

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH REED and CHRISTOPHER WHITE,
Plaintiffs-Appellees,

UNPUBLISHED
October 9, 2012

v

FREMAN HENDRIX,

No. 305166
Wayne Circuit Court
LC No. 10-010560-CZ

Defendant-Appellant.

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiffs Kenneth Reed and Christopher White appeal as of right from the trial court's order granting summary disposition in favor of defendant Freman Hendrix, in this breach of contract cause of action. On appeal, plaintiffs assert that the trial court erred in denying their motion to amend their complaint and in determining that defendant did not owe them certain disputed fees. We affirm.

This cause of action arises out of plaintiffs' allegation that defendant promised to pay them for political consulting services and then failed to comply with his promise after plaintiffs performed. Defendant was a candidate in a special election in 2009. The top two vote-getters in the special election primary, which was held on February 24, 2009, proceeded to a general election to become the Mayor of Detroit. Defendant received the third-largest number of votes at the primary and did not qualify for the general election. It is undisputed that plaintiffs were involved in defendant's campaign. However, while plaintiffs contend that they served the campaign as paid political consultants, defendant contends that plaintiffs were, in actuality, volunteers.

Plaintiff's filed their verified Amended Complaint for Account Stated on September 14, 2010.¹ In their complaint, which was filed without the benefit of counsel, plaintiffs alleged that they initially began providing defendant with consulting services in October 2008. The

¹ Plaintiffs' initial complaint was filed one day before their amended complaint. It appears that the amended complaint merely corrected a typographical error and did not alter the allegations or the theories of relief.

complaint states that defendant determined that plaintiffs' fees "would be paid by the campaign." Thereafter, plaintiffs allegedly provided a number of consulting services. On January 11, 2009, plaintiffs sent an invoice "to the Hendrix for Mayor Campaign" in the amount of \$2,310.00, and that invoice was allegedly paid approximately two days later. Plaintiffs allege that an additional payment of \$5,000 was eventually made. Plaintiffs continued to provide defendant with consulting services and sent him an invoice dated March 17, 2009 in the amount of \$27,000. In an e-mail attached to the complaint, defendant expressly denied owing plaintiffs the \$27,000 and asserted that plaintiffs were serving the campaign as volunteers as the campaign had no payroll. Plaintiff's complaint sought relief on a theory of promissory estoppel and detrimental reliance. It was supported by an affidavit from each plaintiff. The affidavits stated that the plaintiffs provided consulting services, were owed certain funds and had not been paid those funds. The affidavits did not explicitly state who promised the funds at issue.

Defendant filed an answer in response to the complaint. Defendant's answer denied that plaintiffs were promised compensation for their services and stated that plaintiffs were serving as volunteers for the campaign. Likewise, defendant filed an affidavit in which he stated that he never promised plaintiffs the compensation they were now seeking. Subsequently, defendant sent plaintiffs certain interrogatories. Of relevance to the current appeal, one of the interrogatories asked plaintiffs to admit that neither defendant nor the Freman Hendrix for Mayor Committee (The Committee) promised plaintiffs compensation for their services. In response, plaintiffs stated that "the campaign" promised to compensate them and that "it" actually did compensate them to an extent.

Defendant filed a motion for summary disposition on March 11, 2011. In the accompanying brief, defendant generally argued that summary disposition was proper pursuant to MCR 2.116(C)(8) and (10) where plaintiffs failed to recognize that the Committee was a distinct legal entity and that defendant could not be held liable for its acts. Defendant further argued that plaintiffs' claim regarding an account stated legally failed because defendant immediately denied owing the funds in question. Similarly, defendant argued the claim of promissory estoppel failed because plaintiffs admitted in their interrogatory response that the Committee, not defendant, made the alleged promise.

Plaintiffs filed a response to defendant's motion for summary disposition in which they argued that defendant was liable for the acts of the Committee because it was proper to pierce the veil between defendant and the Committee. Plaintiffs also alleged that the claim of promissory estoppel was viable because defendant, not the Committee, made the promise regarding the alleged compensation. In support of that position, plaintiffs submitted a second affidavit with their response, which explicitly stated that it was defendant that actually made the promise.

On May 27, 2011, after the motion for summary disposition had been filed, plaintiffs filed a motion to amend their complaint through newly obtained counsel. The motion asserted that it was proper to amend the complaint because the proposed amendment would not prejudice defendant. The proposed amended complaint was attached to the motion. The complaint included two additional defendants, the Committee and Access Consulting Group. Further, the proposed complaint added counts of breach of contract, fraud and innocent misrepresentation relating to defendant. Defendant filed a brief in opposition to the motion, arguing that the motion was prejudicial, unduly delayed and contradictory to plaintiffs' previous legal positions.

The trial court held a hearing on the motion to amend the complaint on June 3, 2011. At the hearing, the trial court asked plaintiffs' counsel about the nature of the proposed amendment. Plaintiffs' counsel stated that she intended to add two defendants and "some additional claims against defendant Hendrix." Counsel explained that, in addition to adding parties and counts, she intended to reword the complaint as originally filed so that the existing claims "can actually be viable." Defense counsel argued that the proposed amendment was improper because it contradicted plaintiffs' previous sworn statements and because it was filed after the close of discovery and the filing of the motion for summary disposition. In contrast, plaintiffs argued that it was proper to grant the motion because the brief discovery period had only recently closed, a trial was not yet scheduled, and defendant would not suffer undue prejudice. Following those arguments, the trial court issued its ruling from the bench. The court denied plaintiffs' motion after noting that the discovery period had ended and the case evaluation was scheduled for the following week. The court reasoned that all of the facts upon which the proposed complaint relied were available when the initial complaint was filed, and a grant of the motion would consequently result in undue delay and unfair prejudice.

The trial court held a hearing on the motion for summary disposition on July 1, 2011. At the hearing, the parties reiterated the arguments from their briefs and primarily argued regarding whether there was evidence that defendant had personally made any promises to plaintiffs and whether it was proper to pierce the veil between defendant and the committee. At the completion of the argument, the trial court issued its ruling from the bench. The court stated that it had reviewed all of the submitted evidence and that "there's no documentary evidence that has been submitted that supports any of the theories that have been put forward here." The court specifically noted that the evidence did not show that plaintiffs entered into an agreement with defendant personally. Consequently, the court held that there was no genuine issue of material fact and that defendant was entitled to summary disposition. Plaintiffs now appeal as of right.

Plaintiffs first argue that the trial court erred in denying their motion to amend their complaint. We disagree. We review a trial court's ruling on a motion for leave to amend a complaint for an abuse of discretion. *Titan Ins v North Pointe Ins*, 270 Mich App 339, 346; 715 NW2d 324 (2006). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Pursuant to MCR 2.118(A)(2), leave to amend a complaint should be freely granted "when justice so requires." "A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons: [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility" *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) (citation omitted). "The prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits." *Knauff v Oscoda Co Drain Com'r*, 240 Mich App 485, 493; 618 NW2d 1 (2000). "If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision." *Weymers*, 454 Mich at 659. As the Court further explained in *Weymers*,

A party is not entitled to wait until the discovery cutoff date has passed and a motion for summary judgment has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories in an amended complaint . . . it is particularly likely that drastic amendments on the eve of trial will prejudice the defendants.... [*Id.* at 661, quoting *Priddy v Edelman*, 883 F.2d 438, 446-447 (CA 6, 1989).]

The trial court denied plaintiffs' motion to amend and held that to allow the motion would cause undue delay and prejudice. We cannot conclude that the trial court's ruling constitutes an abuse of discretion. At the hearing on the motion, plaintiffs' counsel acknowledged that the proposed amendment would result in the addition of multiple parties as well as multiple new counts alleged against this defendant. As the trial court noted, the motion was brought after the close of discovery, after defendant's dispositive motion for summary disposition had been filed and a week before the case evaluation. The court correctly observed that the delay in filing the amended complaint was undue where all of the facts that formed the basis of the proposed amendment were available at the time the original complaint was filed.

In arguing that the trial court abused its discretion, plaintiffs emphasize that unlike in *Weymers*, trial was not impending in this matter. While it is true that the present case is factually distinguishable from *Weymers*, the opinion in that matter demonstrates that the trial court's decision here was not an abuse of discretion. Quoting *Feldman v Allegheny Int'l Inc*, 850 F2d 1217, 1225-1226 (CA 7, 1988), the *Weymers* Court acknowledged that permitting certain amendments can needlessly deny a party the speedy resolution of a dispute and can increase the costs that have already accrued by necessitating additional discovery. *Weymers*, 454 Mich at 661. That reasoning is certainly applicable to the present matter. The addition of two more parties and several new counts relating to defendant would have required additional discovery and would have delayed resolution of this matter. The trial court did not abuse its discretion in denying the motion to amend.

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in light of defendant's argument that he was not liable for payments owed by the Committee. Plaintiffs contend that summary disposition was improper because the trial court was permitted to pierce the corporate veil and hold defendant liable for the acts of the Committee.² We disagree. This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich

² We note that the parties have not argued that a candidate committee established under the Michigan Campaign Finance Act, MCL 169.201 *et seq.*, is a corporation. Nonetheless, the parties' arguments reflect their agreement that the traditional piercing the corporate veil analysis applies when determining if defendant can be held liable for the acts of the Committee, which is a distinct legal entity. Further, we note that certain distinct legal entities other than corporations have been recognized as providing the same type of insulation from liability as a corporation. See *Chisholm v Chisholm Const Co*, 298 Mich 25, 28; 298 NW 390 (1941); *Florence Cement Co v Vittraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011).

557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997).

“There is no single rule delineating when the corporate entity may be disregarded.” *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). As this Court explained in *Rymal v Baergen*, 262 Mich App 274, 293-94; 686 NW2d 241 (2004),

For the corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity. Further, the corporate entity must have been used to commit a wrong or fraud. Additionally, and finally, there must have been an unjust injury or loss to the plaintiff. There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation’s economic justification to determine if the corporate form has been abused. [Internal citations omitted.]

At issue in the present case is whether plaintiffs have adequately demonstrated that the Committee was a mere instrumentality of defendant. When previously determining if an entity was a mere instrumentality of an individual, this Court has indicated that it is relevant to examine factors such as the comingling of funds and the extent to which the individual controlled the decisions of the entity. See *Foodland Distributors*, 220 Mich App at 457.

Upon reviewing the record, we conclude that the trial court did not err when it did not pierce the veil between defendant and the Committee. Pursuant to MCL 169.203(2), “[a] candidate committee shall be under the control and direction of the candidate named in the same statement of organization.” Citing that statutory language, plaintiffs state that defendant, “as a matter of law,” controls the Committee and cannot dispute that the Committee is a mere instrumentality. Pursuant to plaintiffs’ argument, a candidate is per se financially responsible for the wrongs committed by a campaign committee. Apart from their citation to the statutory language regarding control, plaintiffs offer no legal support for that broad approach to piercing the veil between distinct entities. There exists neither an opinion nor a statute that stands for the proposition argued by plaintiffs.

As this Court has previously noted,

even where a corporation is wholly owned by a single individual, it is conceivable that the conduct of a corporation that has been judged to be criminal could be attributable to someone other than the corporation’s owner, such as a member of the corporation’s staff. In such a case, piercing the corporate veil to reach the corporation’s owner would actually foster injustice and inequity because the owner was not personally responsible for the conduct giving rise to the corporation’s conviction. [*Dept of Consumer Indus Services v Shah*, 236 Mich App 381, 394; 600 NW2d 406 (1999).]

Here, plaintiffs do not contend that defendant was the only individual affiliated with the Committee, and the pleadings and documentary evidence demonstrate that a large number of

individuals were involved with the committee on various levels. Even if we were to conclude that defendant was legally obligated to maintain control of the Committee, plaintiffs have not demonstrated that the control rose to the level needed to justify piercing the veil. While it certainly remains possible that there are instances where the veil between a candidate and an election committee should be pierced, plaintiffs have not demonstrated that this is such an instance where they have simply conducted no analysis regarding the structure of the Committee and whether it was a mere instrumentality of defendant.

Finally, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition regarding plaintiffs' promissory estoppel claim. Plaintiffs assert that summary disposition was improper because they presented evidence that defendant, and not only the committee, made a direct promise to provide them with compensation. We disagree. As stated above, this Court reviews a grant of summary disposition pursuant to MCR 2.116(C)(10) de novo, *Dressel*, 468 Mich at 561, and examines the pleadings, depositions, affidavits and other record evidence in the light most favorable to the non-moving party, *Quinto* 451 Mich at 362.

This Court has previously stated,

The elements of promissory estoppel are: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." [*Charter Tp of Ypsilanti v Gen Motors Corp*, 201 Mich App 128, 133-34; 506 NW2d 556 (1993), quoting 1 Restatement Contracts, 2d, § 90, p 242.]

Further, the alleged promise must be "actual, clear and definite." *Id.* "In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). Courts should "apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted." *Id.*

Here, plaintiffs argue that the trial court erred in granting summary disposition regarding this claim because the admissible evidence demonstrated that defendant personally promised to compensate them for consulting services, that defendant intended for plaintiffs to rely on that promise and that they did rely on the promise to their detriment. In response, defendant argues that the only record evidence that defendant made any such promise to plaintiffs is in the form of plaintiffs' affidavit attached to their response to defendant's motion for summary disposition. Defendant contends that because that affidavit contradicts plaintiffs' verified complaint, previous affidavits and answers to interrogatories, it cannot be properly considered when determining if summary disposition is proper.

As this Court has explained, "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition, and . . . a trial court that disregards such testimony does not err." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-57; 503 NW2d 728 (1993). This Court has stated that the "no contradiction" rule

stated in *Kaufman* does not merely apply in the context of affidavits that contradict deposition testimony; rather, the rule equally applies when affidavits contradict other forms of sworn statements. See *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 411; 622 NW2d 533 (2000).

Plaintiffs' complaint explicitly stated that defendant agreed to provide them with "their customary fee" in exchange for certain political consulting services. Subsequently, in response to defendant's interrogatories, plaintiffs stated that "the campaign" promised to compensate them for their services. Finally, plaintiffs filed an affidavit in their response to the motion for summary disposition where they unequivocally stated that defendant agreed to pay plaintiffs in exchange for their services. The affidavit explained that their previous statements substituted the term "campaign" for defendant's name but were not intended to imply that the promises were not actually made by defendant.

Upon reviewing the above described evidence, we cannot conclude that plaintiffs' second affidavit contradicted their previous sworn statements. Plaintiffs' explanation regarding their wording of their response to the interrogatories, which they provided before they were represented by counsel, is certainly plausible. As this Court noted in *Hamed v Wayne County*, 284 Mich App 681, 700-701; 775 NW2d 1 (2009) (reversed on alternative grounds by 490 Mich 1), there is a distinction between arguably *inconsistent* sworn statements and *contradictory* sworn statements. While a contradictory statement sworn should not be considered, a statement that is merely inconsistent simply creates "fodder for cross-examination." As a result, we conclude that plaintiffs' second affidavit may be considered when determining the propriety of the grant of summary disposition.

Despite concluding that the contents of the second affidavit may be considered when determining if there exists a genuine issue of material fact, we nonetheless determine that summary disposition was properly granted to defendant. The second affidavit does explicitly provide that defendant promised plaintiffs would be compensated for their services. However, even if that statement is accepted as true, it does not establish that defendant promised to personally provide the compensation. The second affidavit states that plaintiffs considered any promise made by defendant to be tantamount to a promise from the Committee. However, as we have explained, that is not necessarily legally accurate. One could potentially envision instances in which a candidate could be held personally liable for the wrongs of his or her election committee. Plaintiffs have not demonstrated that this is such an instance.

As we stated above, the doctrine of promissory estoppel should only be applied when there exists a clear promise, the facts are unquestionable, and the alleged wrong cannot be doubted. As the record exists, we cannot conclude that defendant clearly promised to be personally engaging plaintiffs' services, as opposed to engaging their services on behalf of the Committee. Likewise, it would be inaccurate to state that the facts in this matter were unquestionable, as plaintiffs and defendant have offered entirely conflicting evidence regarding the existence of a promise. Further, we note that the record is devoid of any evidence regarding the rate of compensation defendant allegedly agreed upon, which casts doubt upon the nature of the alleged wrong. As a result, we cannot conclude that the trial court erred in granting defendant's motion for summary disposition regarding plaintiffs' promissory estoppel claim.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens