

No. 22300 - David L. Marshall, dba David's Enterprises v. Elmo Greer & Sons, Inc. and The Hartford Fire Insurance Co.

Cleckley, Justice, concurring:

In conducting the required de novo review of the circuit court's decision to grant summary judgment, the majority opinion states: "Mr. Marshall's allegation . . . is not creditable." ____ W. Va. at ____, ____ S.E.2d at _____. (Slip op. at 4). If there is one thing that is clear under Rule 56 of the West Virginia Rules of Civil Procedure, it is that a court's function at the summary judgment stage is not to weigh evidence and determine the truth of a matter, but it solely is to determine whether there is a genuine issue for trial. Painter v. Peavy, ____ W. Va. ____, 451 S.E.2d 755 (1994). I concur, however, because the outcome would likely not have been different had the majority applied the correct standard.

Engaging Rule 56 analysis, I believe Mr. Marshall did not meet his burden of demonstrating that a genuine issue of fact exists in reference to an additional contractual provision providing for the clearing and grubbing of ninety-one acres at \$1,500 per acre.

Self-serving assertions without factual support in the record will not defeat a motion for summary judgment. Thus, a plaintiff cannot avoid summary judgment by merely asserting the moving party is wrong,

lying, or hiding evidence.* Rather, Rule 56 requires the nonmoving party to produce specific facts that cast doubt on the conclusiveness of the defense or raise significant issues of credibility. The plaintiff is required to make this showing because he is only entitled to the benefit of all reasonable or justifiable inferences when confronted with a motion for summary judgment. Under Rule 56, facts, inferences, and opinions must be grounded on more than flights of fancy, speculations, hunches, intuitions, or rumors.

*This is not a case where the plaintiff needed more time to avail himself of additional discovery to obtain the missing page. In fact, no such request was made and the plaintiff did not seek to comply with Rule 56(f). See Nguyen v. CNA Corp., 44 F.3d 234, 241-42 (4th Cir. 1995) (failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate); Paddington Partners v. Bouchard, 34 F.3d 1132 (2nd Cir. 1994).

Because I can find no evidence whatsoever in this record giving factual support to Mr. Marshall's claim that there is a missing part of the contract, I believe the granting of summary judgment is appropriate. Indeed, Rule 56(e) mandates the entry of summary judgment where the party opposing the motion "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). Without sufficient evidence establishing the existence of another page to the contract, Mr. Marshall's remaining evidence is insufficient to demonstrate a genuine issue of fact. Under these circumstances, "[i]f a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue." Goodman v. Resolution Trust Corp., 7 F.3d 1123, 1126 (4th Cir. 1993), quoting World-Wide Rights Ltd. Partnership v. Combe Inc., 955 F.2d 242, 245 (4th Cir. 1992).

In summary, the judgment of the lower court should be affirmed not because Mr. Marshall "is not creditable," but because his unsupported allegations of the existence of another contractual

provision are not sufficient to withstand the granting of a motion for summary judgment.