STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

MARSHALL MILLER, ET AL,
Plaintiffs,

v. **Case No. 15-148869-CB**
Hon. James M. Alexander

ISRAEL IZZY YOUNGWORTH,
Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for partial summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

Defendant is a former accountant for Plaintiff Marshall Miller and his companies. This case, in large part, revolves around Defendant's claim that Miller gifted Defendant 1,000 shares of stock in Plaintiff Emagine POS in recognition of Defendant's many years of service.[1] Plaintiff disputes any such gift and filed the present suit, in relevant part, to nullify any claimed interest.

To this end, Plaintiff now moves for partial summary disposition under MCR 2.116(C)(10), claiming that Defendant has no legal right to claim a 1,000 share interest in Emagine.

"In presenting a motion for summary disposition [under (C)(10)], the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing

1 Plaintiffs also allege that Defendant retained their financial documents as a result of the dispute over the 1,000 shares.

Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994).

The parties agree on little, but they agree that, in order for a gift to be valid, the following elements must be satisfied: "(1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift." *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965). "[A] gift inter vivos must . . . invest ownership in the donee beyond the power of recall by the donor." *Id*.

The *Osius* standard has been applied to the transfer of securities – requiring donative intent be present at the time of delivery. *In re Zaharion Estate*, 95 Mich App 70, 72-73; 290 NW2d 84 (1980), vacated on other grounds 412 Mich 852, 312 NW2d 85 (1981).

Despite Plaintiffs' citation to each of the above cases, and the concept that intent is generally a question of fact, Plaintiffs still move for summary disposition under (C)(10) based, in large part, on the argument that the Court should ignore Defendant's claims of what occurred. In other words, Plaintiffs challenge Defendant's credibility.

It is well settled, however, that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *White*, *supra* at 625.

Plaintiff also ignores the first sentence of the very next paragraph of *Osius*, where our Supreme Court cautions, when analyzing whether there was a valid gift, "[t]he crucial question here is one of fact." *Osius*, 375 Mich at 611. See also *In re Rudell Estate*, 286 Mich App 391, 404; 780

NW2d 884 (2009) (reasoning "Whether a party has acted with donative intent presents a question of fact.").[2]

And in response to Plaintiffs' motion, Defendant claims that each gift requirement is met. In support, Defendant attaches as exhibits: (1) shareholder meeting minutes signed by Miller that reflect the granting of 1,000 shares to Defendant, (2) a stock certificate, signed by Miller, granting 1,000 shares to Defendant, and (3) a telephone recording of Miller and Defendant, where Miller appears to admit gifting the shares to Defendant.

In fact, **both** parties' submissions contain evidentiary support for their assertions – as well as challenges to the other's credibility. As cautioned by our appellate courts, factual development is necessary for disposition of this issue.[3]

For the foregoing reasons and viewing all evidence in the light most favorable to Defendant, the Court finds that resolution of this issue is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition on the same wholly inappropriate. As a result, Plaintiff's motion for partial summary disposition is DENIED.

IT IS SO ORDERED.

March 29, 2016__ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge

2 It would, likewise, be a question of fact whether Defendant returned any alleged gifted stock to Plaintiffs.
3 The Court also rejects Plaintiffs' estoppel argument because the same is also substantially intertwined with factual determinations as to render summary disposition based on the same wholly inappropriate.