

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET BRYSON,

Plaintiff-Appellant,

v

VTS, d/b/a BRANDY'S II,

Defendant-Appellee.

UNPUBLISHED

April 15, 2003

No. 239841

Wayne Circuit Court

LC No. 92-234878-NS

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(3). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court originally granted defendant's motion because plaintiff failed to make service of process in the manner specified in an order for alternate service. We reversed and remanded for an evidentiary hearing to determine whether defendant actually received a copy of the summons and complaint before the summons expired. *Bryson v V.T.S., Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 16, 1997 (Docket No. 186573). Upon remand, defendant filed a renewed motion for summary disposition, which the court granted without holding an evidentiary hearing. We again reversed and remanded for an evidentiary hearing. *Bryson v VTS*, unpublished opinion per curiam of the Court of Appeals, issued May 25, 2001 (Docket No. 218399).

The parties elected not to call any witnesses and instead presented documentary evidence and deposition testimony to the court. Having reviewed the evidence, the trial court concluded that it did not establish that defendant had received the summons and complaint, by whatever method of service, before the summons expired, and again granted defendant's motion. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

The evidence showed that a copy of the summons and complaint were delivered to "Brandy's II C/O Manager." Plaintiff did not present any evidence to show who received the papers and defendant presented evidence that the bar had ceased operations and the premises had reverted to the previous owner. Plaintiff made alternate service by posting a copy of the summons and complaint at the Michigan home of Terry Alcorn, defendant's resident agent, but

plaintiff already had information that Alcorn no longer lived there and defendant presented evidence that Alcorn had moved to Texas.

Plaintiff does not dispute that she did not produce affirmative evidence to show that a person authorized to receive service of process for defendant received a copy of the summons and complaint within the life of the summons. Plaintiff contends that the court should have drawn an inference of service because defendant's insurer destroyed its investigation file and defendant failed to produce Alcorn for deposition.

A party's intentional destruction of material evidence within its control creates a presumption that the evidence would have been adverse to that party if he was acting fraudulently in an effort to suppress the truth. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 520; 592 NW2d 786 (1999). A party's failure to produce material evidence under his control where there is no reasonable excuse for its nonproduction permits an inference that the evidence would have been adverse to that party. *Botsford General Hosp v Citizens Ins Co*, 195 Mich App 127, 144-145; 489 NW2d 137 (1992); *Berryman v K Mart Corp*, 193 Mich App 88, 101-102; 483 NW2d 642 (1992). Because the inference is permissive, not mandatory, the factfinder is not required to draw such an inference. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997).

Plaintiff has not shown that defendant intentionally destroyed any evidence. While its insurer intentionally destroyed its file, it was not done to prevent its use in this case. Rather, the file was discarded after several years as routine procedure because the insurer was not aware of any pending litigation. Moreover, the correspondence between plaintiff's counsel and the insurer indicated that the insurer had closed its file because it had no record that plaintiff had filed suit against defendant within the limitations period. Therefore, we cannot find that the trial court abused its discretion in failing to infer that the file would have contained evidence showing that defendant received service of process within the life of the summons.

Alcorn was defendant's agent and defendant failed to produce him for deposition. However, defendant had a reasonable explanation for its failure to do so, that being that it had traced Alcorn to Texas, but had been unable to make contact with him. Moreover, the evidence showed that Alcorn was living in Texas at the time the summons and complaint were posted at his house in Michigan. Therefore, we cannot find that the trial court abused its discretion in failing to infer that Alcorn would have testified that he received the summons and complaint within the life of the summons.

Because defendant presented evidence to show that an agent authorized to receive service of process was not served with the summons and complaint during the life of the summons, MCR 2.105(D), (H), and plaintiff failed to present any evidence to show otherwise, the trial court did not clearly err in finding that plaintiff had failed to prove that she made service on the defendant, MCR 2.613(C), and thus, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood