

STATE OF MICHIGAN
COURT OF APPEALS

BAY BUSINESS SERVICES, INC.,

Plaintiff-Appellant,

v

THOMAS K. JOLITZ,

Defendant-Appellee.

UNPUBLISHED

October 26, 2004

No. 247992

Grand Traverse Circuit

LC No. 01-021823-CK

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition in favor of defendant under MCR 2.116(C)(7) based on a determination that this contract claim was barred by assignment. We affirm.

On May 29, 1998, plaintiff and defendant entered into an agreement whereby plaintiff was to provide certain telecommunication account management services to defendant. In return, defendant was to pay plaintiff thirty percent of all income generated as a result of plaintiff's services. The agreement contained a provision prohibiting assignment of the agreement without the written consent of the parties. As security for the contract, plaintiff and defendant executed a second agreement whereby defendant assigned all income derived from the "Gen-Ex" telecommunication contract held by defendant.

Plaintiff subsequently arranged for Charles Willette to provide short-term financing for defendant. On July 9, 1998, plaintiff assigned to Willette fifty percent of its interest in the revenue under the May 29 agreement with defendant "[i]n return for a loan to Mr. Tom Jolitz in an amount of \$40,000 . . . and the personal management services of Mr. Willette." Plaintiff eventually assigned to Willette the remainder of its interest in the May 29, 1998, agreement with defendant. Defendant did not sign the July 9, 1998, agreement; also, no one disputes that he never signed the second assignment.

On June 16, 1999, defendant and Willette executed a forbearance agreement due to defendant's failure to pay Willette. Defendant failed to make good on the forbearance agreement, and Willette brought suit against him. On September 22, 1999, defendant and Willette executed a settlement agreement mutually releasing each other from any liability under the Europa and Myers contracts.

Defendant failed to pay Willette pursuant to the September 22 settlement agreement, and Willette again filed suit. Defendant and Willette executed another mutual release on August 15, 2000.

Plaintiff filed the instant action against defendant alleging that defendant had breached the May 29, 1998, agreement. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(7), concluding that the claim was barred due to assignment and that plaintiff was estopped from denying the assignment.

“We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7).” *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001), citing *Diehl v Danuloff*, 242 Mich App 120, 122-123; 618 NW2d 83 (2000). MCR 2.116(C)(7) tests, in part, whether a claim is “barred because of . . . assignment[.]” With respect to a motion brought pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). If a party submits affidavits, depositions, admissions, or other documentary evidence, those materials must be considered. *Id.* The substance or content of the supporting documentation must be admissible into evidence. *Id.* at 82-83. The evidence is viewed in a light most favorable to the nonmoving party. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001).

Plaintiff first argues that defendant's behavior in fact showed that defendant opposed the assignment between plaintiff and Willette and that the assignment is therefore invalid. We disagree. “An assignment is defined as ‘[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.’” *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987), quoting Black's Law Dictionary (4th ed), p 153. “To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned.” *Id.* The following passage from Corbin on Contracts is instructive:

A provision forbidding one party to make an assignment of his right is solely for the advantage of the other party who is under the correlative duty. That other party can waive the benefit of the provision, either before or after an assignment has been made. A mere expression of willingness, made to either the assignor or the assignee, acted on by them, makes the assignment effective. And such an expression made to the assignee when he presents his claim, or brings suit on it, is likewise effective. Third parties cannot, in such case, maintain the invalidity of the assignment.

So, too, the assignor is in no position to assert the invalidity of the assignment, even though the debtor might do so. . . . [T]he assignment transaction may be operative as between the assignor and the assignee [9 Corbin, Contracts (Interim ed), ch 48, § 873, pp 439-440 (emphasis added).]

Plaintiff in this case is thus barred from asserting the invalidity of the assignment.

Additionally, the Restatement of Contracts Second provides that “[u]nless the circumstances indicate the contrary, a contract term [simply] prohibiting assignment of ‘the contract’ bars only the delegation to an assignee of the performance by the assignor of a duty or condition.” Restatement Contracts, 2d, § 322(1), p 31-32.

The May 29, 1998, agreement provides in pertinent part, “This Agreement shall be binding upon and inure to the benefit of both of the parties and their respective legal representatives, successors and assigns, provided, however, neither party may *assign this Agreement* without the prior written consent of the other.” [Emphasis added]. This language, although effective to protect defendant from the delegation of plaintiff’s duties, is not sufficient to prohibit assignment of the revenue due plaintiff under the May 29, 1998, agreement.

Plaintiff also contends that the trial court erred in finding that plaintiff should be estopped from contesting the assignment’s validity. Specifically, plaintiff argues that the trial court granted this relief sua sponte, and defendant’s own inequitable conduct should bar equitable relief. Given our disposition of the previous issue, this issue need not be addressed.

Plaintiff next argues that the trial court erred in holding that the September 22, 1999, release bars the instant action by plaintiff. Specifically, plaintiff argues that the scope of the September 22, 1999, release executed by defendant and Willette does not extend to cover plaintiff’s claims under the May 29, 1998, agreement between plaintiff and defendant. However, plaintiff, by its own admission, assigned its interest in the revenue stream from the May 29, 1998, agreement to Willette. Therefore, the scope of the September 22, 1999, release is of no relevance, as plaintiff had no remaining claim to the revenue stream. Plaintiff’s claim against defendant is thus barred under MCR 2.116(C)(7).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey