party asserting the defense must not only present evidence that "the person was of unsound mind or insane when [the contract] was made, but [also] that the unsoundness or insanity was of such a character that he had no reasonable perception of the nature or terms of the contract." *Star Realty, Inc v Bower*, 17 Mich App 248, 250; 169 NW2d 194 (1969). "A mentally incompetent person is one who is so affected mentally as to be deprived of sane and normal action." *In re Erickson Estate*, 202 Mich App at 333.

Here, the Trust relied on affidavits by Peter J. Cubba's daughter, Jill Cubba, and his nurse, Greenwood. In their affidavits, both affiants described numerous physical ailments that purportedly plagued Peter J. Cubba at the time he executed the guaranty: he was confined to a wheelchair, needed assistance to perform daily activities, became tired easily, had poor eyesight, and could not always write. These averments were, however, insufficient to establish that Peter J. Cubba was mentally incompetent. As our Supreme Court explained, a person is not incompetent to contract merely because he or she is old or sick:

It is not, however, enough for invalidity that one be enfeebled by disease, be old, or indeed be irrational on some subjects. He must, in order to have invalidity as a result of lack of mental capacity, lack the ability to comprehend, in a reasonable

manner, what he is doing with respect to the contract asserted. [*Applebaum*, 350 Mich at 648-649.]

Moreover, although both affiants averred that Peter J. Cubba was “suffering from years of debilitating neurological impairment because of his Parkinson’s disease”, neither affiant averred that she had medical training sufficient to assess Peter J. Cubba’s neurological state, diagnose him with Parkinson’s disease, or describe the effects that Parkinson’s disease has on a person’s mental state. As such, these statements could not be used to establish that Peter J. Cubba actually had Parkinson’s disease or suffered from “debilitating neurological impairment.” See MCR 2.119(B)(1)(c) (stating that the affiant must affirmatively show that he or she is competent to testify as to the facts stated in the affidavit); MCR 2.116(G)(6) (stating that a trial court may only consider an affidavit to the extent that the content or substance would be admissible as evidence); *Barnard Mfg*, 285 Mich App at 373-374.³ For the same reason, Jill Cubba could not properly aver that her father’s medications and disease “caused sporadic periods of hallucinations, confusion, inability to focus his mental attention and difficulty understanding conversation.” Jill Cubba and Greenwood failed to establish that they had the requisite qualifications to discuss whether and to what extent Parkinson’s disease or certain medications might *cause* hallucinations, confusion, or the inability to focus “mental attention.”

Although Jill Cubba could offer testimony about her father’s behaviors and conduct that were consistent with neurological problems, she did not do so. Rather, she averred generally about his physical condition and suggested that he must have been suffering from mental deficiencies because he had Parkinson’s disease and was using medications, which she believed caused mental problems. She did not even aver that her father’s behavior and appearance on the day at issue suggested that he was suffering from these effects.

Greenwood did aver that she recalled the day that Peter J. Cubba executed the guaranty and described his physical and mental condition. She averred that he seemed to be tired and agitated and stated that he apparently did not understand where he was being taken. She also stated that Peter J. Cubba remained agitated after he returned and “repeatedly said that he did not know what he agreed to and wanted to cancel whatever agreement he had signed.” On the basis of these observations, Greenwood believed that Peter J. Cubba did not have “the ability to understand what he [was] signing or the scope of his agreement.”

³ On appeal, the Trust contends that Greenwood was a medical professional because she averred that she was a nurse. However, even if she were a medical professional in the broadest sense, she nevertheless had to aver facts that would enable the trial court to conclude that she had the requisite training and experience to offer medical opinions on these matters. But she did not do so. Therefore, the trial court could not consider her statements to the extent that she purported to be able to specifically diagnose and discuss Parkinson’s disease, or generally discuss mental and neurological ailments.

Greenwood's affidavit did not establish that Peter J. Cubba lacked "the ability to comprehend, in a reasonable manner, what he [was] doing with respect to the contract asserted." *Applebaum*, 350 Mich at 648-649. None of Greenwood's averments suggested that Peter J. Cubba was, on the day at issue, *unable* to understand the nature of the guaranty. On the contrary, he apparently understood that he signed an agreement and had the presence of mind to regret having done so and desired to cancel it. These statements suggest that he was apprehensive about the whole process, but do not suggest that he lacked the ability to reasonably understand the agreement. Finally, Greenwood failed to establish the factual basis and requisite medical training to support her opinion about Peter J. Cubba's mental condition. MCR 2.119(B)(1)(c); MCR 2.116(G)(6). As such, her allegation that he lacked the ability to understand the guaranty did not establish this claim. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006) (stating that conclusory allegations in an affidavit are insufficient to create a question of fact).

Likewise, Stephen Cubba's testimony did not establish that his father was incompetent to execute the guaranty. Stephen Cubba testified that his father told him before the closing that he did not intend to sign the guaranty. He also stated that his father spoke to him on the day after the closing and told him that he regretted signing the guaranty and said he wanted to "stop the deal." Rather than suggesting incompetence, as with Greenwood's averments, this testimony tends to support the view that Peter J. Cubba understood and appreciated the significance of his decision to execute the guaranty.

The Trust failed to present evidence that, if left un rebutted, would establish that Peter J. Cubba lacked the mental capacity to execute the guaranty. Because the Trust failed to offer evidence in support its affirmative defense and did not otherwise establish a question of fact as to any element of Flagstar's claim, Flagstar was entitled to summary disposition in its favor on its claim against the Trust.⁴ MCR 2.116(C)(10).

III. CONCLUSION

Flagstar properly supported its motion for summary disposition of its claim against the Trust. In response to Flagstar's motion, the Trust did not present any evidence that established that there was a question of fact on the elements of Flagstar's claim or established that the Trust had an affirmative defense to that claim. Therefore, the trial court did not err when it granted summary disposition in Flagstar's favor.

Affirmed. As the prevailing party, Flagstar may tax its costs. MCR 7.219(A).

/s/ Jane M. Beckering

/s/ Kathleen Jansen

/s/ Michael J. Kelly

⁴ Given our resolution of this issue, we decline to consider Flagstar's alternate arguments for affirming.