

STATE OF MICHIGAN  
COURT OF APPEALS

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EKLAS OROW,

Plaintiff-Appellant,

v

METRO DETROIT INVESTMENT CO.,

Defendant-Appellee.

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UNPUBLISHED

April 2, 1999

No. 199190

Oakland Circuit Court

LC No. 96-512007 CZ

Before: Smolenski, P.J., and White and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

First, we will address plaintiff's claim that the trial court erred in ruling that plaintiff's declaratory judgment claim was improper because there was no actual controversy. We agree with the trial court.

The requirement of an actual controversy is a condition of the "judicial power of the state", Const 1963, Art. VI, § 1, and prevents a court from deciding hypothetical issues. *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). An actual controversy will be found only where a declaratory judgment is necessary to guide a party's future conduct in order to preserve the party's legal rights. *Flanders Industries, Inc v State of Michigan*, 203 Mich App 15, 20; 512 NW2d 328 (1993). While courts are not precluded from reaching issues before actual injuries occur, *Shavers, supra*, where there is no threat that would subject the plaintiff to any disadvantage in ultimately asserting and maintaining its legal rights, declaratory relief is unwarranted. See *Flint v Consumers Power Co*, 290 Mich 305, 310; 287 NW 475 (1939).

In the case at bar, defendant has not attempted to assert any rights under any of the security agreements or mortgages signed by plaintiff, and plaintiff has submitted no evidence to support her assertion that if defendant did assert its rights, the business assets would be insufficient to cover the indebtedness. Also, if plaintiff's claim, that the mortgages, guarantees and security agreements in favor of defendant are null and void, then when defendant seeks to enforce those agreements, plaintiff will have a valid defense and will not be responsible for any of the improperly accumulated indebtedness.

Because plaintiff needs no guidance to preserve her legal rights, declaratory relief is improper. We therefore affirm the trial court's ruling on this issue. As a result of this holding, we need not address plaintiff's claims dealing with whether declaratory relief should have been granted in her favor.

Next, plaintiff claims the trial court improperly dismissed plaintiff's claim for rescission. However, as an initial matter, we disagree with the trial court's interpretation of plaintiff's complaint as asserting an independent claim for rescission. Rather, we read plaintiff's complaint as asking for declaratory relief, and no other equitable relief. Plaintiff sought relief, in part, in the form of a declaration that the mortgages, guarantees, and security agreements be rescinded, and by treating plaintiff's complaint as asserting an independent claim for rescission, the trial court essentially bypassed the "actual controversy" requirement and decided, in part, the merits of plaintiff's declaratory judgment claim. We conclude that the trial court erred in doing so and we reverse the ruling by the trial court on the merits of any purported rescission claim. However, as plaintiff's complaint sought only declaratory relief and we have affirmed the trial court's finding that declaratory relief was improper, we find no need to remand on this issue. However, plaintiff is not hereafter precluded from bringing a proper action for rescission.

Next, plaintiff claims that the trial court erred in dismissing her claim for civil conspiracy. Again, we disagree with the trial court's inferring of a civil conspiracy claim from plaintiff's complaint. Plaintiff conceded in her brief in response to defendant's motion for summary disposition that she did not seek an independent claim of conspiracy, and we interpret the allegations of conspiracy in her complaint simply as support for her claim that her agreements with defendant should be declared null and void. Once again, by addressing such a claim the trial court essentially bypassed the "actual controversy" requirement and decided, in part, the merits of plaintiff's declaratory judgment claim. We conclude that the trial court erred in doing so and we reverse the ruling by the trial court on the merits of any purported civil conspiracy claim. However, as plaintiff's complaint sought only declaratory relief and we have affirmed the trial court's finding that declaratory relief was improper, we again find no need to remand on this issue. However, plaintiff again is not precluded from hereafter bringing a proper action for civil conspiracy.

Next, plaintiff claims the trial court erred in failing to allow her to amend her complaint to allege a claim of silent fraud. We disagree.

A party to a business transaction has a duty to "exercise reasonable care to disclose to the other party, before the transaction is consummated, any subsequently acquired information which he recognizes as rendering untrue or misleading, previous representations, which when made, were true or believed to be true." *US Fidelity & Guaranty v Black*, 412 Mich 99, 127; 313 NW2d 77 (1981) quoting *Strand v Librascope, Inc.*, 197 F Supp 743, 754 (ED Mich, 1961). In the case at bar, plaintiff takes issue with actions taken by defendant after the agreements were signed. However, even assuming that those actions were inconsistent with any representations defendant made prior to the consummation of the transaction, because there is no evidence, or even allegation, that at the time the transaction was consummated defendant knew it would be taking such action, there can obviously be no duty to disclose that such actions would be taken. Because plaintiff has failed to establish a viable fraud claim, the trial court did not abuse its discretion in failing to allow plaintiff to amend her complaint to assert

such a claim. See *Formall, Inc v Community National Bank of Pontiac*, 166 Mich App 772, 783; 421 NW2d 289 (1988).

Last, plaintiff claims that summary disposition was improper because there were questions of fact concerning whether the agreements were void on the ground of illegality. Plaintiff only mentioned illegality below in one sentence in her brief in response to defendant's motion for summary disposition, and never argued the merits of allowing amendment to assert such a claim or the merits of an illegality claim itself. The trial court never addressed an illegality issue. As a result, we will treat this issue as unpreserved. See *Sallee v Auto Club Ins Ass'n*, 190 Mich App 305, 308; 475 NW2d 828 (1991).

Affirmed.

/s/ Michael R. Smolenski

/s/ Stephen J. Markman