

STATE OF MICHIGAN
COURT OF APPEALS

AFFILIATED WORLDWIDE, LLC,

Plaintiff/Counter-
Defendant/Appellee,

v

CRAIG A. VANDERBURG and JOHN W.
BURCHAM II,

Defendants/Counter-
Plaintiffs/Third-Party Plaintiffs,

and

JAMES E. BAIERS,

Defendant,

and

PRESIDION SOLUTIONS, INC., f/k/a AFFINITY
BUSINESS SERVICES, INC.

Defendant/Counter-Plaintiff/Third-
Party Plaintiff/Appellant,

and

PRESIDION CORPORATION,

Defendant,

and

AFFILIATED CAPITAL/WORLD WIDE, LLC,
RICK BELLESTRI, DOUGLAS SMITH, and
JOHN F. FORTUNE,

Third-Party Defendants.

UNPUBLISHED

May 21, 2009

No. 283393

Oakland Circuit Court

LC No. 2006-077686-CK

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Presidion Solutions, Inc. (Presidion) appeals as of right the trial court order granting summary disposition in favor of plaintiff and denying its motion for summary disposition. We affirm the trial court's findings that Presidion was liable for the loans at issue and that the assignments were valid, but remand for a determination or clarification as to whether the assignment of a loan from Lotic, LTD to DKT Horizons involved one of the loans at issue.

Plaintiff filed a complaint against defendants Vanderburg, Burcham, Baiers, and Presidion to recover the balance of several loans. According to plaintiff, the three above individual defendants formed Presidion's predecessor company, Affinity Business Services, Inc., (Affinity) for the express purpose of acquiring certain Florida properties. To enable the acquisition, four other individuals, among them third-party defendants Rick Bellestri, Douglas Smith, and John Fortune, loaned defendants \$800,000.00. The individuals making the loans thereafter assigned their respective interests in the loans to plaintiff. For approximately two years, regular payments were made to plaintiff on the loan. Plaintiff has received no payments, however, since August 2003. Plaintiff thus initiated the instant action to recover the remaining balance due on the \$800,000.00 loans. Defendants Burcham and Baiers were eventually dismissed, by stipulation, from this action.

Presidion moved for summary disposition pursuant to MCR 2.116(C)(5), (7), and (8), asserting that the assignments of interest in the loan were invalid such that plaintiff was not a proper party in interest and that, alternatively, plaintiff's claims were barred by the statute of frauds and because plaintiff failed to set forth a claim upon which relief could be granted.¹ Plaintiff denied Presidion's assertions and affirmatively asserted that because the assignments were valid and payments were undisputedly made on the loans to it for a period of almost two years, summary disposition in its favor was appropriate. The trial court agreed, denying Presidion's motion for summary disposition and granting summary disposition in plaintiff's favor. A judgment in favor of plaintiff and against Presidion and defendant Vanderburg was entered in the amount of \$434,500.00. This appeal followed.

While the trial court did not identify the rule it relied upon in granting summary disposition in plaintiff's favor, it appears that after finding that the assignments comported with the statute of frauds, to have relied upon MCR 2.116(C)(10). We will thus review this matter as though summary disposition was granted in plaintiff's favor pursuant to MCR 2.116(C)(10). We review a motion brought under MCR 2.116(C)(10) de novo, considering all the evidence,

¹ Presidion also alleged that plaintiff's claims were barred by the applicable statute of limitations. While the trial court ruled that the claims were timely, Presidion has not appealed that portion of the decision.

affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002).

We similarly review motions brought pursuant to MCR 2.116(C)(5), (7) and (8) de novo. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). Under MCR 2.116(C)(5), summary disposition is appropriate when the plaintiffs lack the capacity to sue. When a motion is premised on subrule (C)(5), the court must consider not only the pleadings, but also any other documentary evidence submitted by the parties. Summary disposition is warranted under subrule (C)(5) when the moving party is entitled to judgment as a matter of law. *In re Quintero Estate*, 224 Mich App 682, 692; 569 NW2d 889 (1997). As to motions brought pursuant to MCR 2.116(C)(7), we review the same to determine whether the statute of frauds bars a cause of action. *Miller v Malik*, 280 Mich App 687, 693-694; 760 NW2d 818 (2008). This Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and construes the pleadings in the plaintiff's favor. *Id.* In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(8), we look to the pleadings alone, accepting as true all factual allegations and their reasonable inferences, to determine whether a claim for which relief may be granted has been stated. *In re Estate of Quintero, supra.*

On appeal, Presidion first contends that the trial court erred in holding it liable for the repayment of the loans, as they were made to defendants Vanderburg and Burcham individually. We disagree.

It appears undisputed that the original intent was for plaintiff to secure \$2.5 million in loan funds for defendants. It is also undisputed that the full \$2.5 million loan was never made, that loans totaling \$800,000.00 were issued, and that payments were made to plaintiff on the loans for a period of two years. The dispute lies in to whom the loans were made. While Presidion insists that the loans were made only to Burcham and Vanderburg, individually, the submitted evidence establishes otherwise.

There were apparently no formal loan documents prepared. The primary evidence establishing that there were, in fact, loans, is four receipts issued to the four individual payors. One receipt, dated, May 2, 2001 provides as follows:

RECEIVED \$200,000 this 2nd day of May, 2001 from John Fortune as a deposit towards the loans to be made by Elmma Management Company to John W. Burcham II and Craig A. Vanderburg.

The document then contains the signature of James E. Baiers, below which the following language appears:

James E. Baiers, on behalf of Affinity Business Services, Inc. and John W. Burcham II and Craig A. Vanderburg, individually

Three other receipts, one for \$300,000, one for \$200,000 and one for \$100,000 bear language identical to that above, with the exception of the payors' names, which appear on the remaining three receipts as being Rick Bellestri, Gretchen Drader, and Douglas Smith. From the receipts, it is clear that the monies were paid to and received by three persons/entities:

Presidion's predecessor (Affinity), Burcham, and Vanderburg. There is no argument that Baiers, as one of Affinity's principals, was without authority to bind Affinity. Plaintiff also submitted several cancelled checks, in varying amounts, to evidence some of the loans, all of which were made out to Affinity. Notably, at no time does Presidion assert that it did not receive or use the funds for their stated purpose. Its argument is, instead, the very narrow assertion that they are not *liable* for the loans.

Later correspondences from plaintiff regarding the loans are addressed from plaintiff to Affinity. The letters unequivocally discuss loan disbursements already made to "Affinity Business Services" and a May 21, 2001 letter specifies, "[t]his letter will confirm the status of the 2.5 Million Dollar Loan arranged by Affiliated Capital/Worldwide LLC to Affinity Business Services . . ."

Further evidencing an understanding that the funds were loaned to Presidion's predecessor, as well as Vanderburg and Burcham, is Presidion's answer to plaintiff's complaint. In its answer to plaintiff's complaint, while Presidion denied having any legal or equitable obligation to make any payments to plaintiff, it also "admit[s] that that Presidion Solutions, Inc. used the \$800,000.00 deposits, in part, for purposes of acquiring five separate Florida corporations collectively known as the Sunshine Corporations." Relevant documentation suggests that Baiers, Burcham, and Vanderburg formed Presidion's predecessor at least in part for the purpose of purchasing these Florida properties. Furthermore, in its motion for summary disposition, Presidion affirmatively states several times that Affinity received the \$800,000.00

Additionally, in its third-party/counter-complaint premised on breach of contract, Presidion states that in 2001, plaintiff delivered a loan commitment agreement concerning a proposed loan to Presidion and Vanderburg. Presidion alleged that pursuant to the loan commitment, plaintiff and its members were to secure a \$2.5 million loan to Vanderburg and Burcham, but that they "breached the Agreement with Presidion by failing to arrange for and provide the loan. Presidion suffered damages as a result of Defendant's breach of the Agreement." The above language reflects Presidion's belief that the original loan was to be made to it, not just Vanderburg and Burcham. If Presidion was not an intended recipient of the anticipated \$2.5 million (and the actual \$800,000.00) loan funds, it would not have identified itself as a party to the loan agreement, or alleged that because plaintiff failed to secure the entire funds, it breached an obligation owed to Presidion, thus causing Presidion damages.

In support of its contention that Vanderburg and Burcham, alone, were the intended recipients of the loans, Presidion relies on a March 2, 2001 document. This document, referred to as a "term sheet," identifies plaintiff's clients for purposes of the proposed \$2.5 million loan as Burcham and Vanderburg. However, the document bears a large and distinct statement indicating that it is for discussion purposes only. The document also does not specify an interest rate for any loan, merely indicating that it would be between 12% and 14%, and is signed only by defendant Fortune. Moreover, the document details a proposed \$2.5 million loan that never proceeded to fruition. As previously indicated, the loans actually issued totaled \$800,000.00. The document, then, is a non-binding proposal that has no impact on the final loans actually issued, including to whom the loans were to be made.

Presidion also relies upon one of the assignments of interest, which states that the assignor, Rick Bellestri, assigns "his entire right, title and interest in and to certain indebtedness

of Craig A. Vanderburg and John W. Burcham II. . .” to plaintiff. According to Presidion, the fact that one of assignments references only the above defendants and the other assignments do not specify the debtor on the loan assigned, it can be surmised that the intent was to loan the monies at issue to Vanderburg and Burcham, alone. Again, however, the monies were specifically received on behalf of Presidion’s predecessor, Burcham, and Vanderburg. That the assignment does not mention Presidion does not alter to whom the loans were actually made.

Again, the only solid documentation evidencing that loans were even made is the receipts, specifically signed “on behalf of” Presidion’s predecessor, Burcham, and Vanderburg. Presidion has failed to provide any competent, material evidence refuting the receipts, and, in fact, admits to receiving the loan funds and using them for its benefit. The trial court did not err in its determination that Presidion was liable for the loan balance still owing.

Presidion next argues that the trial court erred in granting summary disposition to plaintiff, as the assignments were insufficient to confer standing on plaintiff to collect repayment of the loans.

An assignment is defined as “[t]he transfer of rights or property.” Black's Law Dictionary (7th ed), p. 115. Under general contract law, rights can be assigned unless the assignment is clearly restricted. *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). In determining whether an assignment has been made, the question is one of intent. A written agreement assigning a subject matter must manifest the assignor's intent to transfer the subject matter clearly and unconditionally to the assignee. *Id.* at 655. No particular form of words is required for an assignment; the assignor must simply manifest an intent to transfer and must not retain any control or any power of revocation. *Id.* at 655. “Thus, under Michigan law, a written instrument, even if poorly drafted, creates an assignment if it clearly reflects the intent of the assignor to presently transfer “the thing” to the assignee.” *Burkhardt, supra*, at 654. An assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed. *Professional Rehabilitation Associates v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

Here, one of the assignments, an “Assignment of Promissory note” dated August 15, 2006, provides:

FOR VALUE RECEIVED, the receipt and adequacy of which is hereby acknowledged; CHARLES S. BELLESTRI (the “Assignor”) hereby assigns to AFFILIATED CAPITAL/WORLDWIDE GROUP L.L.C., and/or RICK C. BELLESTRI . . . (the “Assignee”), his entire right, title and interest in and to certain Promissory Notes, in the aggregate principal amount of Two Hundred Thousand Dollars (\$200,000.00), payable to the Assignor, which promissory Notes are attached hereto and made part hereof.

The above is followed by September 6, 2001 document which provides, “In consideration and receipt of a \$200,000.00 payment from Charles Bellestri, I hereby assign the said loan from Affinity Business Systems to Charles Bellestri.” The document is signed by Gretchen Drader and Charles Bellestri.

The remaining “Assignment of Promissory notes” bear similar language to the above, though there are no notes or other documents attached to them. While Presidion asserts that the above assignments fail, as they do not identify the subject matter of the assignment, it has directed us to no binding authority suggesting that the subject matter of the assignment must be defined with any specificity. Again, under Michigan law, no particular form of words is required for an assignment. The assignment must simply reflect an intent to transfer something from one to another. *Burkhardt, supra*. Notably, neither the assignor nor assignee is challenging the language or validity of the assignments. It can be presumed that the contracting parties, then, well understood the subject matter of the assignment.

In addition, it is undisputed that payments were made on the loan to plaintiff for a period of two years. In an affidavit provided to the trial court, Rick Bellestri swore that after defendants approached him for a loan, he and three other individuals made separate loans to defendants in an amount totaling \$800,000.00. Bellestri swore that all four of the original lenders assigned their individual rights to the repayment of their respective individual loans to plaintiff. Bellestri further swore that between October 2001 and August 2003, “defendants” made \$365,500.00 in loan payments to plaintiff, that defendants were aware that the claims were assigned to plaintiff and that defendants never objected to making their loan repayments to plaintiff. Presidion has provided no competent evidence, in the form of documentation, affidavits, or otherwise, to refute any of the above.

We do note, however, that one of the assignments relied upon by plaintiff purports to assign a \$250,000.00 loan from Lotic, LTD to DKT Horizons. The assignment is signed by Fortune, one of the original four lenders. Another assignment serves to transfer the same loan from DKT Horizons to plaintiff. However, there is no indication that Lotic, LTD was involved in any loan to Presidion’s predecessor, Vanderburg, or Burcham. To the extent that plaintiff is asserting that the above assignments transferred one of the initial loans to it, it would be incumbent upon plaintiff to provide some sort of evidence establishing Lotic, LTD’s involvement in the original loan. It is unclear from either the motion hearing transcript or the trial court’s order whether this discrepancy was addressed. Thus, we remand to the trial court for a determination/clarification as to whether the assignment of a loan from Lotic, LTD to DKT involved one of the loans at issue.

Finally, Presidion contends that the trial court erred in denying its motion for reconsideration, given plaintiff’s counsel’s statements on the record that the loan was made to the individual defendants Vanderburg and Baiers.² We disagree.

We first note that Presidion cites to no authority in support of its position that a single statement made by counsel during a hearing may serve as the sole basis for summary disposition in Presidion’s favor (or denial of summary disposition in plaintiff’s favor). A party may not simply announce his position, and then leave it to this Court to search for authority to sustain or

² While the record reflects that plaintiff’s counsel referred to Baiers, we believe he simply misspoke and intended to make reference to Burcham.

reject the position, or to discover and rationalize the basis for his claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Nevertheless, briefly considering the argument, plaintiff's counsel did state, during the hearing on the parties' cross-motions for summary disposition ". . . the loan was made to the individual Defendants Vanderburg and Baiers." However, counsel did not state that the loans were made *only* to the two named individuals. Moreover, immediately prior to the above statement, counsel indicated, ". . . Vanderburg and Burcham owned a company, Affinity, *that purchased the Sunshine Companies with the \$800,000.00 loan*" (emphasis added). Throughout all of the proceedings, plaintiff maintained that the loan was made to Presidion's predecessor *and* Vanderburg and Burcham. Thus, a single statement, which could be viewed as contradicted by a prior statement, does not serve as a basis for assigning error to the trial court's decision.

We remand to the trial court for a determination/clarification as to whether the assignment of a loan from Lotic, LTD to DKT involved one of the loans at issue. We affirm in all other respects. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra