

STATE OF MICHIGAN
COURT OF APPEALS

DAVID FINDLING,
Court Appointed Receiver of Linda Lossing,

Plaintiff-Appellee,

v

LINDA LOSSING, f/k/a Linda Garback,

Defendant-Appellant.

UNPUBLISHED
April 26, 2011

No. 296841
Oakland Circuit Court
LC No. 2008-091819-CZ

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

While married, Brent Garback and defendant Linda Lossing (formerly Garback) owned and operated Total Travel Management, Inc. (TTM). When the couple divorced, they each signed a Memorandum of Understanding that outlined a property settlement and their respective responsibilities. Lossing did not perform her obligations, and a court-appointed receiver, plaintiff David Findling, filed a complaint, claiming that Lossing breached the Memorandum of Understanding. He also filed a complaint asking the trial court to declare the debt that Lossing owed to Garback to be non-dischargeable pursuant to the United States Bankruptcy Code. The trial court held that the debt was non-dischargeable and, because Lossing did not pay it, she breached the Memorandum of Understanding. Lossing now appeals those rulings, and we affirm.

I. FACTS

In 2003, Garback resigned as chief executive officer of TTM and divested himself of his majority interest in exchange for an employment contract that would pay him an annual consulting fee. In 2005, Garback filed for divorce from Lossing. Lossing terminated Garback's employment contract with TTM upon learning of the divorce action. Garback then filed a suit against Lossing, claiming that she breached their employment contract.

On December 15, 2005, Garback and Lossing signed a Memorandum of Understanding, which operated to divide their assets and marital property, as well as to resolve the employment action that Garback had filed. At the time the parties signed the Memorandum of Understanding, TTM was a separate entity of which Lossing owned 51 percent of the shares. The Memorandum of Understanding provided, in part, that Lossing would cause TTM to pay Garback \$600,000 for the redemption of his TTM stocks. The Memorandum of Understanding stated:

The balance of value less loan of Mr. Garback's stock[] is \$600,000.00. Linda [Lossing] will cause TTM to redeem Brent Garback's stock over a period of 60 months. Payments in the amount of \$10,000.00 per month shall be paid by TTM to Brent Garback commencing with the entry of the Judgment of Divorce. Part of this payment is interest at the rate of 4.5% per annum. Linda [Lossing] shall guaranty these payments with a written guaranty.

In exchange for TTM redeeming his stocks, Garback agreed to refrain from working for competitors for 18 months. Garback subsequently relocated to Florida to work.

In June 2006, the trial court entered a Judgment of Divorce. The Judgment of Divorce merged but did not incorporate the Memorandum of Understanding.

In January 2007, Lossing caused TTM to file for Chapter 11 Bankruptcy, which was later amended to a Chapter 7 proceeding. At the time of filing, TTM listed Lossing as the sole equity security holder. Also, up to the time of this filing, neither TTM nor Lossing had paid Garback any of the money that the parties agreed to in the Memorandum of Understanding. As a result of this filing, the family court appointed David Findling as receiver to examine the situation and distribute the assets according to the Memorandum of Understanding, including the \$600,000 owed to Garback.

In April 2008, Lossing filed bankruptcy on behalf of herself. She attempted to discharge her personal guarantee to pay Garback the \$600,000.

In May 2008, the receiver, Findling, filed a complaint, pursuant to 11 USC 523(a)(5), asking the trial court to declare the \$600,000 to be non-dischargeable. Findling subsequently amended the complaint to include a Breach of Contract action because Lossing failed to honor the Memorandum of Understanding.

In May 2009, Findling moved for summary disposition pursuant to MCR 2.116(C)(10). Findling claimed that there was no material issue of fact that the \$600,000 was non-dischargeable and that Lossing breached the Memorandum of Understanding when she failed to pay Garback the \$600,000. Findling argued that the Memorandum of Understanding encompassed and settled all of the parties' issues. He argued that Garback fulfilled his obligations under the Memorandum of Understanding by not competing with TTM and by dropping his breach of employment claim, but Lossing had failed to fulfill her obligations under the memorandum.

In opposition to the motion, Lossing asserted that the motion was premature because it was brought before the parties completed discovery. Lossing also argued that there were genuine issues of fact surrounding the effect of the guaranty, the intent of the parties regarding the Memorandum of Understanding, the nature of the stock redemption debt, and what exactly constitutes support under the Bankruptcy code. Lossing further argued that the \$600,000 was the debt of TTM and not of herself because Garback never executed the stock redemption agreement, which would have triggered Lossing's obligation to ensure the debt was paid to Garback. Lastly, Lossing contended that, for the purposes of the Bankruptcy Code and dischargeability, it was unclear what constituted debt.

The trial court granted Findling's motion for summary disposition regarding the dischargeability of the \$600,000 debt to Garback. The trial court held that the language of the Memorandum of Understanding clearly evidenced the parties' intent that the Memorandum of Understanding be a settlement agreement. The trial court held that a letter from Garback's attorney to Lossing, stating that Garback transferred all his shares to Lossing, was an effective transfer of shares. The trial court found that, based on the Memorandum of Understanding and the Judgment of Divorce, the debt owed to Garback was not a "domestic support obligation," but it did find that the debt was not dischargeable because it was a debt incurred in the course of a divorce proceeding.

Regarding the claim that Lossing breached the Memorandum of Understanding when she failed to pay Garback, Findling argued that Lossing incurred the debt in the course of a divorce proceeding, and because it was not dischargeable, her failure to pay constituted a breach of the Memorandum of Understanding. He argued that the Memorandum of Understanding was a contract that both parties intended to function as a settlement agreement, and Lossing breached the terms of that contract when she failed to execute a written guaranty and pay Garback. Lossing argued that the Memorandum of Understanding between the parties was not a contract but was instead an "agreement to agree." She asserted that the Memorandum of Understanding was just a "preliminary settlement understanding," and it should fail for indefiniteness if the trier of fact found that it lacked essential terms.

The trial court further found that Lossing had indeed breached the Memorandum of Understanding because she failed to execute a written guaranty and to make payments as she agreed to in the Memorandum of Understanding. The trial court determined that the language of the Memorandum of Understanding was "clearly intended to be a property settlement," and the trial court further found that the Memorandum of Understanding was the sole agreement between the parties. The trial court stated that the Memorandum of Understanding set out payment terms under which Lossing guaranteed payment to Garback, and because she had not paid him accordingly, there was no issue of material fact as to whether she had breached the contract.

Lossing now appeals.

II. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.¹ Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.² "The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its

¹ *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

² MCR 2.116(C)(10); *West v General Motors*, 469 Mich 177, 183; 665 NW2d 468 (2003).

position with documentary evidence.”³ Then the burden shifts to the non-moving party to prove that an issue of disputed fact exists.⁴ The non-moving party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts that show there is a genuine issue for trial.⁵ If the non-moving party fails to establish a genuine issue as to a material fact, then the moving party is entitled to judgment.⁶ “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”⁷ A trial court’s decision to grant summary disposition is a question of law that this Court reviews de novo.⁸

B. BREACH OF CONTRACT

1. FORMATION OF CONTRACT

Lossing argues that, because the Memorandum of Understanding was not a contract, she is not liable for any breach. She contends that the Memorandum of Understanding was essentially a “contract to contract.” She states that the Memorandum of Understanding did not indicate what the parties intended their obligations to be, it contained no definitions, and nothing established what type of guaranty that she was to issue.

The essential elements for parties to form a valid contract are 1) the parties are competent to contract, 2) the parties are contracting over proper subject matter, 3) the parties give legal consideration, 4) there is a mutual agreement, and 5) there is a mutual obligation.⁹ In this case, both parties were competent to contract with one another. They were both substantial shareholders in, and operated, a well-appraised company. Further, they contracted to relinquish and redeem shares of that company respectively, as a result of the parties divorcing one another. The subject matter of the Memorandum of Understanding was proper. Also, both parties gave consideration in the Memorandum of Understanding: Garback relinquished his shares in TTM in exchange for Lossing promising to give him a written guaranty of payment for the shares. Both parties also agreed to the terms of the Memorandum of Understanding as evidenced by their respective signatures. Lastly, both parties were mutually obligated to perform their duties under the Memorandum of Understanding. The Memorandum of Understanding appears to meet all of the requirements to be deemed a valid contract.

³ *E R Zeiler Excavating, Inc v Valenti, Trobec & Chandler, Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006).

⁴ *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

⁵ MCR 2.116(G)(4); *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

⁶ *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

⁷ *West*, 469 Mich at 183.

⁸ *Peña*, 255 Mich App at 310.

⁹ *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005).

Lossing argues that the Memorandum of Understanding was simply an agreement to agree, that the parties did not intend it to be a binding contract. However, the Memorandum of Understanding itself is quite comprehensive. It spans ten pages and covers division of property ranging from 401K's, to real estate, to a wine collection. The introduction to the Memorandum of Understanding states that "[t]he terms of the settlement, as outlined below, will be put on the record" It further states that the actual Judgment of Divorce will "incorporate the terms of [the Memorandum of Understanding]." Additionally, just above the signature lines, the Memorandum of Understanding reads, "The undersigned have read the foregoing agreement, understand and approve all of its terms and conditions, and agree to execute same voluntarily and *be bound by all its terms and conditions.*" Both parties signed the Memorandum of Understanding. Additionally, there are several handwritten markings, including asterisks, which indicate that the parties read the provisions.

Nevertheless, Lossing states, without legal support, that "[w]hen interpreting a contract of guaranty, or any contract, the intent of the parties must be given effect and the intention to bind oneself must be clearly manifested." Lossing refers to interpretation, not formation, which is the issue. Nonetheless, Lossing clearly manifested her intent to be bound by the Memorandum of Understanding, through the depth of the document, her signature on the document, and her failure to object when the trial court named the Memorandum of Understanding as the parties' settlement agreement. The Memorandum of Understanding was clearly an enforceable contract.

2. CONDITION PRECEDENT

Lossing next asserts that she did not breach the Memorandum of Understanding because it contained a condition precedent that Garback did not satisfy; thus, her obligations were never triggered.

"A condition precedent is a fact or event that the parties intend must take place before there is a right to performance."¹⁰ In this case, Lossing contends that Garback breached the Memorandum of Understanding first because he refused to sign the Redemption Agreement, and therefore, he was not entitled to have Lossing perform her obligations. However, there is no provision or mention in the Memorandum of Understanding that required Garback to sign a stock redemption agreement. This Court has held that "unless the contract language itself makes clear that the parties intended a term to be a condition precedent, this Court will not read such a requirement into the contract."¹¹ In this case, the Memorandum of Understanding does not mention any "condition precedent," nor does it even mention that Garback must sign a stock redemption agreement. The contract language does not clearly identify the parties' intent to create a condition precedent, and therefore this Court declines to create one.

¹⁰ *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006) (citations and quotations marks omitted).

¹¹ *Id.*

Because the Memorandum of Understanding did not contain a condition precedent, Lossing's obligations under the contract were established when the parties executed the Memorandum of Understanding. After the parties executed the Memorandum of Understanding, Garback transferred his shares of TTM to Lossing via a letter from his attorney. Again, the Memorandum of Understanding states that

The balance of value less loan of Mr. Garback's stock[] is \$600,000.00. Linda [Lossing] will cause TTM to redeem Brent Garback's stock over a period of 60 months. Payments in the amount of \$10,000.00 per month shall be paid by TTM to Brent Garback commencing with the entry of the Judgment of Divorce. Part of this payment is interest at the rate of 4.5% per annum. Linda [Lossing] shall guaranty these payments with a written guaranty.

Lossing did not guaranty the payment to Garback with a written guaranty, nor did TTM or Lossing pay any of the installments to Garback. The Memorandum of Understanding was a binding contract. And because Lossing failed to complete her duties under the Memorandum of Understanding, she breached its terms. The trial court correctly held that Lossing breached the Memorandum of Understanding.

C. DISCHARGEABLE DEBT

Lossing contends that the debt she guaranteed to Garback is dischargeable under the United States Bankruptcy Code.

The issue of whether a debtor's obligation is non-dischargeable is resolved according to federal bankruptcy law, not state domestic relations law.¹² Lossing contends that the debt TTM owes, and that she guaranteed, is a debt owed by a third-party and is not an obligation that she incurred as the result of divorce proceedings with Garback. The United States Bankruptcy Code states:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

* * *

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit[.]^[13]

¹² *In re Young*, 35 F3d 499, 500 (CA 10 1994).

¹³ 11 USC 523.

