STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

HALLMARK CONSTRUCTION, INC.,

Plaintiff/Appellee,

v

File No. 01-21505-AV
HON. PHILIP E. RODGERS, JR.

AZTEC PAINTING, INC.,

Defendant/Appellant.
_____/

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DECISION ON APPEAL

Introduction

This is an appeal from a March 12, 2001 decision of the 86th District Court granting Plaintiff/Appellee Hallmark's motion for summary disposition, pursuant to MCR 2.116(C)(10). Briefs were timely filed by both parties. This Court heard the oral arguments of counsel on July 2, 2001 and took the matter under advisement. Supplemental briefs were filed and reviewed. For the reasons stated herein, this Court affirms the decision of the District Court ("trial court").

Factual Background

In 2000, the Kingsley School System sought bids for the construction of a new high school pursuant to plans and specifications prepared by Birtles Hagerman DeKryger Architects. (The "Contract.") The bid involved general contractors submitting overall construction bids based on selected subcontractor bids.

Aztec Painting submitted a bid for the painting on the project to Hallmark Construction. Hallmark bid on the overall construction using Aztec's bid. Hallmark received the construction contract as general contractor and notified Aztec by a written Purchase Order dated April 6, 2000. Aztec refused to sign the Purchase Order. Aztec believed that the Purchase Order changed the payment terms set forth in the Contract. After discussing this concern with Hallmark, Hallmark agreed to make special payment arrangements with Aztec so that Aztec would be paid consistent with the terms of the Contract. Aztec nonetheless declined to participate in the project.

Hallmark contracted with another subcontractor to provide the painting on the project. Hallmark filed this action solely on a theory of promissory estoppel, seeking to recover the increase in the cost of the painting over and above what Aztec had bid.

The parties filed cross motions for summary disposition. The trial court heard oral arguments on March 9, 2001. At that time, Aztec withdrew its motion. By written decision dated March 12, 2001, the trial court granted Hallmark's motion, pursuant to MCR 2.116(C)(10), and granted Hallmark the "additional expenses in excess of $7,000 occasioned by Aztec's withdrawal from the project."

Aztec timely perfected this appeal.

STANDARD OF REVIEW

The parties agree that this Court's review is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. **Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.** *McCart v J. Walter Thompson USA, Inc,* 437 Mich 109, 115; 469 NW2d 284 (1991). **If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.** *McCormic v Auto Club Ins Ass'n,* 202 Mich App 233, 237; 507 NW2d 741 (1993).

I.

Aztec argues on appeal that the trial court erred because the court did not determine whether any factual development at trial would provide support for Aztec's claim. Aztec erroneously relies upon *Independence Twp v Reliance Bldg Co*, 175 Mich App 48; 437 NW2d 22 (1989) in which the Court of Appeals cites *Rizzo v Kretschmer*, 389 Mich 363, 371-372; 207 NW2d 316 (1973) for the proposition that "[u]nder MCR 2.116(C)(10), . . . the trial court must be satisfied that it is impossible for the claim to be supported by evidence at trial." This standard, commonly referred to as the *Rizzo* standard, is not the current standard of review for MCR 2.116(C)(10) motions. *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). Under current case law, the opposing party "may not rely on mere allegations," but . . . must set forth facts showing that a genuine issue of material fact exists. *Id.* "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.*

It is clear from a review of the trial court's written decision that the trial court applied the appropriate standard in this case.

II.

Hallmark's case against Aztec was solely on a theory of promissory estoppel. The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). In determining whether a requisite promise exists. the court must objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions. *First Security Savings Bank v Aitken*, 226 Mich App 291, 313; 573 NW2d 307 (1997); *State Bank of Standish v Curry*, 442 Mich 76, 86; 500 NW2d 104 (1993). The court must exercise caution in evaluating an estoppel claim and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted. *Marrero, supra* at 442-443.

In the instant case, it is undisputed that Aztec bid on the painting portion of the Kingsley High School construction project. It is undisputed that Hallmark bid on the overall construction project using Aztec's bid. It is also undisputed that when Hallmark notified Aztec that it had been awarded the contract, Aztec refused to sign the Purchase Order or to perform the work. Aztec argues that it was justified in refusing to sign the Purchase Order because the payment terms contained in the Purchase Order were different than the payment terms in Section 5.1.3 of the Contract.

Section 5.1.3 of the Contract states:

> Provided that an Application for Payment is received by the Architect not later than the <u>twenty fifth</u> day of a month, the Owner shall make payment to the Contractor not later than the <u>fifteenth</u> day of the <u>next</u> month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than <u>thirty</u> days after the Architect receives the Application for Payment.

Aztec contends that this provision applies to its subcontract with Hallmark because of Section 7 of the Contract which states:

> 1. SUBCONTRACTORS
>
> A.A.A. All contracts made by the successful bidder with subcontractors shall be covered by the terms and conditions of the Contract. The successful bidder shall see to it that subcontractors are fully informed in regard to these terms and conditions.

Aztec maintains that these contractual provisions apply to its subcontract with Hallmark and require Hallmark, upon receipt of an application for payment not later than the 25th day of the month, to pay Aztec on the 15th day of the next month, (the same day the Owner is required to pay Hallmark). The Purchase Order, however, provides in pertinent part as follows:

> B. Payment applications must be submitted to Hallmark Construction, Inc. no later than the 23rd of the month. Payments shall be made by the 25th of the following month.

The trial court did not err in rejecting Aztec's interpretation of these contractual provisions and holding "that 5.1.3 is clear on its face and does not pertain at all to contractor's relationship with any of its subcontractors."

Furthermore, Hallmark agreed to make payments to Aztec as provided in Section 5.1.3 of the Contract, but Aztec still refused to perform. Aztec alleges that it refused to perform because "Aztec did not trust Hallmark to make good on its offer. Aztec anticipated that Hallmark would at some juncture in the job refuse to pay based on some creative dispute." Aztec alleged that "evidence could and would have been developed at trial" in support of these allegations. Aztec's offer to produce evidence of Hallmark's bad reputation at trial is insufficient to withstand a (C)(10) motion. *Smith v Globe Life*, *supra*.

III.

Aztec further argues that the doctrine of unclean hands is an absolute defense to Hallmark's action against Aztec on the equitable theory of promissory estoppel. It is true that unclean hands would bar Hallmark from equitable relief because "one who seeks

equity must do equity" See e.g., *Hogan v Hester Investment Co*, 257 Mich 627; 241 NW 881 (1932); *Michigan Mobile Homeowners Ass'n v Bank of the Commonwealth*, 56 Mich App 206; 223 NW2d 725 (1974), lv den 393 Mich 809 (1975). However, Aztec alleges that Hallmark has unclean hands because Hallmark "attempted to cheat Aztec by retaining Aztec's money for longer than the contractual terms allowed for without compensation and failed to inform Aztec of its rights, as Hallmark was bound to do." The trial court's ruling, which is herein affirmed, that Section 5.1.3 of the Contract was misinterpreted by Aztec and "does not pertain at all to contractor's relationship with any of its subcontractors," disposes of this argument.

CONCLUSION

The decision of the trial court granting summary disposition for Hallmark is affirmed.

IT IS SO ORDERED.

This decision resolves all remaining claims and closes the case.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: s/ 9/17/01