

STATE OF MICHIGAN
IN THE NINTH CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

DAVID S. POOLE,

Plaintiff-Appellant,

Case No. 2019-0383-AV

v

HON. ALEXANDER C. LIPSEY

KALAMAZOO VALLEY BLUES ASSOCIATION;
MICHAEL DEPOIAN; AND PATRICIA OLSEN,

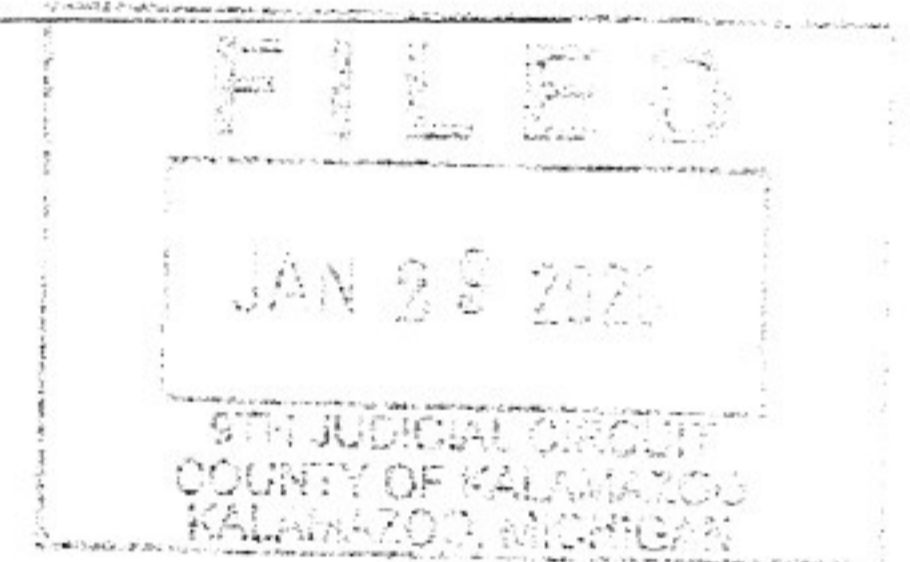
Defendants-Appellees.

David S. Poole
In Pro Per
35114 Knollwood Lane
Farmington Hills, MI 48335

Robb S. Krueger (P66115)
Charles L. Bogren (P82824)
Kreis, Enderle, Hudgins & Borsos
P.O. Box 4010
Kalamazoo, MI 49003

OPINION AND ORDER

At a session of said Court held in the
City and County of Kalamazoo, State of
Michigan, on this 31 day of January, 2020.



PRESENT: HONORABLE ALEXANDER C. LIPSEY, Circuit Court Judge

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff David S. Poole was associated with the Kalamazoo Valley Blues Association ("KVBA") as both a member and a board member, until the 2013 KVBA election, in which Poole was not re-elected. Since 2013, Defendant KVBA asserts that Plaintiff has been a disruptive member, which resulted in KVBA sending Plaintiff a letter in which Plaintiff was banned from all future KVBA activities. Displeased with the letter and KVBA's decision, Plaintiff attempted to re-join the organization a total of seven times since 2017, all of which were rejected by KVBA and

the subsequent monetary exchange was refunded, with only one exception that was caused by technical issues. However, Plaintiff is less concerned about his alleged monetary damages, and more concerned about his perceived right to join and participate with KVBA.

After multiple rejections by KVBA and its current board members, Defendants Michael Depoian and Patricia Olsen, Plaintiff filed his Complaint on February 14, 2019 with the Eighth District Court, alleging Breach of Contract and Tortious Interference with a Contract. On April 15, 2019, Plaintiff filed Plaintiff's Motion for Partial Summary Disposition. Defendants responded to Plaintiff's Motion, and subsequently moved the District Court with its own counter-motion. At a hearing, held on June 12, 2019, before the Honorable Vincent C. Westra, the Eighth District Court found that no contract was ever created between the parties, and thus, no breach of contract or interference of contract could have taken place. Judge Westra denied Plaintiff's Motion for Partial Summary Disposition, and granted Defendant's Motion for Summary Disposition. Plaintiff-Appellant now appeals.

JURISDICTION

In a case tried in municipal or district court, an aggrieved party generally has a right of appeal from a final order or judgment, except for an order or a judgment based on a plea of guilty or nolo contendere, to the circuit court in the county in which the misdemeanor or ordinance violation was committed. MCR 7.103(A)(1). Defendants argue that this matter need not come before the Ninth Circuit Court, as Plaintiff's appeal by right has not yet vested. When the Eighth District Court granted Defendants' Motion for Summary Disposition, Defendants also made a claim of attorney fees. This matter was still pending before the District Court prior to Plaintiff's claim of appeal by right. Defendants are correct that this claim of appeal was filed prematurely to claim it is an appeal by right.

MCR 7.103(A)(1) states that for the circuit court to have jurisdiction of an appeal by right, the district court must have entered its final judgment or final order. Pursuant to MCR 2.602(A)(3), each judgment shall state whether it resolves the last pending claim and closes the case. Judge Westra's July 23, 2019 Order did not explicitly state that it was his final judgment or order, and thus this Court should not consider Plaintiff's claim an appeal by right, but rather an application for leave to appeal.

Although this Court is not convinced that Plaintiff has adequately comported with the rules set forth in MCR 7.105, this Court shall treat Plaintiff-Appellant's claim of appeal as his application for leave, grant the application, and shall now rule on the merits. 7.103(B)(1).

STANDARD OF REVIEW

A trial court's decision whether to grant summary disposition is reviewed de novo. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558 (2007). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) is appropriate when, except for damages, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, subject to the limitations in MCR 2.116(G)(6). MCR 2.116(G)(5). This evidence should be considered in the light most favorable to the non-moving party. *Brown v Brown*, 478 Mich 545, 551-52 (2007).

The moving party has the initial burden of supporting its position by affidavit, depositions, admission or other documentary evidence. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120 (1990). If the motion is properly made and supported, the adverse party must, by affidavit or otherwise, "set forth specific facts showing there is a genuine issue for trial." MCR 2.116(G)(4).

The non-moving party may not rest upon mere allegations or denial in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 124 (1991). Furthermore, the evidence submitted must be "substantively admissible." *Maiden v Rozwood*, 461 Mich 109, 121 (1999). Merely stating facts that will be established at trial is not sufficient to avoid summary disposition. *Id.* If the opposing party does not give evidence that a material factual dispute is alive, then the MCR 2.116(C)(10) motion is properly granted. *McCormic v Auto Club Ins. Ass'n.*, 202 Mich App 233 (1993).

OPINION

Upon review of the briefs, the District Court record, and the transcripts, this Court finds that the record adequately presents the facts and legal arguments, making oral arguments unnecessary. For that reason, this Court will rule on the pleadings and evidence alone, and will decline to hold oral arguments, pursuant to MCR 7.114(A).

Plaintiff's Complaint alleged four counts, one count of Breach of Contract and three counts of Tortious Interference with Contract. As Judge Westra accurately summarized during the Motion for Summary Disposition hearing, to breach a contract, or to tortuously interfere with a contract, there must first be a contract. See generally *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 177-78 (2014).

Plaintiff alleges that by completing the online application and paying the \$20 membership fee, he formed a contract and thus was due certain bylaw procedures that were infringed upon when he was banned in 2013. Plaintiff fails to recognize the full elements of contract formation. A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *ATF*

Mich v Michigan, 497 Mich 197, 235 (2015). Defendants argue, and this Court agrees, that Plaintiff has failed to prove that the fourth element, mutuality of agreement, was satisfied.

Mutuality of agreement, often referred to as mutual assent or meeting of the minds, requires that both parties agree to enter into a contract. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-73 (2003). This standard is analyzed from an objective perspective. *Rood v General Dynamics Corp*, 444 Mich 107, 119 (1993). When viewing the facts of the alleged mutual assent, this Court finds that the weight of evidence showing no mutual assent greatly outweighs the evidence in support of contract formation.

The 2013 letter banning Plaintiff from KVBA, sent through KVBA's counsel, could not have made it clearer that Plaintiff was not welcomed at KVBA. Since 2013, there is no indication by KVBA, Michael Depoian, or Patricia Olsen that Plaintiff was welcomed to join KVBA. This is further iterated in the numerous attempts by Plaintiff to join KVBA through its online membership portal. This online portal allowed individuals to join KVBA through a short application and a submission of \$20. Since 2017, Plaintiff attempted to re-join KVBA through this online portal seven times; Plaintiff has been clearly rejected at least six of those seven times. Each time, with one exception, the proper reimbursement was returned to Plaintiff, and the seventh time was a technical based issue. At no point did KVBA ever indicate, through in person communication or through its online portal, that Plaintiff was welcome to join

Taking into account all of these facts, this Court is not convinced that any mutual assent took place, thus no contractual relationship was ever formed. Although the frustration by Plaintiff is noted by the Court, there is no legal action that is appropriate for what he desires.

Additionally, there were concerns by the Eighth District Court and Defendants that the statute of limitations had run its course regarding the 2013 actions, much of which is the foundation

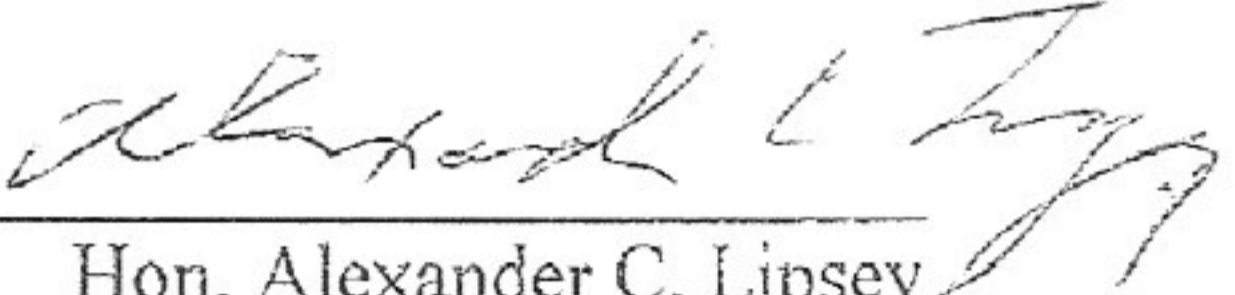
for the Breach of Contract and Tortious Interference with a Contract. Although this argument may hold merit, this issue is now moot.

CONCLUSION

This Court, after reviewing all the evidence presented, holds that the decision of the Eighth District Court is **AFFIRMED**.

IT IS SO ORDERED.

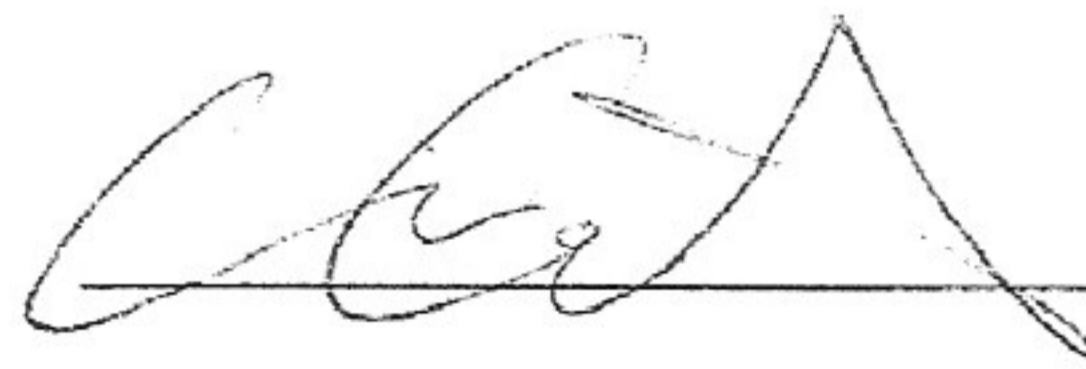
Dated: January 29, 2020


Hon. Alexander C. Lipsey
Circuit Court Judge

PROOF OF MAILING

I certify that on this date, copies of this order were served on the parties at their above stated addresses via first class mail and interoffice mail.

Date: January 30, 2020



Charles M. Curts
Law Clerk to the Honorable Alexander C. Lipsey