

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GEORGE SLATER and MARGARET
SLATER, individually and d/b/a
G.M. & ASSOCIATES,

Plaintiffs,

File No. 98-18414-PD
HON. PHILIP E. RODGERS, JR.

v

PATRICK DUKE, AMERACALL, INC.,
NATIONAL WIRELESS, INC., RUSSELL
MADSEN, DAVID NICKERSON, PAMELA
NICKERSON, JAMES SCHOPIERAY, and
MARY SCHOPIERAY,

Defendants.

James Moskal (P41885)
Attorneys for Plaintiffs

Paul T. Jarboe (P34343)
Attorney for Defendants Ameracall, Russell Madsen,
James Schopieray and Mary Schopieray

Patrick Duke in Pro Per

William M. Conklin (P27560)
Attorney for David Nickerson

DECISION AND ORDER OF THE COURT ON
DAVID A. NICKERSON'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The Plaintiffs (hereinafter referred to as "Slater") filed this action in December of 1998. Among other things, Slater alleged that the Defendants Patrick Duke and National Wireless, Inc. (hereinafter referred to as "Duke"), usurped Ameracall, Inc.'s corporate opportunities and

squandered its corporate assets. In response, Duke filed a counterclaim against Slater and cross-claims against several others, including David A. Nickerson (hereinafter "Nickerson") alleging that he was deceived into investing in Ameracall, Inc. Duke claimed that he was deceived because he was unaware of certain documents, namely the Articles of Incorporation of Ameracall, Inc., the Voting Trust Agreement, and the Buy-Sell Agreement, that restricted the transfer of Ameracall stock. Duke stated that he did not discover the existence of these documents until December of 1998.

On June 8, 1999, the Plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) and a motion for sanctions pursuant to MCR 2.114. By written Decision and Order dated September 3, 1999, this Court granted Plaintiffs' motion and dismissed Defendant Duke's counterclaims against Slater. Subsequently, the Plaintiffs and all Cross-Defendants, except for Nickerson, made motions for entry of default against Defendants Duke and National Wireless, Inc. for failure of the Defendants to comply with the Court's Order of November 15, 1999 compelling discovery. Those motions were granted and the various actions dismissed on November 22, 1999. On January 25, 2000, by stipulation of the Plaintiffs and all the Defendants, except Duke, the Court dismissed all remaining claims, except the cross-claim by Duke against Nickerson.

The final settlement conference on this remaining cross-claim by Defendant Duke against Defendant Nickerson was scheduled for January 28, 2000. Defendant Duke failed to appear. Nickerson made a motion to dismiss the cross-claim which was granted. The Court's Order dismissing the cross-claim was issued on February 9, 2000. On January 31, 2000, however, Nickerson filed a motion for summary disposition. He contends that, notwithstanding the dismissal for failure to appear, there is no genuine issue of material fact and that he is entitled to judgment on the merits as a matter of law. MCR 2.116(C)(10). He relies upon this Court's Decision and Order dated September 3, 1999 granting Plaintiff's motion for summary disposition and sanctions.

On February 1, 2000, this Court issued a Pre-Hearing Order giving Defendant Duke twenty-one days from the date of the Order to file a response to Nickerson's motion. No response was filed. The Court, having reviewed the motion and the entire record in this case, and otherwise being fully advised in the premises, dispenses with oral argument pursuant to MCR 2.119(E)(3) and issues this written Decision and Order. For the reasons stated herein, the motion is granted.

II

MCR 2.116(C)(10)

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was most recently 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*, 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).

III.

Duke's counterclaim against Slater contained three counts: Count I - fraud and misrepresentation, Count II - unjust enrichment, and Count 3 - breach of fiduciary duty. The factual

allegations underlying each of these counts were stated in paragraphs 9 through 12 of the counterclaim. Briefly stated, Duke alleged that he did not know about the existence of Article IX of the Articles of Incorporation of Ameracall, the Buy and Sell Agreement, and the Voting Trust Agreement; that Slater allowed him to enter into stock purchase agreements knowing these transactions were prohibited by these documents; that Slater caused him to believe that he was an officer and shareholder of Ameracall when Slater knew that these documents prohibited Duke from becoming either; and that he did not discover the existence of these documents until December of 1998.

In support of his motion for summary disposition, Slater submitted to the Court copies of the three documents in question, as well as copies of correspondence between the parties, excerpts from Duke's deposition, and other documentary evidence. Duke filed a response with various attachments, including his affidavit.

These same factual allegations form the basis of Duke's cross-claim against Nickerson. After reviewing Slater's motion, Duke's response thereto, the affidavits, pleadings, deposition excerpts, and other documentary evidence and hearing arguments of counsel, the Court found that the allegations contained in paragraphs 9 through 12 of Duke's counterclaim were false in so far as Duke claimed that he was unaware of Article IX of the Articles of Incorporation, the Buy and Sell Agreement, and the Voting Trust Agreement when he purchased stock and invested in Ameracall. Further, the Court found that the allegations of fraud contained in Duke's counterclaim were false in so far as Duke claimed that because he was unaware of these three documents, Slater and the cross-defendants, including Nickerson, were able to and did make material misrepresentations which induced Duke to purchase stock and invest in Ameracall.

Duke testified at his deposition that, in April or May of 1996, he requested certain documents before he decided to invest in Ameracall. He testified that the document attached to Slater's motion and brief in support as Exhibit K was a list of those documents. The three documents in question were specifically referred to in Exhibit K. In addition, the correspondence, other documents and deposition excerpts attached to Slater's motion and brief in support, clearly indicated that Duke knew about Article IX, the Buy and Sell Agreement, and the Voting Trust Agreement prior to his entering into any agreement to purchase stock or invest in Ameracall. For example, the initial draft of the

Stock Purchase Agreement which was sent to Duke in July of 1997, a copy of which was attached to Slater's motion and brief in support as Exhibit L, expressly referred to the Buy and Sell Agreement. Furthermore, the Stock Purchase Agreement that Duke entered into with Russell Madsen in November of 1997 stated:

Section 4. Representations of Both Seller and Purchaser. Seller and Purchaser hereby represent, warrant, acknowledge and agree to the following:

* * * * *

4.4 Seller and Purchaser have had an opportunity to review the recent financial statements of Corporation and to investigate any financial or other information pertaining to Corporation appropriate for purposes of selling Seller's Shares.

4.5 Seller and Purchaser have had the opportunity to meet with representatives of Corporation, and have had the opportunity to ask questions of, and receive answers from, those representatives concerning the terms and conditions of this transaction and the operations of Corporation.

4.6 Seller and Purchaser are relying solely on their independent investigation and upon their own tax and legal counsel in entering into this Agreement. **Seller and Purchaser are not relying upon the advice, statement, or counsel of George Slater** or James Schopieray in entering into this Agreement. (Emphasis supplied.)

Thus, the Court held that Duke had failed to show that Slater could have or did make any material misrepresentations that induced Duke to purchase stock or invest in Ameracall. Further, the Court held that Duke had failed to demonstrate that there was a genuine issue of material fact for trial. Slater's motion for summary disposition pursuant to MCR 2.116(C)(10) was granted and Duke's counterclaim against Slater was dismissed with prejudice.

The factual issues in the instant cross-claim by Defendant Duke against Defendant Nickerson are identical to the factual issues presented by the Defendant Duke's counterclaim against Plaintiff Slater. This Court has already found in the context of the Plaintiff Slater's Motion for Summary Disposition that there is no genuine issue of material fact for trial on these issues. Thus, Defendant Nickerson is entitled to judgment as a matter of law and his Motion for Summary Disposition should be granted. MCR 2.116(C)(10).

IV.
SANCTIONS

MCR 2.114 provides in pertinent part as follows:

(D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the pleading;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the pleading is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(3) the pleading is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a pleading is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

In order to determine whether the Defendant Duke's cross-claim violated MCR 2.114, this Court must determine whether at least one of the following conditions is met:

(a) Whether Duke's primary purpose in initiating the action was to harass, embarrass, or injure the opposing party; or

(b) Whether Duke had no reasonable basis to believe that the facts underlying their legal position were in fact true; or

(c) Whether Duke's legal position was devoid of arguable legal merit.

MCR 2.114(F); *Broadway Coney Island, Inc v Commercial Union Ins Co*, 217 Mich App 109, 116-117; 550 NW2d 838 (1996).

This Court has conducted an independent review of the entire record and finds that condition (b) has been met. Duke had no reasonable basis to believe that the facts underlying his legal position were in fact true. Nickerson is entitled to sanctions.


CONCLUSION

Defendant Duke filed a cross-claim against Defendant Nickerson alleging that he was unaware of Article IX of the Articles of Incorporation of Ameracall, the Buy and Sell Agreement, and the Voting Trust Agreement, and thus was able to be induced to purchase stock and invest in Ameracall. As a result, Duke claims he lost a large sum of money. The underlying factual allegations contained in the cross-claim are false. The factual allegation that Duke did not know about Article IX of the Articles of Incorporation, the Buy and Sell Agreement, and the Voting Trust Agreement are false.

The cross-claim was prepared and signed by counsel for Duke. It is evident that counsel would have had to rely upon information supplied by Duke. Thus, this Court orders Duke to pay the amount of reasonable expenses incurred by Nickerson because of the filing of the cross-claim, including reasonable attorney fees. MCR 2.114(E). In addition, all costs of the proceedings made necessary by the filing of the cross-claim are taxed against Defendant Duke. MCR 2.114(F).

Nickerson shall submit an affidavit within seven (7) days of the date signed below setting forth with particularity all fees and expenses incurred in this case. The Court will review the affidavit and order Defendant Duke to pay those fees and expenses it finds reasonable. The failure to submit a timely affidavit shall be deemed a waiver of the Court's award of MCR 2.114 sanctions.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/03/00