“Both pre- and post-BAPCPA,^[14] a ‘debt’ is defined as a ‘liability on a claim.’ To determine whether a ‘debt’ exists, one must determine whether a ‘claim’ exists.”¹⁵ Further, a “claim” is defined as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.^[16]

The Memorandum of Understanding was a binding contract. Lossing guaranteed that either she or TTM would pay Garback \$600,000 for his shares. Neither TTM nor Lossing paid Garback any of the installments he was due. As a result, Garback has a claim against TTM and Lossing for the \$600,000 because he relinquished his shares of TTM to Lossing.

Because there is a debt, this Court must then decide if that debt is dischargeable. To establish a debt as non-dischargeable, a debtor has the burden of proving that (1) a debt is owed to a spouse, former spouse, or child of the debtor, (2) the debt is not a domestic support obligation as described in section 5, and (3) the debt is incurred by the debtor in the course of a divorce or a divorce decree.¹⁷

In this case, the debt that Lossing guaranteed is a debt to a former spouse. Even though the debtor was TTM, Lossing also owed a debt when she agreed to guaranty the payment to Garback.

This Court must next determine if the debt was a domestic support obligation.

(14A) The term ‘domestic support obligation’ means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

¹⁴ The acronym BAPCPA stands for the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.”

¹⁵ *In re Lewis*, 423 BR 742, 747 (WD Mich 2010), quoting 11 USC 101(12).

¹⁶ *Id.* at 748, quoting 11 USC 101(5).

¹⁷ *Id.* at 750.

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

* * *

(B) in the nature of alimony, maintenance, or support . . . of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

* * *

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse^[18]

A court should look at the nature of the debt rather than what it was called.¹⁹ In this case, Garback was awarded several assets in the Memorandum of Understanding. He received a credit of \$173,247.65 in equity from his and Lossing's home, and he retained approximately \$240,000 in his 401k, \$35,000 in an IRA, an annuity valued at \$105,000, and the \$108,000 cash value of his life insurance policy. Garback likely would not need the \$10,000 payments from Lossing or TTM to support him. The debt that Lossing owed Garback was not a domestic support obligation.

Lastly, this Court must decide whether the debt was incurred by the debtor as part of a divorce decree or proceeding. And we conclude that Lossing incurred the debt "in the course of a divorce proceeding." The Memorandum of Understanding was drafted as a result of the failure of Lossing's and Garback's marriage. It is conceivable that neither party would have divided their assets and liabilities if they were not getting divorced. In the Memorandum of Understanding, Lossing personally guaranteed that Garback would be compensated for his shares of TTM to the price of \$600,000. The contents of the Memorandum of Understanding were clearly intended to be a property settlement as the result of impending divorce actions.

Therefore, all of the requirements are present to deem the debt that Lossing guaranteed to Garback to be non-dischargeable. Accordingly, the lower court did not err when it granted Findling's motion for summary disposition pursuant to MCR 2.116(C)(10).

D. PREMATURE MOTION FOR SUMMARY DISPOSITION

Lossing contends that Findling's motion for summary disposition was premature because the parties had not completed discovery and they disputed genuine issues of material fact.

"[S]ummary disposition before the completion of discovery is proper only where further discovery does not stand a fair chance of uncovering factual support for the opposing party's

¹⁸ 11 USC 101.

¹⁹ See *In re Lewis*, 423 BR at 750.

position.”²⁰ “[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists.”²¹ But, unless the party opposing the motion can assert what facts are disputed or likely to be uncovered by further discovery, incomplete discovery will not bar a motion for summary disposition.²²

In this case, Lossing asserts that the parties’ intent and terms and effect of the Memorandum of Understanding should have been determined before Findling’s motion for summary disposition could have been granted. But the interpretation of the Memorandum of Understanding presents a legal issue rather than a factual issue. The parties do not dispute what is written in the Memorandum of Understanding. Both Lossing and Garback provided affidavits illustrating what they intended or thought the terms of the Memorandum of Understanding to be. Lossing does not state what further information discovery may reveal. She has not carried her burden of showing there were additional material facts that the parties needed to uncover through discovery. Lossing has not met the burden showing that discovery would have produced additional facts that show a factual dispute exists between her and Findling.

We affirm.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly

²⁰ *Patterson v Kleiman*, 199 Mich App 191, 193; 500 NW2d 761 (1993).

²¹ *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004), quoting *Mich Nat’l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993) (alteration by *VanVorous*).

²² *VanVorous*, 262 Mich App at 477.