

STATE OF MICHIGAN  
COURT OF APPEALS

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NEWTON & ASSOCIATES, INC.,

Plaintiff-Appellee,

v

DENIS FURGAL and JUDY FURGAL,

Defendants-Appellants.

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UNPUBLISHED

May 30, 2006

No. 265822

Lapeer Circuit Court

LC No. 04-035264-CK

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting plaintiff's motion for summary disposition and awarding plaintiff \$200,000 plus costs and attorney fees. Because the trial court erred in granting summary disposition in plaintiff's favor, we reverse and remand for further proceedings consistent with this opinion.

Defendants owned a certain parcel of land and engaged in negotiations with a third party for the purchase of the land. Negotiations between defendants and the third party apparently broke down. According to plaintiff, defendants thereafter entered into an agreement with plaintiff whereby plaintiff would negotiate a new purchase agreement between defendants and the third party, and defendants would pay it a \$200,000 fee for such service. Defendants, on the other hand, claim plaintiff solicited them and offered to continue negotiations with the third party on defendants' behalf. Defendants contend plaintiff was to receive a commission only if defendants and the third party entered into a purchase agreement, which, according to defendants, did not occur.

On July 19, 2005, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10). On the morning of the hearing, defendants filed an answer to plaintiff's motion for summary disposition. At the hearing, the court noted that, pursuant to MCR 2.116(G)(1)(a)(ii), defendants had not filed a timely response to plaintiff's motion, and subsequently granted plaintiff's motion. Defendants thereafter filed a motion for reconsideration, which the court denied.

We review de novo a trial court's order granting summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon*

*Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In reviewing such a motion, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted under this court rule when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10).

On appeal, defendants assert, essentially, that the trial court erred in granting plaintiff’s motion when plaintiff failed to present evidence that an agreement existed between the parties. We agree.

It is undisputed that defendant did not file and serve a response to plaintiff’s motion for summary disposition within seven days of the motion hearing contrary to MCR 2.116(G)(1)(a)(ii). Therefore, defendant’s response was untimely and, pursuant to *Prussing v Gen Motors Corp*, 403 Mich 366, 369-370; 269 NW2d 181 (1978), the court properly excluded it from consideration. Importantly, however, there is no indication in either MCR 2.116(G)(1)(a)(ii) or *Prussing*, *supra*, that failure to timely file a response to a motion for summary disposition results in the automatic award of summary disposition to the moving party or that the moving party is entitled to a default judgment based upon a lack of timely response. Indeed, the *Prussing* court did not decline to review the merits of the case based upon an untimely-filed affidavit, but instead excluded the affidavit and found that the moving party’s timely filed affidavit, without rebuttal, indicated there was no genuine issue of material fact relative to the issue in that case.

The plaintiff has “the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence” before the burden shifts to defendants “to demonstrate that a genuine issue of disputed fact exists for trial.” *Willis v Deerfield Tp*, 257 Mich App 541, 550; 669 NW2d 279 (2003). Here, the only evidence properly before the court was that attached to plaintiff’s motion for summary disposition and supporting brief and any pleadings timely filed prior to plaintiff’s motion, and the same should be reviewed by the court even in the absence of a responsive brief from defendants.

In the complaint, plaintiff alleged that the parties’ agreement that defendants would pay plaintiff a fee of \$200,000 for their services was evidenced in a “term sheet.” Plaintiff also provided the term sheet to the court in support of its motion for summary disposition. However, the term sheet simply provides, in part:

DOWN PAYMENT

\$200,000 additional cash at closing. Closing to occur at or before end of due diligence period set forth below.

Notably, plaintiff is not mentioned in the above, nor is it indicated that the defendants were to pay plaintiff \$200,000.

Plaintiff additionally presented to the court a number of facsimiles exchanged between plaintiff, the third party's counsel, and defendants that plaintiff claimed indicated the extensive negotiations in which plaintiff participated on behalf of defendants. While the facsimiles presented to the court may demonstrate that plaintiff engaged in negotiations on defendant's behalf, they do not confirm that the parties entered into an agreement, explain the boundaries or expectations of the parties' relationship, or indicate that plaintiff was performing the negotiations in anticipation of a specified fee or commission.

Plaintiff has failed to present a written contract, testimony of people who allegedly entered into or witnessed an agreement, or any other evidence showing that a definite agreement actually existed (or, if so, its terms). Based upon the only evidence properly before the court, plaintiff clearly failed to meet its initial burden to support its claim that there was an actual agreement between the parties or that defendants had agreed to pay plaintiff \$200,000 for a particular service. Accordingly, the court erred in granting plaintiff's motion for summary disposition under MCR 2.116(C)(10).

In light of this conclusion we need not reach the additional issues raised by plaintiff on appeal.

We reverse the trial court's grant of summary disposition to plaintiff and remand this case for further appropriate proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood  
/s/ Deborah A. Servitto