STATE OF MICHIGAN

COURT OF APPEALS

KLOCHKO EQUIPMENT RENTAL CO., INC.,

Plaintiff-Appellee,

v

VILLAGE GREEN CONSTRUCTION, L.L.C., d/b/a REGENTS PARK OF TROY, L.L.C.,

Defendant-Appellant.

UNPUBLISHED
June 17, 2003

No. 235599
Oakland Circuit Court
LC No. 01-028470-CK

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff had filed a complaint against defendant alleging causes of action predicated on breach of contract and "account stated" for excavation work it performed as a subcontractor with respect to the construction of an apartment complex. We affirm.

The first issue on appeal is whether the trial court's summary disposition ruling on plaintiff's breach of contract claim was improper because, according to defendant, there were genuine issues of material fact regarding the elements necessary to establish the claim. We disagree. This Court reviews de novo a trial court's decision on a summary disposition motion. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The trial court's ruling on plaintiff's breach of contract claim was proper because there was no genuine issue of material fact on which reasonable minds could differ, and plaintiff was entitled to judgment as a matter of law.

In support of plaintiff's motion for summary disposition, plaintiff attached the affidavit of its vice president, Thomas Klochko, who asserted that plaintiff performed its work and submitted daily tickets indicating the equipment used, number of hours worked, and total cost in compliance with the terms of the contract. Klochko further asserted that, from June 2000 through September 2000, defendant signed each and every daily ticket that plaintiff submitted thereby approving plaintiff's work and billing, which totaled $241,100. Even though defendant signed and approved each daily ticket, it has only paid plaintiff approximately $105,656.

Klochko further asserted that, contrary to the contract's terms, defendant failed to issue a change order to cover the $105,868 balance on plaintiff's third payment application and failed to issue weekly change orders, instead choosing to issue monthly change orders.[1] According to Klochko, plaintiff repeatedly requested payment of the remaining contract balance, but defendant has refused to pay it.

In addition to providing Klochko's affidavit, plaintiff also submitted daily tickets signed by defendant's agent showing the performance of extra work from June 13, 2000 through September 1, 2000, totaling about $166,802. In addition to these "daily tickets," plaintiff submitted an application for payment that included $17,836 as an "excess soil and loader charge" for work it performed in late September. This amount, $17,836, is apparently covered by a change order that was executed by defendant. The original subcontract price of $56,462, together with the $166,802 owed for additional work performed through September 1, 2000, and the $17,836 excess soil and loader charge add up to a total contract price of $241,100.

Defendant argues that the total contract price, as reflected by the original contract price and the executed change orders, totaled $135,231, and that plaintiff's third application for payment requesting additional amounts is not reflected, as required, by an executed change order. We initially note with interest that defendant makes no claim that plaintiff did not complete the work for which plaintiff seeks recovery. The documentary evidence indicates that the work for which plaintiff seeks recovery was performed between August 4, 2000, and September 1, 2000. Plaintiff submitted daily tickets signed and approved by defendant with respect to the work performed between August 4 and September 1. Although no change order was submitted as to this work, the parties' contract provides that defendant "will issue change orders on a weekly basis to cover all approved amounts exceeding [the] contract amount." The record shows that the work was approved and completed; therefore, a change order should have been issued, and defendant cannot now claim that the lack of a change order negates plaintiff's claim.

Defendant failed to introduce any affidavits, depositions, or other documentary evidence necessary to create a factual dispute in regards to whether it approved of the extra work plaintiff performed. Defendant has not contradicted the daily tickets it signed approving charges for time and material. In a motion for summary disposition under MCR 2.116(C)(10), once the moving party offers evidence supporting the grounds for summary disposition, the adverse party must

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[1] The record reflects that plaintiff made three payment applications for its work, the first two of which defendant paid except for a ten-percent retention amount, $11,739, that was not paid after completion of the entire project. The first payment application was based on the project price as reflected in the terms of the original contract without the need for any change orders. The second payment application was predicated on signed and approved daily tickets and a change order executed by defendant. In regards to the third payment application, plaintiff submitted a request for $123,704 based on signed and approved daily tickets for the entire amount. However, defendant executed a change order covering only $17,836 of that amount, which left a balance of $105,868 not covered by a change order. Defendant did not pay any of the billed amount of $123,704, which, when added to the retention amounts not paid, totaled $135,443, which amount is reflected in the judgment.

come forward with documentary evidence showing that a genuine issue of material fact exists for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

The only documentation defendant attached to its response to plaintiff's motion for summary disposition was the parties' agreement, an August 15, 2000, contractor's affidavit signed by plaintiff's project superintendent, and plaintiff's October 2000 payment application. None of these documents create a genuine issue of material fact regarding the $241,100 total contract price or regarding whether defendant approved of the extra work when it signed the daily tickets. The documents submitted by defendant are either taken out of context or simply do not contradict plaintiff's claims.

We also conclude that, contrary to defendant's argument on appeal, the fact that the change orders do not add up to the total contract price of $241,100 does not create an issue of fact as to whether defendant owed plaintiff a duty to pay for additional work performed. The prices listed in the change orders do not represent that total contract price because the change orders only cover payment for extra work beyond that specified under the original contract price.

Accordingly, we conclude that plaintiff established through documentary evidence the existence of a valid agreement between the parties and further presented documentary evidence establishing defendant's failure to perform its duty to pay the contract balance, which was not contradicted by evidence submitted by defendant. The trial court did not err in granting summary disposition to plaintiff.

Next, defendant argues that the trial court improperly granted plaintiff summary disposition on its "account stated" claim because plaintiff failed to provide prima facie evidence of indebtedness as required by MCL 600.2145. Again, according this issue de novo review, *Maiden*, *supra* at 118, we disagree.

An "account stated" is a balance struck between the parties on a settlement; and where a plaintiff is able to show that the mutual dealings which have occurred between the parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002).

Under MCL 600.2145, when a plaintiff bringing an "account stated" claim makes an affidavit of the amount due and attaches to the affidavit a copy of the account and serves the defendant with the copy of the account, the affidavit, and the complaint, the affidavit "shall be deemed prima facie evidence of indebtedness, unless the defendant with his answer, by himself or agent, makes an affidavit and serves a copy thereof on the plaintiff or his attorney denying the [indebtedness]." The statute's language does not mandate serving a defendant with a copy of the account and the affidavit when serving the complaint. Rather, it states that such action creates "prima facie evidence of indebtedness" absent an affidavit by the defendant denying the indebtedness.

Moreover, MCL 600.2145 is not the only way to establish a claim for an account stated; such a claim can be proven through evidence of an express understanding, or words and acts, and the necessary and proper inferences thereon. *Keywell*, *supra* at 331. To establish a claim for account stated, a plaintiff must prove that the defendant expressly accepted bills tendered by paying them or failed to object to them within a reasonable time. *Id.*

Plaintiff established its "account stated" claim. The documentary evidence plaintiff submitted to the lower court indicated that defendant partially paid the bills that plaintiff submitted, and that defendant failed to object to any of the costs within a reasonable time. Plaintiff provided the court with the daily tickets that explained the extra work it provided and the charges incurred for the extra work during the period of June 13, 2000 through September 1, 2000. Each of those tickets was signed and approved by defendant's agent. Plaintiff also furnished the affidavit of Thomas Klochko, in further support. Defendant has not come forward with documentary evidence establishing a genuine issue of material fact for trial.

Given the documentary evidence plaintiff submitted, and defendant's failure to submit an affidavit or other documentary evidence indicating that it objected to the amount owed within a reasonable time, the trial court properly concluded that plaintiff established its "account stated" claim and properly granted summary disposition based on its conclusion that no genuine issue of material fact existed for trial and that plaintiff was entitled to judgment as a matter of law.

Finally, defendant argues that the trial court's decision to grant plaintiff summary disposition pursuant to MCR 2.116(C)(10) was premature because no discovery was conducted. We disagree.

Generally, summary disposition is premature if a circuit court grants the motion before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), quoting *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). Nevertheless, a court's decision to grant summary disposition before the completion of discovery may be proper "where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992).

In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 519; 575 NW2d 36 (1997); *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). In *Pauley*, this Court stated as follows:

> This Court has held that a grant of summary judgment is premature if made before discovery on the disputed issue is complete. However, there must be a disputed issue before the court. If the party opposing a motion for summary judgment cannot present competent evidence of a disputed fact because his or her discovery is incomplete, the party must at least assert that such a dispute does indeed exist and support the allegation by some independent evidence, even if hearsay. An unsupported allegation which amounts solely to conjecture does not entitle a party to an extension of time for discovery, since under such circumstances discovery is nothing more than a fishing expedition to discover if any disputed material fact exists between the parties. [*Id.*(citations omitted).]

Here, defendant has failed to identify any disputed issue and has further failed to support its allegation that a dispute exists with independent evidence. Therefore, we find no merit to defendant's claim that the trial court's summary disposition ruling was premature.

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen