STATE OF MICHIGAN

COURT OF APPEALS

DAVID C. PETTIT,

Plaintiff-Appellant,

v

MYM ENTERPRISES, LLC d/b/a HANDRICH FARM SUPPLY,

Defendant-Appellee.

UNPUBLISHED
October 17, 2013

No. 310572
Sanilac Circuit Court
LC No. 11-034161-CK

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

In this contract dispute, plaintiff appeals as of right the circuit court's order granting summary disposition to defendant based solely on accord and satisfaction. Because we hold that the court plainly misapplied the law of accord and satisfaction in Michigan, we reverse and remand.

Although the parties dispute many of the facts in this case and address them at length on appeal, the pertinent facts supporting the court's dispositive decision are few and undisputed. Plaintiff operated a dairy farm on which defendant provided dairy parlor installation services. Plaintiff sued defendant for breach of contract and negligence arising out of the parties' unwritten service contract entered into on September 30, 2012. Plaintiff hired defendant to install a dairy parlor in plaintiff's new barn. Plaintiff alleged that he suffered financial loss exceeding $100,000 because the defendant did not complete the project in a timely manner and the delayed installation was not done properly. Plaintiff claimed he was damaged by having to hire other contractors to correct the improper installation and suffered both loss of cattle and milk. Defendant did not specifically raise accord and satisfaction as an affirmative defense or a ground for relief in his dispositive motion but merely asserted "all affirmative defenses provided for in MCR 2.116(C)(1)-(10)". Although defendant did not counterclaim against plaintiff, defendant included evidence in his brief that plaintiff failed to make all required payments under their agreement. Specifically, defendant contended that plaintiff's remaining balance for the parlor installation services was $16,775.31, but defendant agreed to accept $13,050 to pay off the account, $50 of which was a bank fee for writing a bad check. Although defendant cashed plaintiff's $10,000 check stating "pay off account per agreement," defendant crossed out that language on the check because he did not accept this as a full payoff, as it was insufficient to cover the remaining balance of $3,050. Although plaintiff informed the court that defendant

never raised accord and satisfaction, the court—based on plaintiff's $10,000 check and defendant's affidavit—held that plaintiff's claims against defendant were barred "in accordance with satisfaction between the parties" and, thus, granted summary disposition to defendant based on MCR 2.116(C)(10). Plaintiff moved for reconsideration, and the court promptly denied his motion.

Plaintiff argues that the court erred in granting summary disposition to defendant on the basis of accord and satisfaction. We agree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In a motion for summary disposition under MCR 2.116(C)(10), the court evaluates whether a genuine issue of material fact exists that precludes summary disposition. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a matter in which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, the court may not make factual findings on disputed factual issues during a motion for summary disposition. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

Additionally, this issue presents questions of law, specifically the interpretation and application of Michigan statutes, which are reviewed de novo by this Court. *Briggs Tax Service, LLC v Detroit Pub Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010). When interpreting a statute, the court's goal is to give effect to the Legislature's intent. *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628-629; 765 NW2d 31 (2009). Unless ambiguous, statutory language should be given its ordinary meaning and is presumed "to have intended the meaning expressed in the statute." *Id.* at 629. This Court must avoid an interpretation of a statute that would render any part of the language as surplusage or nugatory. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

Plaintiff first argues that the court erred in considering this issue because defendant failed to raise the issue as an affirmative defense, which resulted in waiver of the issue. Defendants generally waive affirmative defenses that they fail to raise in their answer or first dispositive motion. MCR 2.111(F)(3). In his answer, defendant failed to assert accord and satisfaction as an affirmative defense, and did not raise the issue in his dispositive motion. Therefore, plaintiff did not have the opportunity to present contrary evidence on this issue at the summary disposition hearing. However, courts have authority to raise dispositive issues sua sponte and are required to do so when a party "is entitled to judgment as a matter of law" or if "there is no genuine issue of material fact." MCR 2.116(I)(1); *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). Further, in *Al-Maliki*, this Court held that a trial court's sua sponte consideration of a dispositive issue does not violate procedural due process or warrant reversal, even if the prevailing party conceded on the issue, so long as the adversely affected party is provided an opportunity to "fully brief and present the argument in a motion for reconsideration." *Id.* at 486. If the party is provided such an opportunity, the error "may be harmless under MCR 2.613(A)." *Id.* However, this Court ultimately reversed in that case because the trial court did not give the plaintiff additional time to obtain evidence on the surprising issue before issuing the order, and also refused to address new evidence offered when moving for reconsideration. *Id.* at 488-489.

In this case, the court did not deprive plaintiff of his due process rights in considering an unraised dispositive issue sua sponte. Following the hearing, plaintiff moved for reconsideration, asserting that the parties did not agree to settle their debts because defendant had repeatedly attempted to collect on the unpaid remainder of plaintiff's debts. In denying the motion, the court noted that it found no palpable error and that it was "not convinced that a different disposition of the motion should result." As the court considered plaintiff's argument and found it meritless, plaintiff's procedural due process rights were not violated by the court. However, the court's decision to grant summary disposition was unfounded in both law and fact.

"An accord and satisfaction is an affirmative defense grounded in contract principles. An accord is a contract and requires a meeting of the minds of those who enter into it. A satisfaction is the discharge of the debt occurring after acceptance of the accord." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 70-71; 711 NW2d 340 (2006). Although the underlying contract primarily involved the provision of services, as opposed to the sales of goods, "MCL 440.3311, not the common law, applies to an accord and satisfaction involving a negotiable instrument such as a check." *Mossing v Demlow Prod, Inc*, 287 Mich App 87, 90; 782 NW2d 780 (2010). MCL 440.3311 states in relevant part:

> (1) If a person *against whom a claim is asserted* proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, [accord and satisfaction may bar the claimant's claims against the debtor]. [Emphasis added.]

In *Hoerstman*, our Supreme Court held that a claimant may not avoid an accord and satisfaction by crossing out conspicuous language placed on a negotiable instrument indicating that the payment was given to fully satisfy the debtor's debts, as the "meeting of the minds" is implied by law when the claimant accepts the offer by cashing the instrument. 474 Mich at 69, 71, 80-81.

Factually speaking, it appears that the court assumed that plaintiff's $10,000 check was an offer to settle both parties' outstanding claims against each other. However, defendant's affidavit stated that plaintiff's payment to defendant resulted from defendant's "effort to collect the balance due and owing to [defendant] for the labor and materials supplied at [plaintiff's] farm . . . a sum less than the balance due and owing but which [defendant] agreed to accept as a full and final settlement of the account." Therefore, the court clearly erred to the extent that it found that plaintiff's check to defendant mutually resolved both parties' claims against each other.

More importantly, the court plainly misapplied the law of accord and satisfaction. It was plaintiff who tendered an instrument in satisfaction of *defendant's claims against plaintiff*. The court appears to have applied the law in reverse. Had defendant counterclaimed against plaintiff for unpaid amounts under the agreement, defendant would be unable to recover on those claims based on accord and satisfaction. There was no record evidence establishing that defendant, "the person *against whom a claim is asserted*," tendered a check to plaintiff in satisfaction of *plaintiff's claims against defendant*. Therefore, plaintiff's payment of $10,000 in satisfaction of his own debts to defendant had no bearing whatsoever on plaintiff's breach of contract and negligence claims against defendant. Accordingly, the trial court committed error requiring

reversal by granting summary disposition to defendant on this ground. As neither the court nor the parties addressed defendant's other grounds for relief contained in his dispositive motion, we similarly decline to comment on the merits of those issues.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens