STATE OF MICHIGAN

COURT OF APPEALS

ANDRE PIZZO,

Plaintiff-Appellant,

V

UNICORN DEVELOPERS & ENGINEERING, INC., UNICORN TESTING & ENGINEERING CONSULTANTS, MARIE VAGLICA, PHILIP VAGLICA, STEVE VAGLICA, and JOSEPH VAGLICA,

Defendants-Appellees.

UNPUBLISHED
November 1, 2002

No. 230507
Macomb Circuit Court
LC No. 98-001920-CK

Before: Murphy, P.J., and Markey and R. S. Gribbs[*], JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order dismissing all remaining claims against defendants Unicorn Developers & Engineering, Inc. and Unicorn Testing & Engineering Consultants (referred to jointly as Unicorn) in this construction services contract action. Previous orders issued by the trial court granted summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(10) and (C)(8) in favor of defendants Joseph Vaglica, Philip Vaglica, Steve Vaglica and Marie Vaglica. We affirm in part, reverse in part, and remand.

Plaintiff is a builder who entered into an oral contract with defendants to perform services related to construction of a residential home. Plaintiff alleged that defendants breached the contract, negligently performed the contract and violated various sections of the Michigan Consumer Protection Act. Plaintiff also sought to pierce the corporate veil of defendant Unicorn to attach personal liability against the individual defendants. Plaintiff claims on appeal that the trial court improperly granted summary disposition of his claims. We review a trial court's grant or denial of summary disposition de novo. *Spiek v Transportation Dept*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff argues that summary disposition was premature because further discovery was necessary. We disagree. As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. *Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). However, summary disposition may be properly granted before discovery is complete if further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id.*

Although plaintiff asserted that he might uncover additional evidence to support his claims, he failed to cite what evidence he expected to obtain, or how that evidence would provide factual support for his claims. A mere pledge that plaintiff can establish an issue of fact at trial is not sufficient to survive a motion for summary disposition pursuant to MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). A trial court's grant of summary disposition may be proper where, as here, the opposing party fails to assert or provide an evidentiary basis for what he believes he might find to support the existence of a factual dispute. *Dimondale, supra*; *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

Plaintiff also argues that the trial court improperly granted summary disposition of plaintiff's breach of contract claims. We agree in part.

The trial court improperly made a factual finding that it was impossible for defendant Unicorn to properly perform the surveying services under the contract because plaintiff moved the survey stakes. Although the trial court considered the testimony of witnesses who claimed to observe plaintiff moving the stakes, who overheard plaintiff admitting to moving the stakes to the building inspector, and who heard that plaintiff had moved the stakes, it failed to consider plaintiff's affidavit denying that he did so and the testimony from a contractor who did not believe that plaintiff could have moved them. While defendants' evidence may have been convincing, the trial court improperly made a finding of fact based on the greater credibility of defendants' evidence. *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Viewing the evidence in the light most favorable to plaintiff, and giving the benefit of any reasonable doubt to plaintiff, we conclude that whether plaintiff moved the stakes presented a genuine issue of material fact. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999); *Manning, supra*, 202 Mich App 690

The trial court properly granted summary disposition as to the individual defendants, however. Plaintiff did not allege that he contracted with defendants Philip Vaglica, Marie Vaglica or Steve Vaglica and there is no factual support establishing that they were parties to the contract. Although plaintiff did allege that he contracted with defendants Joseph Vaglica and/or Unicorn, he proffered no factual support as to his allegation against Joseph Vaglica. To the contrary, plaintiff stated in his affidavit, "I hired Unicorn Developers and Engineering, Inc., to perform surveying services including the 'as built' preliminary grade certificate." Although an agent may be personally liable when he acts only on his own behalf in contracting or does not disclose the involvement or existence of a corporation, *Baranowski v Strating*, 72 Mich App 548, 559-560; 250 NW2d 744 (1976), it is evident from the record here that plaintiff was aware of defendant Unicorn's existence when he contracted with defendants. We find no legal or factual support for plaintiff's breach of contract claim against defendants Steve Vaglica, Marie Vaglica,

Philip Vaglica, or Joseph Vaglica, and summary disposition of plaintiff's breach of contract claims against the individual defendants was properly granted. *Spiek, supra,* 456 Mich 337; *Simko v Blake,* 448 Mich 648, 654; 532 NW2d 842 (1995).

Next, plaintiff contends that the trial court improperly granted summary disposition of his negligence claims against defendants. Plaintiff's allegations of negligence arise out of defendants' alleged negligent performance of the contract and plaintiff's allegations that defendants owed "certain duties" to the public in general. Specifically, plaintiff alleged that defendants negligently prepared and submitted an inaccurate "as built" preliminary grade certificate and wrongfully and improperly surveyed, measured and staked the property. The trial court granted summary disposition of plaintiff's claim against defendants, after concluding that Dr. Sajadi, the professional engineer who prepared and sealed the preliminary grade certificate, was solely liable for any alleged inaccuracies in the measurements contained in the certificate. We disagree.

It is undisputed that defendant Unicorn used the services of Dr. Sajadi and that Dr. Sajadi's seal appeared on the "as built" preliminary grade certificate. However, we are not convinced that the presence of Dr. Sajadi's seal shields defendants from all liability related to the "as built" preliminary grade certificate. The trial court relied on *Ambassador Baptist Church v Seabreeze Heating & Cooling,* 28 Mich App 424, 426; 184 NW2d 568 (1970), for the proposition that the affixing of a seal by a professional engineer signifies the assumption of responsibility by the professional. In *Ambassador,* the plaintiff directly sued the architects who submitted plans for approval under their seal. *Ambassador, supra,* 28 Mich App 425-426. The Court in *Ambassador* concluded that the evidence presented, i.e., the sealed plans and testimony by an architect that affixing a seal to a set of plans customarily signifies the assumption of liability, would have allowed a jury to find that the architects assumed responsibility for the plans submitted in their names, thus making a directed verdict inappropriate. *Id.*

In this case, plaintiff did not bring suit against the professional engineer who sealed the "as built" preliminary certificate; rather, he sued defendants, who allegedly negligently performed under the contract. Although Dr. Sajadi's seal may be sufficient evidence to establish liability against him pursuant to *Ambassador, supra,* Dr. Sajadi's seal does not excuse defendants from liability for their allegedly negligent performance under the contract as a matter of law, especially where, as here, plaintiff contracted with defendants, and not Dr. Sajadi. Moreover, there was no evidence in the record ascertaining the relevance of a professional engineer's affixed seal to a preliminary grade certificate and no factual basis for the trial court's conclusion that Dr. Sajadi's seal signifies the assumption of all liability.

Every contract includes an implied duty to perform skillfully, carefully, diligently, and in a workmanlike manner. *Co-Jo, Inc v Strand*, 226 Mich App 108, 114; 572 NW2d 251 (1997). Where a party to a contract fails to comply with the implied duty to perform in a workmanlike manner, the other party may be entitled to damages resulting from the deficient performance. *Id*. Accordingly, negligent performance under a contract constitutes a tort as well as a breach of contract. *Id.*, *Williams v Polgar,* 391 Mich 6, 19; 215 NW2d 149 (1974).

Thus, defendant Unicorn, as a party to the contract, owed a duty to plaintiff arising from the contract to perform its terms in a skillful, careful, diligent and workmanlike manner. *Co-Jo,*

supra, 226 Mich App 114. Plaintiff alleged that defendant improperly certified, checked and drafted the "as built" certificate, and improperly measured and staked the property, actions which are "obvious examples" of a failure to perform the contracted for services in a diligent, skillful and workmanlike manner. *Williams, supra,* 391 Mich 22. Because defendant Joseph Vaglica allegedly performed the contracted for services at issue, he could be held personally liable for his tortious conduct.

Plaintiff does not allege that defendants Marie Vaglica or Philip Vaglica acted negligently in this matter and, because these individual defendants were not parties to the contract, they do not owe a contractual duty to plaintiff and cannot be held liable for defendant Unicorn's negligent performance of the contract under a breach of contract theory absent tortious conduct by them personally. Defendant Steve Vaglica was only minimally involved in the surveying services by assisting defendant Joseph Vaglica during one or two of the stake outs. His assistance amounted to holding a stake one time during the stake out. We do not believe that holding the stake, at the direction of defendant Joseph Vaglica, is a sufficient factual basis to move forward on a negligence claim. Accordingly, summary disposition of plaintiff's negligence claim against defendants Marie Vaglica, Philip Vaglica and Steve Vaglica was appropriate.

Next, plaintiff argues that the trial court improperly granted summary disposition of his claims under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. We disagree. To sustain an action against defendants for violations of the MCPA, defendants' services must be primarily for personal, family or household purposes. The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce. *Zine, supra,* 236 Mich App 270-271; MCL 445.903(1). The intent of the MCPA is to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes. *Zine, supra,* 236 Mich App 271.

To determine whether the MCPA applies, the proper focus is on the actual use of the product or service and not merely on the intent of the consumer. *Zine, supra,* 236 Mich App 272 n6. Although plaintiff may have originally intended to occupy the house, we find no evidence in the record that plaintiff ever occupied the house for his personal, family or household use. Accordingly, we find that the services defendants provided to plaintiff were not "primarily for personal, family or household purposes," and the MCPA does not apply to this transaction.

Plaintiff also contends that defendant Unicorn's corporate veil should be pierced in order to assess personal liability against defendants in their individual capacity. As a general proposition, the law treats a corporation as an entirely separate entity from its stockholders, even where only one person owns all the corporation's stock. *Foodland Distributors v Al-Naimi,* 220 Mich App 453, 456; 559 NW2d 379 (1996). However, where the corporate fiction is used to subvert justice, the court may ignore the corporate entity. *Id.* There is no single rule delineating when the corporate entity may be disregarded. *Id.* This Court uses a three-prong test for piercing the corporate veil: First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff. *Id.* In addition, the injustice to be prevented by piercing the corporate veil must relate to the abuse of the corporate form. *Soloman*

v Western Hills Development Co (After Remand), 110 Mich App 257, 264; 312 NW2d 428 (1981).

We find no evidence that defendant Unicorn was a mere instrumentality of the individual defendants or that the individual defendants abused the corporate form to engage in fraudulent or wrongful conduct. The evidence does not support the conclusion that respecting the corporate entity in this case would subvert justice, *Foodland, supra*, 220 Mich App 456, and summary disposition was properly granted.

Finally, plaintiff contends that the trial court improperly awarded sanctions pursuant to MCR 2.625(A)(2), and MCL 600.2591, for filing a frivolous claim against defendants Steve Vaglica and Marie Vaglica. We disagree. We review a trial court's finding that a plaintiff's claim is frivolous and that the imposition of a sanction was required, for clear error. *Cvengros v Farm Bureau Ins,* 216 Mich App 261, 266; 548 NW2d 698 (1996); *Contel Systems v Gores,* 183 Mich App 706, 710-711; 455 NW2d 398 (1990). Sanctions are mandatory if the court concludes that a claim is frivolous. *Cvengros, supra*, 216 Mich App 268. A claim is frivolous when the party's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, or the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true, or the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a); *Cvengros, supra*, 216 Mich App 266-267.

Here, none of plaintiff's claims against defendants Steve Vaglica and Marie Vaglica were viable due to their limited involvement in this matter and the lack of factual support for plaintiff's claim. Defendants Steve Vaglica and Marie Vaglica do not own defendant Unicorn, they did not materially participate in this matter, and they were not parties to the contract at issue in this case. The trial court did not clearly err in determining that plaintiff's claim was devoid of arguable legal merit, and therefore, frivolous. MCL 600.2591(3)(a); *Cvengros, supra*, 216 Mich App 266-267.

Plaintiff also argues that the trial court improperly awarded defendant Joseph Vaglica mediation sanctions. A trial court's decision to award mediation sanctions involves a question of law that is reviewed de novo. *Elia v Hazen,* 242 Mich App 374, 376-377; 619 NW2d 1 (2000). In light of our conclusion that summary disposition of some claims against Joseph Vaglica was not proper, there was no verdict in this case and the order of mediation sanctions for defendant Joseph Vaglica against plaintiff is set aside. MCR 2.403(O)(2).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Roman S. Gribbs