

STATE OF MICHIGAN
COURT OF APPEALS

MEDIAFORM LLC,

Plaintiff-Appellant,

v

DANIEL SUSZKO,

Defendant-Appellee.

UNPUBLISHED

June 15, 2010

No. 290482

Oakland Circuit Court

LC No. 2008-089709-NO

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Plaintiff appeals by right orders granting summary disposition in favor of defendant and dismissing the case. We reverse and remand.

This case arises out of misconduct defendant allegedly committed while employed by plaintiff. Plaintiff discovered that defendant had diverted client funds to a PayPal account. Defendant allegedly told plaintiff that he only did so on one occasion, but he undisputedly refused to turn over any information about the PayPal account. Plaintiff terminated defendant. The parties entered into an agreement (the Agreement) that waived any claims plaintiff might have against defendant arising out of his employment in exchange for defendant agreeing to a non-compete provision. The Agreement also contained an integration clause. Three days later, defendant began working for a competitor to plaintiff, albeit in a different role. Plaintiff subsequently discovered that defendant had allegedly diverted client funds and misappropriated plaintiff's inventory on other occasions, and it commenced this suit. Plaintiff sought to have the contract—containing the waiver provision—declared void for fraudulent inducement, and plaintiff subsequently added an alternative claim for breach of contract. The trial court concluded that the integration clause precluded the fraudulent inducement claim, and it dismissed the breach of contract claim because plaintiff failed to articulate damages. This appeal followed.

This Court reviews a grant or denial of summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(7), where the claim is allegedly barred, so the Court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Maiden, supra*, 461 Mich 119. Plaintiff sought summary disposition pursuant to MCR 2.116(C)(9) and MCR

2.116(C)(10). Under MCR 2.116(C)(9), where a defendant has failed to state a valid defense, all of the defendant's well-pleaded allegations are accepted as true, and summary disposition is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002). Under MCR 2.116(C)(10), this Court tests the factual support for a claim by considering all evidence submitted by the parties in the light most favorable to the non-moving party to determine if the evidence fails to establish a genuine issue regarding any material fact. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006).

Fraud in the inducement is actionable where a defendant makes a material misrepresentation that was false, that the defendant knew at the time was false, that the defendant intended at the time for the plaintiff to act on, that the plaintiff did act in reliance on; and where the plaintiff was harmed thereby. *Custom Data v Preferred Capital*, 274 Mich App 239, 242-243; 733 NW2d 102 (2006). The reliance must also be reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). If a contract contains a merger clause, parol evidence may nevertheless be admissible to prove the existence of "fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause." *Custom Data, supra*, 274 Mich App at 243, quoting *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 503; 579 NW2d 411 (1998), citing 3 Corbin, Contracts, § 578. Thus, the bare fact that a contract contains a merger clause does not necessarily preclude a claim of fraudulent inducement premised on statements or promises not contained in a contract. The trial court erred to the extent that it held as a matter of law that the *only* "type of fraud that would invalidate the entire contract occurs where the plaintiff is defrauded into believing that the written contract included a provision when it did not." The trial court correctly held that plaintiff's claim of fraudulent inducement based on defendant's alleged intention of never honoring the non-compete agreement was legally cognizable notwithstanding the integration clause, *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995).

We therefore conclude that the trial court erred in granting summary disposition to defendant on the basis of the legal viability of plaintiff's fraudulent inducement claim. If plaintiff's claims are taken as true, defendant engaged in a misrepresentation that would "invalidate the entire contract including the merger clause."

The trial court also placed on the record its doubts as to the factual support for plaintiff's fraudulent inducement claim. We are sympathetic to any frustration the trial court had that plaintiff's claims were not presented as artfully as might be preferred. However, when the entire record is viewed in the light most favorable to the nonmoving party, we find that there is a genuine question of fact whether plaintiff's reliance was reasonable and whether defendant's misrepresentation was intended to induce plaintiff to waive any claims against him. Furthermore, plaintiff correctly observes that fraud can be inferred from acts and circumstances, and it need not be directly shown. *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005). While we agree with the trial court that the timing of defendant's subsequent employment does not necessarily directly prove that defendant negotiated in bad faith, it is distinctly suspicious. And it is not necessary for the record to prove plaintiff's case at a summary disposition stage of the proceedings.

We therefore conclude that the trial court also erred in granting summary disposition in defendant's favor on the basis of a finding that there was no genuine question of material fact for trial. In light of our reversal of the summary disposition as to plaintiff's fraudulent inducement claim, we need not consider any of the other issues raised on appeal. Plaintiff consistently asserted throughout the proceedings that its breach of contract claim was strictly an alternative theory; and it would, in any event, be rendered moot should plaintiff prevail on its fraudulent inducement claim.

The trial court's grant of summary disposition in favor of defendant as to plaintiff's fraudulent inducement claim is reversed, and the matter is remanded for further proceedings. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis