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STATE OF MICHIGAN

COURT OF APPEALS

HALEY SANDULA,

Plaintiff-Appellant,

v

EASTWOOD CUSTOM HOMES INC.,

Defendant-Appellee.

UNPUBLISHED
August 19, 2026
11:47 AM

No. 375509
Grand Traverse Circuit Court
LC No. 2025-037385-CK

Before: ACKERMAN, P.J., and REDFORD and FEENEY, JJ.

ACKERMAN, P.J. (*concurring*).

I concur in full with the majority opinion. I write separately to note my respectful disagreement with Judge FEENEY's suggestion that a nonbinding mediation agreement cannot properly be enforced under MCR 2.116(C)(7).

By its terms, MCR 2.116(C)(7) applies when "dismissal of the action . . . is appropriate because of . . . an agreement to arbitrate or to litigate in a different forum." Judge FEENEY asserts that "the plain language of the purchase agreement [in this case] did not include an arbitration agreement or requirement to litigate in a different forum." In my view, the mediation agreement at issue qualifies as an agreement to "litigate in a different forum" within the meaning of MCR 2.116(C)(7). I believe that the contrary interpretation reads MCR 2.116(C)(7) too narrowly and fails to consider it in the context of the overall function of MCR 2.116(C).

The grounds for summary disposition listed in MCR 2.116(C) cannot be understood as an exhaustive enumeration of either the dispositive theories a party may raise or the authority a trial court may exercise. The intention is that "[t]he stated grounds are broad enough to include any legal issue that may be dispositive of a claim or defense." 1 Longhofer & Quick, Michigan Court Rules Practice—Text (8th ed), § 2116.8, p 520. The absence of a specifically identified theory from the rule does not establish that the theory is unavailable.

Judicial estoppel illustrates the point. It is well established as a legitimate basis for summary disposition, even though it is not apparent which particular subrule of MCR 2.116(C) most naturally encompasses it. See *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 478-479; 822 NW2d 239 (2012). Because the rule does not purport to *create* options for moving parties to

invoke or *empower* trial courts to act, the fact that none of the grounds for summary disposition in MCR 2.116(C) is clearly tailored to judicial estoppel is not dispositive; it remains a viable theory even so.

Viewed from that perspective, I see no reason to reject defendant's motion merely because MCR 2.116(C)(7) does not expressly refer to nonbinding mediation. I therefore respectfully disagree with Judge FEENEY's complaint that "[d]efendant has not cited any jurisprudence in which summary disposition under MCR 2.116(C)(7) was the appropriate remedy for a party's failure to undergo a contract's nonbinding mediation clause." If the mediation agreement was enforceable and plaintiff failed to comply with it, then defendant should be entitled to have the case dismissed without prejudice until plaintiff satisfies that contractual prerequisite. The remaining question is simply which subrule is most applicable to that viable defense.

In my view, MCR 2.116(C)(7) is the subrule best suited to considering such a request. Although the phrase "litigate in a different forum" may not be the most natural fit, MCR 2.116(C)(7) is the subrule most closely analogous to the contractual defense asserted here because the parties agreed to pursue an alternative dispute-resolution process before litigating. Conceivably, the motion might also be understood as asserting that "[t]he party asserting the claim lacks the legal capacity to sue," MCR 2.116(C)(5), because plaintiff could not proceed with litigation until she fulfilled the contractual mediation requirement.[1] But the timing for filing a (C)(5) motion is the same as a (C)(7) motion, MCR 2.116(D)(2), and the materials that can or must be submitted in support of a (C)(5) motion are the same as for a (C)(7) motion, see MCR 2.116(G)(2), (3)(a), (4) & (5). I therefore see no reason to require trial courts and litigants to parse which rule applies, and I believe that creating uncertainty about MCR 2.116(C)(7)'s applicability here would introduce unnecessary confusion into trial practice.

Of course, none of these observations undermine my support for the majority opinion. I therefore concur in full.

/s/ Matthew S. Ackerman

[1] Consider that this Court cannot agree on whether lack of standing is tested under MCR 2.116(C)(5) or some other subrule of MCR 2.116(C). Compare *Sprenger v Bickle*, 302 Mich App 400, 402-405; 839 NW2d 59 (2013) (affirming trial court's holding under MCR 2.116(C)(5) that the plaintiff lacked standing), with *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 215 n 2; 880 NW2d 793 (2015) ("[S]tanding may be challenged in connection with a motion for summary disposition under MCR 2.116(C)(8) or (10) . . . .").