

STATE OF MICHIGAN
COURT OF APPEALS

VISION INFORMATION SERVICES, LLC,

Plaintiff-Appellee,

v

PHILLIP TOCCO,

Defendant-Appellant.

UNPUBLISHED

December 20, 2005

No. 258422

Genesee Circuit Court

LC No. 03-077252-CK

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant Phillip Tocco appeals as of right from a judgment in favor of plaintiff Vision Information Services, LLC (VIS), in the amount of \$100,000. We affirm.

I. FACTS

Defendant, Irene Correia, and Salvatore Craparotta are the three sole shareholders of VIS. Defendant owns a 14% interest in VIS, while Correia and Craparotta own the remaining interest equally. The VIS operating agreement states that the purposes of the business “are to provide services that are required or appropriate to manage a direct-to-retail program and/or retail inventory management, including, by way of illustration only, information management and field service management” Defendant, Correia, and Craparotta also jointly own Vision Worldwide Management, LLC (VWM), which is a holding company that performs administrative services for VIS.

In April 1999, defendant advised Correia that he needed to borrow \$100,000 to purchase a home. On April 14, 1999, Correia wrote defendant a personal check for \$100,000. This transaction and defendant’s failure to repay the \$100,000 is the source of the dispute between plaintiff and defendant. There was no written contract or agreement regarding defendant’s repayment of the \$100,000, and the parties dispute whether it was a loan or an advance. Correia contends that the money was a loan and that the parties verbally agreed that the money was payable on demand when defendant got “his life in order.” In contrast, defendant contends that the money was an advance and that he and Correia had an oral agreement that he would repay the money from his portion of the proceeds of the sale of VIS when VIS was sold.

On November 10, 2003, Correia executed a written assignment to plaintiff of her “right to receive payment in full on demand, in and to the April 14, 1999 loan to [defendant] in the

principal amount of \$100,000 made by Irene Correia.” The assignment indicated that the assignment was effective as of October 1, 2000, and the record indicates that plaintiff paid Correia \$100,000 for the right to receive payment of the \$100,000 from defendant on November 6, 2000. On August 5, 2003, plaintiff sent defendant a letter, which was signed by Correia, demanding payment of the \$100,000 and requesting that defendant remit payment to plaintiff. According to Correia, with the exception of this letter, she never sought repayment of the loan from defendant because defendant was her business partner and because she assumed that defendant was still in a “financial bind.” Therefore, she asserted, she simply assigned the loan to plaintiff. Defendant has not repaid Correia or plaintiff the \$100,000.

In September 2003, plaintiff filed a complaint against defendant seeking repayment of the \$100,000, plus interest, costs, and attorney fees. The complaint contained a claim for account stated as well as a breach of contract claim. According to the complaint, Correia personally loaned defendant \$100,000, the loan was payable on demand, Correia assigned the loan to plaintiff on October 1, 2000, and defendant failed to repay the loan despite a demand for repayment on August 5, 2003. Defendant filed an answer and raised several affirmative defenses. In his answer, defendant admitted plaintiff’s allegation that Correia “personally loaned defendant the sum of \$100,000.” However, defendant denied plaintiff’s allegation that the loan was “payable on demand.” Furthermore, in his affirmative defenses, defendant asserted that he was not obligated to repay the \$100,000 on demand “since there is no term to the obligation; there is no interest rate; there is no document indicating an obligation of repayment.” Defendant also contended that plaintiff did not have standing to bring the action.

On July 12, 2004, plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10), arguing, among other things, that defendant breached the agreement to repay the \$100,000 loan because he was financially able to repay the debt and failed to do so. On July 20, 2004, defendant moved for summary disposition under MCR 2.116(C)(10). Defendant argued that he was entitled to summary disposition because he did not breach an agreement to repay the \$100,000 because he was not obligated to repay the \$100,000 until he sold his interest in VIS, and he had not yet done so. Therefore, defendant contended, he had not breached a contract because his obligation to repay the \$100,000 was not due. Defendant also argued that plaintiff did not have standing to sue defendant because the assignment of the debt was invalid, in part, because there was no consideration to support the assignment of the debt. On August 23, 2004, the trial court granted plaintiff’s motion and denied defendant’s motion.¹ In granting summary disposition in favor of plaintiff, the trial court determined that it was undisputed that defendant had the ability to repay the \$100,000. Therefore, the trial court ruled that under *Dewey v Tabor*, 226 Mich App 189; 572 NW2d 715 (1997), defendant was required to repay the \$100,000. Defendant moved for reconsideration, and the trial court denied the motion. On September 27, 2004, the trial court entered a judgment in favor of VIS in the amount of \$100,000.

¹ Because the trial court considered documentary evidence in addition to the pleadings in granting plaintiff’s motion for summary disposition, we conclude that the trial court granted plaintiff’s motion under MCR 2.116(C)(10), and not under MCR 2.116(C)(9). MCR 2.116(G)(5).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. ANALYSIS

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition. According to defendant, there were several genuine issues of material fact, which should have precluded summary disposition in plaintiff's favor. Defendant also contends that the trial court erred in relying on *Dewey, supra*, in granting plaintiff's motion. We disagree.

Defendant first argues that the trial court erred in concluding that defendant's obligation to repay plaintiff was a loan that was payable on demand rather than an advance that would be deducted from the proceeds of defendant's sale of his interest in VIS. Defendant asserts that the evidence was conflicting regarding repayment of the \$100,000 because Correia asserted in her deposition that when she loaned the \$100,000 to defendant, it was clear in her mind that the loan was payable on demand, although she admitted that she did not discuss repayment with defendant, while defendant asserted both in his affidavit and in his deposition that he was to repay the \$100,000 when he sold his interest in VIS. According to defendant, the trial court was required to resolve this conflicting evidence in defendant's favor, as he was the non-moving party.

Defendant's reliance on his affidavit to create a genuine issue of material fact is misplaced because the trial court properly refused to consider the affidavit because it conflicted with defendant's answer to plaintiff's complaint and with statements that defendant made in his deposition. In his answer, defendant admitted that plaintiff "personally *loaned* defendant the sum of \$100,000" (emphasis added). Defendant also admitted in his deposition that the \$100,000 was a loan. Regarding the time for repayment, defendant asserted in his affirmative defenses that there was "no term to the obligation; there is no interest rate; there is no document indicating an obligation of repayment." (Emphasis added.) In direct contradiction of his assertions in his answer, affirmative defenses, and deposition, defendant asserted in his affidavit that the \$100,000 that he received from Correia was a "personal advance" that would "be paid back to Ms. Correia, without interest, out of my portion of the sale proceeds resulting from the sale of [VIS]." A party may not contrive an issue of fact by submitting an affidavit with

conclusory assertions that contradict the party's prior conduct or clear and unequivocal testimony. *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). In addition, a party may not avoid summary disposition by creating a factual issue through the contradiction of his own prior sworn statements. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 411; 622 NW2d 533 (2000). Therefore, the trial court properly rejected defendant's affidavit because it directly contradicted statements that defendant made in his answer to plaintiff's complaint and in his deposition.

In addition to his affidavit, defendant also asserts that his deposition testimony created a genuine issue of material fact on the issue of whether the \$100,000 was a loan or an advance. Defendant failed to attach his deposition or even an excerpt of his deposition testimony to his brief in response to plaintiff's motion for summary disposition. While defendant did attach to his motion for summary disposition a short excerpt from his deposition in which he asserted that the \$100,000 was an advance that was to be repaid when defendant sold his interest in VIS, this assertion is merely a conclusory statement which is not sufficient to create a genuine issue of material fact. A party may not create a genuine issue of material fact by merely asserting conclusory statements. See *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002). MCR 2.116(G)(4) requires a party opposing a motion for summary disposition to "set forth specific facts showing that there is a genuine issue for trial." *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). While defendant presented some documentary evidence, it did not contradict plaintiff's documentary evidence. If a party opposing a motion for summary disposition fails to present documentary evidence establishing the existence of a material factual dispute, summary disposition is properly granted. *Koenig v South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999) (Taylor, J.). Therefore, summary disposition was appropriate on this issue.

Defendant next contends that the trial court improperly found that defendant had the ability to repay the \$100,000. According to defendant, the trial court's conclusion that defendant was able to repay the \$100,000 was based on misleading information provided by plaintiff. Plaintiff supported its motion for summary disposition with copies of defendant's federal tax returns and bank statements. These documents reflect that defendant's total income was \$270,482 in 1999, \$359,287 in 2000, \$172,450 in 2001, and \$773,187 in 2002. In addition, plaintiff presented copies of defendant's bank statements, which indicated that defendant's account balances rendered him able to repay the \$100,000 at various different times between 2000 and 2004. Defendant concedes on appeal that "on paper" it appears that he had the ability to repay the \$100,000 obligation, but contends that plaintiff's documents are misleading. However, defendant admits on appeal that he failed to provide any documentary evidence to contradict plaintiff's documentary evidence regarding his ability to repay the \$100,000. If a party opposing a motion for summary disposition fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* Therefore, the trial court properly granted summary disposition on this issue.

Defendant next argues that the trial court erred in failing to determine if any of the \$100,000 debt had been repaid. This issue is not preserved for review because defendant failed to raise it below, and the trial court did not address it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Defendant did not raise the issue regarding whether any of the

\$100,000 had been repaid in its reply brief to plaintiff's motion for summary disposition, in its motion for summary disposition, or on the record at the summary disposition hearing. Furthermore, defendant did not present any documentary evidence establishing the existence of a material factual dispute in this regard. Therefore, summary disposition was appropriate. *Koenig, supra* at 675.

Defendant next argues that the trial court erred in relying on *Dewey, supra*, in granting plaintiff's motion for summary disposition. According to defendant, *Dewey* is factually distinguishable and inapplicable to the fact of this case. Defendant's argument fails to acknowledge, however, that the trial court, in its written opinion denying defendant's motion for reconsideration, acknowledged that *Dewey* was not "factually analogous" to the facts of this case, but that it was relying on *Dewey* for the logic of its holding that when there is no specific time stated for repayment of a loan, a demand on the loan is appropriate when the debtor has an ability to pay. Essentially, by concluding that defendant's obligation to repay the \$100,000 accrued when defendant had the ability to repay the loan, the trial court was supplying the missing contractual term regarding the time for repayment under the reasonableness standard. Such action was within the trial court's discretion. When a contract contains essential terms, but omits details of performance, the law supplies the missing details by construction. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). If an important contractual term, such as the price or the time of performance, is indefinite, the trial court has the discretion to supply the term under the reasonableness standard. See *JW Knapp Co v Sinas*, 19 Mich App 427, 430-431; 172 NW2d 867 (1969). Furthermore, our Supreme Court has held that where there is no time stated for payment of a mortgage loan, the law presumes payment in a reasonable time. *Siegel v Sharrard*, 276 Mich 668, 672-673; 268 NW 775 (1936) ("While there was no agreement as to the time of payment, it cannot be assumed that the loan was to go on forever Where no time for payment is stated, the law will presume a reasonable time."). Similarly, it was appropriate for the trial court to conclude in this case that a reasonable time for repayment was when defendant was able to repay the loan. To the extent that the trial court relied on *Dewey* in concluding that it was reasonable to require repayment of the \$100,000 when defendant had the ability to repay the money, such reliance was not improper. When a loan agreement does not include a term providing for a time for repayment, the law presumes a reasonable time. See *id.* The trial court had the discretion to conclude that a reasonable time for defendant to repay his debt was when defendant was financially able to repay the \$100,000.

Defendant next argues that Correia's assignment of the \$100,000 debt to plaintiff was invalid due to a lack of proper purpose and lack of consideration. Defendant further argues that because federal tax records show that plaintiff transferred its interest in its receivables to VWM, plaintiff has not suffered an injury in fact and therefore has no standing to sue defendant for payment of the \$100,000. We disagree.

According to defendant, the assignment is invalid because it is contrary to the purpose of plaintiff. Plaintiff's purposes, as stated in Article I, § 1.1 of the First Amended and Restated Operating Agreement for VIS, "are to provide services that are required or appropriate to manage a direct-to-retail program and/or retail inventory management, including, by way of illustration only, information management and field service management, and to engage in all activities and transactions as may be necessary or desirable in connection with the achievement of the foregoing purposes." Plaintiff is organized as a limited liability company under the

Michigan Limited Liability Company Act, MCL 450.4101 *et seq.* Under the Act, plaintiff had the authority to loan money to defendant. “[A] limited liability company has all powers necessary or convenient to effect any purpose for which the company is formed, including all powers granted to corporations in the business corporation act” MCL 450.4210. Under the Business Corporation Act, “[a] corporation may lend money to, guarantee an obligation of, or otherwise assist an officer or employee of the corporation . . . if, in the judgment of the board, the loan, guaranty, or assistance may reasonably be expected to benefit the corporation” MCL 450.1548. Given plaintiff’s broad discretion under its operating agreement to enter into any transaction that is “necessary or desirable,” and the fact that plaintiff had broad discretion under the Michigan Limited Liability Company Act and the Business Corporation Act to lend money to its officers and employees, we conclude that the assignment of the \$100,000 debt was not improper.

Defendant next argues that the assignment lacked consideration. According to defendant, there was no consideration that justified plaintiff assuming a personal obligation of one of its shareholders. The assignment asserted that the assignment was for “GOOD AND VALUABLE CONSIDERATION, the receipt and adequacy of which are hereby acknowledged[.]” Consideration is required for a valid contract. *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005). The debt owed to Correia by defendant was a pre-existing debt. “An antecedent or a preexisting debt constitutes valuable consideration.” *Traverse City Depositors’ Corp v Case*, 297 Mich 304, 309; 297 NW 501 (1941); see also *Ann Arbor Construction Co v Glime*, 369 Mich 669, 674; 120 NW2d 747 (1963). We therefore conclude that there was consideration to support the assignment of the \$100,000 debt owed to Correia.

Defendant finally argues that because the assignment to plaintiff was invalid and because plaintiff transferred any interest that it had in receiving the \$100,000 repayment to VWM in 2001, plaintiff does not have standing to bring the underlying action against defendant. Whether a party has standing is a question of law that this Court reviews *de novo*. *Prentis Family Foundation, supra* at 56. For reasons articulated above, we find that the assignment was not invalid on the grounds alleged by defendant. Moreover, we reject defendant’s argument that plaintiff lacked standing to sue defendant. Standing requires an injury in fact, a causal connection between the injury and the conduct complained of, and a likelihood that the injury would be redressed by a favorable decision. *Nat’l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629; 684 NW2d 800 (2004). According to defendant, plaintiff has not suffered an injury in fact because it transferred any interest that it may have possessed in receiving the \$100,000 to VWM in 2001 and therefore plaintiff is not the assignee of the debt. Our review of the record reveals that plaintiff did suffer an injury in fact because Correia assigned the right to receive payment of the \$100,000 debt to plaintiff, and not to VWM. Furthermore, it is undisputed that in exchange for the assignment, plaintiff paid Correia \$100,000. Therefore, we reject defendant’s contention that plaintiff did not suffer an injury in fact.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello