

STATE OF MICHIGAN
COURT OF APPEALS

RIVER OAKS ENTERPRISES, INC., GERALD
M. STONE, and MARCELLA D. STONE,

UNPUBLISHED
January 26, 2001

Plaintiffs-Appellants,

v

BECK INDUSTRIAL CENTER LIMITED
PARTNERSHIP, GENERAL DEVELOPMENT
CO., GARY WEISMAN, and BRUCE
BRICKMAN,

No. 216630
Wayne Circuit Court
LC No. 97-728426-NZ

Defendants-Appellees.

Before: Saad, P.J., and Griffin and R.B. Burns,* JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from summary disposition for defendants. We affirm.

Plaintiffs argue that they should have been given the opportunity to engage in discovery before the summary disposition motion was considered. Generally, summary disposition will not be granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996); *Jordan v Jarvis*, 200 Mich App 445, 452; 505 NW2d 279 (1993). However, summary disposition may nevertheless be appropriate if, as here, further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

Plaintiffs opposed the summary disposition motion with a single affidavit, repeatedly stressing that they are engaged in a retail business, that they have to be in retail business to make a profit, that defendants understood this, and that defendants breached promises to them and engaged in misrepresentation about plaintiffs' ability under local zoning laws to engage in retail business on the subject premises. However, contrary to their assertions in this litigation, plaintiffs represented to the local zoning authority that they would not engage in a retail business. Plaintiffs made these representations only after they had encountered difficulty with receiving certificates of occupancy for the premises as a retail establishment. Based upon plaintiffs'

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

representation that they would not engage in a “retail” business, plaintiffs obtained certificates of occupancy. Plaintiffs also provided “estoppel certificates” saying that defendants had not failed to perform any outstanding duties. Yet, now in this suit they attempt to argue that they were unaware of any difficulty in getting the local zoning authority’s approval for their “retail” activities until after the certificates were issued. However, the aforementioned estoppel certificates were issued two years after plaintiffs’ discussions with township officials regarding the prohibition of engaging in retail sales. Accordingly, plaintiffs were certainly on notice that the local zoning laws prohibited retail sales. Accordingly, we conclude as did the trial court, that there are no genuine issues of material fact in dispute and therefore, we affirm the trial judge’s grant of summary disposition.

Plaintiffs also contend that the trial court improperly resolved disputed factual issues. From what we have said, it is clear that there are no disputed factual issues. MCR 2.116(G)(4) does not allow a party to rest on its pleadings in responding to a motion for summary disposition. It “must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” Plaintiffs failed to do so. Except for a single affidavit, contradicted by plaintiffs’ own prior statements and course of conduct, and offering a theory of the case which plaintiffs are now trying to disavow, plaintiffs offered the trial court nothing from which a genuine issue could be found. The trial court properly found that there were no issues of credibility, or other genuine disputed issues of fact.

Plaintiffs also say that the trial court improperly considered the prior inconsistent statements of the author of the affidavit, because defendants presented these statements to the court only on the eve of the summary disposition hearing. We disagree. Reversal of the trial court’s decision to consider this evidence is warranted only if it works a substantial injustice. There is no substantial injustice in plaintiffs being required to explain their own prior inconsistent statements, and to reconcile the inconsistency between the prior statements to the zoning officials and the position they now assert here. Plaintiffs can hardly claim to be surprised by their own statements. Given that defendants presented these documents to the court in opposition to a sworn affidavit which plaintiffs filed with the court only six days earlier, it is difficult to fault defendants with the timing of the filing, or to accuse them of trying to spring a last-minute surprise on plaintiffs. If there is a difficulty in the court receiving documents at the last minute, which were authored by one of the plaintiffs, contradicting the position taken by that plaintiff in a sworn affidavit filed with the court six days earlier, the responsibility rests with plaintiffs, not with defendants or with the court. We find no substantial injustice to plaintiffs in the court’s consideration of these prior inconsistent statements.

Claiming that this appeal is frivolous, defendants have asked that they be awarded costs and attorney fees. It is instructive to us, that after initially determining the underlying lawsuit to be frivolous and awarding sanctions, the trial judge reversed himself after listening at length to plaintiffs’ lawyer explain what he believed to be the basis for the suit. We conclude, as did the

trial court, that neither plaintiffs nor their attorneys proceeded in bad faith. Therefore, we do not award costs or attorney fees.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns