

STATE OF MICHIGAN
COURT OF APPEALS

MARGHERITA M. LASALA,

Plaintiff-Counterdefendant-
Appellee,

v

MOTOR CITY NUTRITIONAL SUPPORT, INC.,

Defendant-Counterplaintiff-
Appellant.

UNPUBLISHED

March 31, 1998

No. 198429

Macomb Circuit Court

LC No. 94-004889-CK

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Defendant appeals as of right several orders entered by the trial court. First, defendant appeals the February 10, 1995, opinion and order and the March 31, 1995, opinion and order granting in part summary disposition in plaintiff's favor and denying in part summary disposition in defendant's favor. Defendant also appeals the trial court's April 13, 1995, order denying reconsideration of these orders. Second, defendant appeals the trial court's November 6, 1995, order which granted plaintiff's motion to set aside the default judgment and denied defendant's motion to enter the default judgment as to Count III of defendant's countercomplaint, which asserted that plaintiff conspired to defraud defendant. Third, defendant appeals the September 18, 1996, order dismissing defendant's conspiracy to defraud count with prejudice. Finally, defendant appeals the September 30, 1996, order denying its motion for relief from the amended opinion and order. We affirm.

In 1988, plaintiff sold residential property to Kevin and Paula Pluff by land contract. The land contract provided that:

No assignment or conveyance by the Purchaser shall create any liability whatsoever against the Seller until a duplicate thereof, duly witnessed and acknowledged, together with the residence address of such assignee shall be delivered to the Seller. Purchaser's liability hereunder shall not be released or affected in any way by delivery of such assignment or by Seller's endorsement of receipt and/or acceptance thereon.

In July 1992, Kevin Pluff executed a consent judgment in favor of defendant for \$250,000.¹ As security for the judgment, the Pluffs assigned their interest in the land contract to defendant. An affidavit of interest was recorded on July 27, 1992.

On October 30, 1992, after the Pluffs informed plaintiff they would no longer be able to make payments under the land contract, they issued her a quitclaim deed in lieu of foreclosure. As part of the transaction, the Pluffs signed an estoppel affidavit which indicated that there were no other liens on the property. This deed was recorded on October 30, 1992. In April, 1993, plaintiff first learned of defendant's interest.

Defendant first argues that the trial court erred in granting summary disposition in plaintiff's favor because plaintiff does not have the superior interest in the property. We disagree.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Int'l Brotherhood of Electrical Workers, Local 58 v McNulty*, 214 Mich App 437, 442; 543 NW2d 25 (1995). A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Such motion may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The 1988 land contract between plaintiff and the Pluffs vested the Pluffs, who were the vendees, with equitable title to the property, while plaintiff, who was the vendor, retained legal title to the property as security for payment of the purchase price. *Ross Properties v Sheng*, 151 Mich App 729, 734; 391 NW2d 464 (1986); *Pittsfield Twp v City of Saline*, 103 Mich App 99, 103; 302 NW2d 608 (1981). A vendee of a land contract may assign or transfer his equitable interest. *Ross Properties, supra* at 734. The land contract in the present case required that a duplicate of any assignment or conveyance of the vendee's interest be delivered to the vendor.

The trial court ruled that, although the assignment was absolute and related back to the date of execution, see *Detroit v Fidelity & Deposit Co*, 240 Mich 213, 220; 215 NW 394 (1927), it had no legal effect against plaintiff until the notification requirement was satisfied. In a case remarkably similar to this one, the Supreme Court concluded that the plaintiff's quitclaim deed was void and without effect against the defendant, who was the vendor of the land contract. *Stover v Bryant & Detwiler Improvement Corp*, 329 Mich 482, 485; 45 NW2d 364 (1951). The land contract in *Stover* contained an assignment provision very similar to the one in the present case.

In *Stover*, the plaintiff's father was the vendee of the land contract. *Id.* at 483. The father defaulted on the payments due under the contract, and the defendant obtained the vendor's interest, after which the father again defaulted. *Id.* The plaintiff loaned his father the money necessary to comply with the terms of the contract and received a quitclaim deed to the property as security. This deed was recorded as a mortgage in the register of deeds' office. However, no duplicate was delivered to the defendant. *Id.* Some time later, after continuing in default on the contract, the father as vendee, together with his wife, quitclaimed the premises to the defendant and entered a written agreement which released the vendee from his obligations and rights under the contract. *Id.* at 483-484. Ten years later, the plaintiff requested that the deed he was given as security be enforced as an equitable mortgage on the property. *Id.* at 484. The Court held:

The transaction between plaintiff and his father was of a character contemplated by the quoted provision of the land contract. That provision was designed to give the vendor actual notice of any transaction whatsoever whereby any person might acquire from the vendee any right relating to or in connection with the vendee's interest in and to the contract and premises therein described. This was not for the purpose of satisfying the vendor's idle curiosity, but rather to enable it to act advisedly at all times and to take such steps as might be necessary from time to time to protect its own interests. The very situation in the instant case demonstrates the necessity for and wisdom of such provision in the vendor's behalf. The clear intent and purpose of the parties as expressed by the language of the contract would be completely subverted by a construction which would permit a divesting of any or all of the vendee's interest or the creation by him in another of any kind of interest in the contract or premises to be considered as not within the meaning and contemplation of the quoted provision of the contract. [*Id.* at 485.]

Based on the logic in *Stover*, we conclude that plaintiff was entitled to actual notice of the assignment. Because plaintiff did not receive actual notice of the assignment before the Pluffs conveyed their interest to her, the assignment must be held to be void and without effect as against plaintiff. *Stover, supra* at 485.² Moreover, the trial court did not abuse its discretion in denying defendant's motion for reconsideration of this issue because the motion merely presented an issue which had already been ruled on by the court. MCR 2.119(F)(3).

Next, defendant argues that the trial court erred in setting aside the default issued concerning its conspiracy to commit fraud count. Michigan policy favors the meritorious determination of issues and therefore, encourages the setting aside of defaults. However, a trial court's decision whether to set aside a default or default judgment is discretionary. *Gavulic v Boyer*, 195 Mich App 20, 24-25; 489 NW2d 124 (1992). MCR 2.603(D) provides that a default judgment will be set aside only when good cause is shown, and the moving party files an affidavit of facts showing a meritorious defense. Sufficient good cause includes: "(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default judgment were allowed to stand." *Id.*

Plaintiff alleged that she did not receive notice of the default until approximately four months after it was entered. MCR 2.603(A)(2) requires that a party receive notice of the entry of default. *Gavulic, supra* at 25-26. Failure to notify a party of entry of the default establishes a defect in the proceedings sufficient to establish good cause. *Id.* Additionally, good cause may also be shown where the failure to set aside the default would cause manifest injustice. *Hunley v Phillips*, 164 Mich App 517, 523; 417 NW2d 485 (1987). Manifest injustice may result where there exists a meritorious defense and factual issues for trial. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989). After reviewing the record, we conclude that plaintiff demonstrated good cause and a meritorious defense.

Defendant argues that plaintiff failed to submit affidavits of fact establishing a meritorious defense because it submitted unsigned affidavits. However, we do not believe this fact justifies reversing the trial

court's decision where the affidavits were signed when they were originally filed with the trial court, approximately one year prior to the trial court's decision to set aside the default. Moreover, we conclude that defendant was not prejudiced by the unsigned affidavits. Therefore, the trial court did not abuse its discretion in setting aside the default.

Next, defendant argues that the trial court erred in granting plaintiff's motion for directed verdict on the conspiracy count and dismissing the case with prejudice. Although the motion was described as a motion for a directed verdict, the trial court treated the motion as one for involuntary dismissal, and thus weighed the evidence and evaluated the credibility of the witnesses in making its decision. See *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). This Court reviews a trial court's decision to grant a motion to dismiss in a bench trial under the clearly erroneous standard. *Id.*

A civil conspiracy is defined as "a combination of two or more persons, [who], by some concerted action, [endeavor] to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). Fraud includes both actual and constructive fraud, and its generally understood meaning encompasses "the intentional perversion of truth in order to induce another to part with something of value and an act of deceiving or misrepresenting." *General Electric Credit Corp v Wolverine Ins Co*, 420 Mich 176, 188-189; 362 NW2d 595 (1984) (quoting Webster's New Collegiate Dictionary).

Defendant premises its entire argument on the fact that the letter sent to the Pluffs indicated that they were in default on the land contract in October 1992, when in fact they were current in their payments up to that time. We conclude that this discrepancy is insufficient to establish that plaintiff conspired to defraud defendant, especially in light of other evidence that (1) plaintiff did not receive actual notice of the assignment, (2) at the time of the conveyance, the Pluffs denied the existence of any other liens on the property, and (3) a title search did not reveal the assignment. The Pluffs had informed plaintiff that they were no longer able to comply with the land contract, and plaintiff was entitled to take action to protect her interest in the property. Therefore, we conclude that the trial court did not clearly err in granting plaintiff's motion.

Finally, defendant argues that the trial court erred in denying its motion for relief from the March 31, 1995, opinion and order after trial revealed that the Pluffs were not in default under the land contract at the time they conveyed the property back to plaintiff. We find no merit in this argument. The fact that the Pluffs were not in default under the land contract did not alter the fact that plaintiff was entitled to actual notice of any assignment. The trial court did not abuse its discretion in denying defendant's motion.

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

¹ Pluff allegedly defrauded defendant of substantial funds and assets.

² Because we have determined that plaintiff was entitled to actual notice, it is unnecessary to address whether recording the affidavit of interest provided plaintiff with constructive notice under the recording statute.