

STATE OF MICHIGAN
COURT OF APPEALS

WHITE CONSOLIDATED INDUSTRIES, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY, REVENUE
DIVISION, STATE OF MICHIGAN.

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 238096

Court of Claims

LC No. 00-017568-CM

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting summary disposition in favor of plaintiff, entered by the court of claims. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

Plaintiff filed a complaint and an amended complaint seeking a refund from a use tax and interest it paid on the use tax, pursuant to a bill defendant issued to plaintiff, assessing taxes based on a disallowance of an industrial processing exemption for a specific container used by plaintiff. The taxable period at issue is July 1992 through December 1995. The court of claims granted summary disposition in favor of plaintiff finding that the containers used by plaintiff were partially used in an exempt manner. Subsequently, the court of claims denied defendant's motion for reconsideration.

Defendant's first issue on appeal is that summary disposition should not have been granted because the reusable containers used by plaintiff are not within the industrial processing exemption set forth at MCL 205.94(g). We disagree. A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). "Because the trial court looked beyond the pleadings in deciding defendant's motion, we review the motion under MCR 2.116(C)(10)." *Trepanier v National Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This Court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving

party is entitled to judgment as a matter of law. *Scott v Harper Recreation*, 444 Mich 441, 448; 506 NW2d 857 (1993); *Krass v Tri-County Security, Inc*, 233 Mich App 661, 684 n 14; 593 NW2d 578 (1999).

Plaintiff sought an exemption from the Michigan Use Tax, MCL 205.91 *et seq.*, under MCL 205.94(g). MCL 205.94(g), at the time applicable to this case, provided a use tax exemption for industrial processing as follows:

(g) Industrial processing. Property sold to the following:

(i) An industrial processor for use or consumption in industrial processing. Property used or consumed in industrial processing does not include tangible personal property permanently affixed and becoming a structural part of real estate; office furniture, office supplies, and administrative office equipment; or vehicles licensed and titled for use on public highways other than a specially designed vehicle, together with parts, used to mix and agitate materials added at a plant or jobsite in the concrete manufacturing process. Industrial processing does not include receipt and storage of raw materials purchased or extracted by the user or consumer, or the preparation of food and beverages by a retailer for retail sale. As used in this subdivision, "industrial processor" means a person who transforms, alters, or modifies tangible personal property by changing the form, composition, or character of the property for ultimate sale at retail or sale to another industrial processor to be further processed for ultimate sale at retail. Sales to a person performing a service who does not act as an industrial processor while performing the service may not be excluded under this subdivision, except as provided in subparagraph (ii). [These provisions were deleted by 1999 PA 117, immediately effective July 14, 1999.]

There appears to be no dispute that plaintiff is an industrial processor that manufactures refrigerators. The dispute surrounds whether certain containers used by plaintiff constituted property used in industrial processing. Plaintiff, a manufacturer of refrigerators, uses these containers in question for transporting parts to plaintiff's plant from vendors, storing the parts, protecting the parts, and for moving the parts within plaintiff's manufacturing plant and then to the assembly line. Basically, once the containers make it to plaintiff's plant and the parts in the container are ready to be used, the container is used to improve assembly line efficiency. The parts, used in the manufacturing of the refrigerators, are moved toward the assembly lines in these containers. Plaintiff owns these containers throughout the entire process. The trial court found that because the containers were partially being used to hold parts next to the assembly line "they are an integral part of the manufacturing process," and thus, exempt.

Defendant argues that an exemption is not allowed because the containers are not a part of the product that is ultimately sold at retail. However, the containers are used at assembly line side and are used during the assembly process of the refrigerators, which are eventually sold at retail with the installed parts. When these containers are used at the assembly line they are used in industrial processing as they are serving the production of the refrigerators that are to be sold at retail.

For the containers to be considered exempt and considered for industrial processing, they must be used in performing an essential part of the process of manufacture. *Minnaert v Department of Revenue*, 366 Mich 117, 124; 113 NW2d 868 (1962); *International Research and Development Corp v Department of Revenue*, 25 Mich App 8, 13; 181 NW2d 53 (1970). The undisputed facts show that these containers, which are at issue, were used, in part, for industrial processing. The containers were used to move parts along an assembly line and to improve working conditions for employees. The parts that were added to the refrigerators, along with the containers used to move the parts along the assembly line, are essential to the manufacturing of the refrigerator. These undisputed facts also show that the containers were used for activities that would not be considered industrial processing, such as storage and for transporting parts from vendors to plaintiff's manufacturing plant.

Defendant contends that this shipping and storage use of the containers does not bring them within the industrial processing exemption because industrial processing does not include receipt and storage of raw materials purchased or extracted by the user or the consumer. However, the containers are not solely used for receipt and storage. The containers were used to transport parts along the assembly line that were used in assembling the product, and were used to improve working conditions during assembly. While use of the containers for storage and transporting goods from vendors has no relation to the industrial process, concurrent taxable use with an exempt use does not remove the protection of the exemption. See *Michigan Allied Dairy Ass'n v State Bd of Tax Administration*, 302 Mich 643, 650; 5 NW2d 516 (1942); *Milk Producers v Department of Treasury*, 242 Mich App 486, 495; 618 NW2d 917 (2000). The containers are used for shipping parts from vendors, which is an activity that is not exempt from the use tax. The fact that the containers are used for activities that are not subject to the exemption does not keep them from being exempt for other activities. *Michigan Allied Dairy Ass'n, supra*, 302 Mich 650. Therefore, we find, upon a de novo review, that summary disposition was properly granted to plaintiff with respect to whether the containers were exempt from the use tax.

Defendant's final issue on appeal is that, in the event the containers are exempt from the use tax, they are taxable to the extent their use is nonexempt. Defendant has waived this issue because apportionment, in this case, is an affirmative defense that was not properly raised. Except for the defenses of lack of subject matter jurisdiction and failure to state a claim, affirmative defenses not raised in the responsive pleading or by amendment pursuant to the court rule are deemed waived. MCR 2.111(F)(3); *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990); *Coffey v State Farm Mut Auto Ins Co*, 183 Mich App 723, 727-728; 455 NW2d 740 (1990). "Failure to timely plead statutory defenses constitutes a waiver." *Soderberg v Detroit Bank & Trust Co*, 126 Mich App 474, 478; 337 NW2d 364 (1983). Defendant failed to raise the affirmative defense of apportionment in its responsive pleading or in an amended pleading pursuant to MCR 2.118, and thus, the issue is deemed waived on appeal.

Basically, defendant is affirmatively arguing that plaintiff is not entitled to recover fully on the claim for some reason not disclosed in plaintiff's complaint. See *Stanke v State Farm Ins*, 200 Mich App 307, 312; 503 NW2d 758 (1993). An affirmative defense is one that asserts that plaintiff once had a cause of action, but that the cause of action is no longer viable. *Robinson v Emmet Co Rd Comm*, 72 Mich App 623, 636-637; 251 NW2d 90 (1972). Defendant contends that apportionment is not an affirmative defense because it does not foreclose plaintiff's civil

action, but only limits the amount of the refund plaintiff will receive. Defendant cites *Kelly-Nevils v Detroit Receiving Hospital*, 207 Mich App 410; 526 NW2d 15 (1994), as authority for its contention that apportionment is not an affirmative defense because it does not foreclose plaintiff's action. However, *Kelly-Nevils, supra*, only states that, in addition to the affirmative defenses specifically enumerated in MCR 2.111(F)(3)(a), defenses which foreclose plaintiff's action are affirmative, but does not limit what is considered an affirmative defense to defenses which completely foreclose plaintiff's action. This court has, on other occasions, determined that a defense was an affirmative defense when the defense would not completely foreclose the plaintiff's action. In *Teodorescu v Bushnell, Gage, Reizen & Byington*, 201 Mich App 260, 278-279; 506 NW2d 275 (1993), this Court held that collectibility is an affirmative defense to the action of malpractice even to the extent of partial collectibility, which would not fully foreclose plaintiff's action. See also *McInerney's, Inc v Dunford*, 341 Mich 477, 481; 67 NW2d 727 (1954) (our Supreme Court found coverture as an affirmative defense, and coverture is not always going to totally foreclose plaintiff's action).

The affirmative defenses provided in MCR 2.111(F)(3)(a) "were not intended to be all inclusive, but rather were enumerated for purposes of illustration." *Grand Blanc Landfill v Swanson Environmental, Inc*, 200 Mich App 642, 646; 505 NW2d 46 (1993) rev'd in part on other grounds 448 Mich 859; 528 NW2d 734 (1995). Apportionment is comparable to other listed, MCR 2.111(F)(3)(a), affirmative defenses such as the defense of payment and the defense that an instrument or transaction is void or voidable by reason of statute. MCR 2.111(F)(3)(b) provides that an affirmative defense is "a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part." Apportionment, in this case, is an affirmative matter in which defendant seeks to avoid the legal effect, in part, of plaintiff's claim.¹ Therefore, defendant has waived the affirmative defense of apportionment.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen

¹ We note that the intent behind rules requiring pleading of affirmative defenses is to give plaintiff notice of affirmative defenses alleged. *Hanon v Barber*, 99 Mich App 851, 855-856; 298 NW2d 866 (1980). Defendant never raised this issue until it objected to the entry of the order granting summary disposition. Even as late as the motion hearing, when the court asked defendant's counsel if the amount of money was in dispute, defendant's counsel stated "Probably not." Yet, plaintiff's complaint alleged that it was due a full refund for taxes and interest it paid on the containers it alleged were exempt. Under these circumstances defendant waived the issue.