STATE OF MICHIGAN

COURT OF APPEALS

ROGER J. MAC LEOD and MAXINE L. MAC LEOD,

Plaintiffs-Appellants,

v

BAY HAVEN MARINA, INC.,

Defendant-Appellee.

UNPUBLISHED
June 13, 1997

No. 187688
Ottawa Circuit Court
LC No. 93-019405 CH

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Plaintiffs, Roger J. Mac Leod and Maxine L. Mac Leod, appeal as of right from a June 12, 1995, order of judgment and foreclosure in favor of defendant, Bay Haven Marine, Inc., on its counterclaim, entered pursuant to a bench trial. Plaintiffs specifically appeal the trial court's July 10, 1995, orders granting summary disposition to defendant and denying plaintiffs' motion for mediation sanctions. We affirm.

Plaintiffs purchased a boat from defendant with $87,500 they borrowed from First of America Bank. When plaintiffs defaulted, plaintiffs and defendant entered into an agreement on January 11, 1983, whereby defendant would pay off the full amount of principal, interest, and penalties that plaintiffs owed to the bank. In return, plaintiffs were required to give defendant title to the boat so that defendant could sell it and apply the proceeds toward reducing the amount plaintiffs owed under the agreement. Plaintiffs thus remained liable for any deficiency along with various costs and interest of one and one-half percent above the prime rate of the bank. Plaintiffs also mortgaged their interest in two parcels of real estate as security for the obligations under the agreement. Defendant eventually paid $110,000 to the bank, sold the boat for $70,000, and applied the proceeds to reduce plaintiffs' indebtedness under the agreement.

Plaintiffs filed the instant lawsuit to discharge the conditional mortgage and assignment of interest in land contract on one of the parcels, claiming that the indebtedness was fully paid. Defendant counterclaimed seeking foreclosure. Plaintiffs sought summary disposition on two grounds: (1) the interest charged on the loan was usurious; and (2) an accord and satisfaction took place. The trial court

rejected plaintiffs' arguments, denied their motion, and in turn, granted summary disposition to defendant. The dispute was mediated, resulting in an award of $11,500 to defendant which both parties rejected. After a bench trial, the trial court awarded $9,946.94 to defendant and entered a judgment to that effect, which judgment also provided for foreclosure and sale of the property upon plaintiffs' failure to pay. The trial court then denied plaintiffs' motions for new trial and mediation sanctions.

Plaintiffs first argue that the trial court erred in granting summary disposition to defendant because the interest rate on the loan was usurious. This Court reviews a trial court's decision to grant summary disposition de novo on appeal. *Sharper Image v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). The trial court did not state the basis for granting summary disposition to defendant. However, because defendant did not file its own motion, the trial court's decision is properly characterized as being under MCR 2.116(I)(2). "Summary disposition is properly granted to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Sharper Image*, *supra* at 701; MCR 2.116(I)(2).

In addition, because the trial court's decision was based on a determination that no genuine issue of material fact existed regarding plaintiffs' claims of usury and accord and satisfaction, the standards applicable to a motion under MCR 2.116(C)(10) apply. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a party's claim. *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996). The reviewing court must consider the pleadings, affidavits, depositions and other available evidence, and "determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ." *Id*.

Unqualified lenders are prohibited from charging a maximum rate of interest on mortgage loans and land contracts in excess of eleven percent per annum. MCL 438.31c(6); MSA 19.15(1c)(6). There is no dispute here that defendant charged interest in excess of eleven percent. However, the trial court found that because the real estate served as the primary security for the note, the interest rate charged was therefore not usurious. MCL 438.31c(11); MSA 19.15(1c)(11) provides:

> The parties to a note, bond, or other indebtedness of $100,000 or more, the bona fide primary security for which is a lien against real property other than a single family residence . . . may agree in writing for the payment of any rate of interest.

Plaintiffs argue that the above statutory provision is inapplicable because the boat was the primary security for the loan rather than the real estate. We disagree. Primary security has been defined as "that security which the creditor would sell first and to which he would look to obtain the greatest yield to pay the indebtedness due." *Macklin v Brown*, 111 Mich App 110, 114; 314 NW2d 538 (1981). Moreover, "security" is defined by Black's Law Dictionary (6th ed. 1990) as that which is "given by a debtor in order to assure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation." *Id*. at 1355.

In this case, the agreement provided for immediate transfer and sale of the boat, with the proceeds applied toward reducing the amount of plaintiffs' indebtedness. Thus, the boat did not serve as primary security. Rather, defendant's sole recourse upon default was to foreclose on the mortgages

and conditional assignment. Accordingly, the trial court correctly determined that the real estate was the primary security for the loan and that the interest rate charged was therefore not usurious.

Plaintiffs also contend that an accord and satisfaction was reached when defendant orally agreed to accept three $5,000 payments in satisfaction of the debt. It is well established that an accord and satisfaction is enforceable only if it is in writing and signed by the party to be charged or, if oral, based upon additional consideration. MCL 566.1; MSA 26.978(1); see *Melick v Nauman Vandervoort*, 54 Mich App 171, 176; 220 NW2d 748, rev'd on other grounds 393 Mich 774; 224 NW2d 280 (1974). In the instant case, because there was no additional consideration to support the alleged change in payment terms nor any written evidence of the transaction, plaintiffs' argument on this issue must fail. In sum, therefore, the trial court's grant of summary disposition to defendant was proper.

Finally, plaintiffs contend that the trial court erred in denying their motion for mediation sanctions. Where a verdict awards both monetary and equitable relief, the determination whether to award costs is governed by MCR 2.403(O)(5), which provides:

> If the verdict awards equitable relief, costs *may* be awarded if the court determines that
>
> (a) taking into account *both monetary relief* [adjusted as provided in subrule (O)(3)] *and equitable relief*, the verdict is not more favorable to the rejecting party than the evaluation, and
>
> (b) *it is fair to award costs under all of the circumstances*. [*Id*.][Emphasis added.]

Applying the court rule to this case, we conclude the trial court's decision not to award mediation sanctions was within its discretion and fair under the circumstances. First, while the monetary component of the verdict was more favorable to plaintiffs than the mediation evaluation, the equitable relief clearly favored defendant. Second, defendant's decision to reject the mediation evaluation was reasonable under the circumstances. As defendant correctly points out, the mediation panel could not have awarded defendant any equitable relief. MCR 2.403(K)(1); *Dane v Royal's Wine & Deli*, 192 Mich App 287, 293; 480 NW2d 343 (1992). Because the trial court's subsequent entry of judgment on the mediation award would have disposed of all claims, including equitable ones, defendant would have been precluded from pursuing foreclosure. MCR 2.403(M)(1); *Joan Automotive v Check*, 214 Mich App 383, 387-388; 543 NW2d 15 (1995). Consequently, there was no abuse of discretion in the trial court's refusal to award plaintiffs mediation sanctions.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh