

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

GREGORY MCPHERSON,
Plaintiff,

vs

File No. 93-6105-CK
HON. PHILIP E. RODGERS, JR.

GO FORWARD OPERATING LIMITED
PARTNERSHIP, a Michigan Partnership
doing business as SHANTY CREEK/
SCHUSS MOUNTAIN RESORTS, and
CLUB CORPORATION OF AMERICA, a
Texas Corporation doing business
as SHANTY CREEK/SCHUSS MOUNTAIN
RESORTS,

Defendants.

Mark T. Van Slooten (P42689)
Attorney for Plaintiff

Paul T. Jarboe (P34343)
Attorney for Defendant Go Forward
Operating Limited Partnership

John M. Lichtenberg (P31770)
T.R. Knecht (P35362)
Attorneys for Defendant Michigan
Resort Management Corp. &
Club corporation

DECISION AND ORDER

Defendant Go Forward Operating Limited Partnership ("Go Forward") has filed a motion for summary disposition pursuant to MCR 2.116(C)(8). On October 7, 1993, this Court issued a Pre Hearing Order which required that any opposing party file and serve a written response, together with any supporting documents, affidavits, briefs or memoranda, within twenty-one days of the Order. Plaintiff has not responded to the Pre-Hearing Order.

The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23 (1989)

A motion for summary disposition brought under MCR 2.116

(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Beaudin v Michican Bell Telenhone Co*, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [*Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

In its consideration of the issue at hand, this Court reviewed the motion and the court file. Defendant Go Forward filed its motion, in lieu of an Answer to the Complaint, on October 7, 1993. Plaintiff filed a First Amended Complaint on October 28, 1993. MCR 2.118(A)(1) and (2) set forth the timelines and procedure for filing an amended complaint, as follows:

(1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.

(2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Clearly, Plaintiff did not timely file the First Amended Complaint. MCR 2.118(A)(1). Nor did Plaintiff seek leave of court to file the amended pleading. Defendant Go Forward filed its answer to the First Amended Complaint on November 12, 1993. It is not the Court's role to object to the untimely filing of the First Amended Complaint; Defendant Go Forward waived any objection to the procedural irregularity by its timely answer to the amended pleading and lack of objections.

Plaintiff alleges, in paragraph 2 of the Complaint, that

Defendant Go Forward is "doing business as Shanty Creek Schuss Mountain Resorts"¹

Defendant Go Forward admits that it is the owner and operator and offers two arguments to support its contention that Plaintiff has failed to state a valid claim. First, Defendant Go Forward asserts that it was not in existence at the time Plaintiff was allegedly wrongfully discharged in September, 1990. To document that assertion, Defendant Go Forward submitted a copy of its Certificate of Limited Partnership as an attachment to its motion. At the top of the first page there is a stamp showing that the document was filed with the Michigan Department of Commerce's Corporation and Securities Bureau on December 26, 1991.

Second, in paragraph 5, Defendant Go Forward contends that, "Plaintiff has not alleged successor liability against GO FORWARD OPERATING LIMITED PARTNERSHIP." Yet, in the First Amended Complaint, Plaintiff does assert successor liability against Defendant Go Forward in paragraphs 18 through 20, which read as follows:

18. Upon information and belief, defendants, GFO Partner, Incorporated and Go Forward Operating Limited Partnership, are successors in interest of Shanty Creek Management, Incorporated, and presently own and/or operate Shanty Creek/Schuss Mountain Resorts as a mere Continuation of Business Operations undertaken by Shanty Creek Management, Incorporated.

19. Upon information and belief, defendants, GFO Partner, Incorporated and Go Forward Operating Limited Partnership, as successors in interest of Shanty Creek Management, Incorporated, agreed, expressly or impliedly, to assume all liabilities of Shanty Creek Management, Incorporated, including all liability for claims asserted by plaintiff in the present case.

Footnote 1: Defendant Go Forward stated, in paragraph 2 of the motion, that it is "the current owner and operator of SHANTY CREEK/SCHUSS MOUNTAIN REPORT". It appears to this Court that there is a typographical error in that statement. This Court concludes that the drafter of the motion intended that the last word of that sentence would be "resort" or "resorts". Defendant Go Forward, then, admits in paragraph 2 that it is the current owner and operator of Shanty Creek/Schuss Mountain Resorts.

20. As successors in interest of Shanty Creek Management, Incorporated, defendants GFO Partner, Incorporated and Go Forward Operating Limited Partnership are liable to Plaintiff.

Defendant Go Forward answered paragraphs 18 through 20 of the First Amended Complaint, in pertinent part as follows:

18. . . .Defendant Go Forward admits to assumptions of certain liabilities of GFO Partner, Inc., however, is unable at this time to admit assumption of any liabilities owed by said GFO Partner, Inc., to Plaintiff and, therefore, denies the allegations. .

19. . . .denied upon information and belief for same reason stated in Paragraph (18).

20. .denied upon information and belief for same reason stated in Paragraph (18).

Given Defendant Go Forward's admission, in paragraph 18 of its answer to the First Amended Complaint, to "assumption of certain liabilities of GFO Partner, Inc.," factual development could possibly justify Plaintiff's right to recover damages from this Defendant. The parties have not completed discovery. This Court hereby denies the instant motion without prejudice. Parkhurst Homes r Inc. v McLauchlin, 187 Mich App 357; 466 NW2d 404 (1991); Kassab v Michigan Basic Property Ins Ass'n, 185 Mich App 206; 460 NW2d 300 (1990).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 2/01/94