

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE T. NYQUIST,

Plaintiff-Appellee,

v

TILDEN MINING COMPANY, L.L.C.,

Defendant-Appellant.

UNPUBLISHED

October 25, 2012

No. 304848

Marquette Circuit Court

LC No. 10-047707-NZ

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by right the circuit court's order denying defendant's motion for summary disposition under MCR 2.116(C)(10). In this wrongful termination suit, the circuit court concluded that (1) a reasonable jury could find that plaintiff was working for defendant under a just-cause contract and (2) there were genuine issues of material fact as to whether there was just cause, namely whether plaintiff committed theft. We conclude that defendant proffered ample documentary evidence showing cause to terminate plaintiff and that there is no genuine issue of material fact on that issue. Therefore, we need not consider whether plaintiff was working under a just-cause contract nor if his actions met the statutory definition of theft. For these reasons, we reverse and remand.

Plaintiff was hired as an hourly, union employee by defendant. Plaintiff was subsequently promoted to pit maintenance coordinator, a non-union, salaried position. Prior to accepting his promotion, plaintiff received a letter from defendant's senior manager of human resources explaining that plaintiff would be "given consideration for any suitable position that may be available" in the event that he was terminated for "reasons other than performance-related issues." The letter was given to plaintiff in response to his expressed concerns about losing the security of a union position by accepting a salaried position. Subsequent to receiving the letter, plaintiff signed an acknowledgment stating, in pertinent part, that he agreed to comply with company policies "as a condition of" his employment, and that he understood his employment was "at-will."

Plaintiff's employment was later terminated after defendant investigated and determined that plaintiff had stolen company property. The incident leading to the allegation of theft, and ultimately to plaintiff's termination, occurred when plaintiff knowingly left work with

defendant's property concealed in the back of his pick-up truck. The property taken by plaintiff from the work site was a seat that had been removed from a production truck.

Plaintiff filed a wrongful termination suit against defendant alleging breach of contract (Count I) and tortious interference with economic relations (Count II). Defendant moved for summary disposition under MCR 2.116(C)(10), asking for dismissal of both counts. The circuit court granted defendant's motion for Count II, but denied summary disposition for Count I.

We review de novo decisions regarding summary disposition. *Kaupp v Mourer-Foster, Inc.*, 485 Mich 1033, 1035; 776 NW2d 893 (2010). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed.*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party has the initial burden to specify which factual issues are undisputed, and to support those specifications by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The burden then shifts to the non-moving party to show, through evidentiary proof, that a genuine issue of material fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. The non-moving party cannot rely on the "mere allegations or denials of his or her pleading." MCR 2.116(G)(4). The moving party is entitled to judgment if the non-moving party fails to establish a genuine issue of material fact exists. MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when, viewed in the light most favorable to the non-moving party, reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Defendant here proffered ample proof that it had cause to terminate plaintiff's employment. Defendant has a written policy stating that employees will be discharged for theft. Plaintiff signed an acknowledgment of this written policy. The affidavit filed by defendant's senior manager of mining maintenance defined theft as the removal of company property without authorization, and further explained that theft was grounds for automatic discharge. Additionally, plaintiff admitted in his deposition that he knew there was a policy against removing items from defendant's property, that he knew removing items could result in discharge, and that he knowingly removed the seat from defendant's property. Finally, plaintiff offered no evidence in addition to his original pleading to prove that a genuine issue of material fact existed as to the cause of his termination. We, therefore, conclude that defendant had cause to terminate plaintiff's employment and proved this beyond dispute through its offering of documentary evidence.

We need not consider plaintiff's argument that the letter written by defendant's senior manager of human resources could be considered a just-cause contract because, even if it could be, defendant has already shown adequate cause for termination. Likewise, we need not consider plaintiff's argument that defendant cannot prove theft. Defendant is not required to prove that plaintiff's actions met the statutory definition of a criminal theft, but only that plaintiff's actions were cause for dismissal according to defendant's policies. Defendant's filed affidavit adequately establishes this.

For these reasons we reverse the denial of summary disposition and remand to the circuit court with instructions to enter summary disposition in favor of defendant. We do not retain jurisdiction. Defendant may tax costs.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Joel P. Hoekstra