STATE OF MICHIGAN

COURT OF APPEALS

RICHARD L. LAMBERT,

Plaintiff-Appellant,

v

HARBOR SPRINGS REAL ESTATE CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 28, 1999

No. 204605
Wayne Circuit Court
LC No. 95-515826 CK

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the dismissal of his breach of contract action on the ground that he lacked standing to prosecute the action in light of his post-suit assignment of his interest in any debt owed him by defendant. We reverse and remand.

Plaintiff entered into a joint venture agreement with Gary Leigh for the purpose of purchasing and developing two parcels of land located in Emmett County. Before the land was acquired, however, plaintiff and Leigh formed defendant corporation, and each of them acquired 10,000 shares of stock in defendant corporation. Defendant corporation then purchased the parcels. A dispute arose between plaintiff and Leigh concerning development of the parcels. When plaintiff and Leigh could not resolve this disagreement, they allegedly agreed that plaintiff would relinquish his interest in defendant corporation in exchange for $10,000 to repurchase his stock and for $50,000 in consultant fees. Plaintiff and Leigh offset the $10,000 owed plaintiff against a $16,000 debt plaintiff owed Leigh. Neither Leigh nor defendant paid the consultant fee and plaintiff commenced the instant breach of contract action. Plaintiff subsequently incorporated the Emmett Land Company and assigned any right of recovery he had in the consultant fee to this company. Following a seven-day bench trial, the trial court dismissed plaintiff's action after finding that the assignment divested plaintiff of standing to prosecute the action.

The trial court erroneously determined that plaintiff lacked standing. Had plaintiff made the assignment before he filed the instant action, the assignment would have constituted a ground for

dismissal. MCR 2.116(C)(7). However, plaintiff made the assignment after the suit was brought. Because the assignment was made after the instant suit was commenced, plaintiff is entitled to continue the action in "his. . .original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity." MCR 2.202(B). No motions for substitution, joinder or imposition of a different capacity were made in this case. Accordingly, by operation of MCR 2.202(B), plaintiff was entitled to continue prosecuting the action in his name. Because plaintiff was entitled to continue the action in his name, MCR 2.202(B) vested the right of action on the breach of contract action in plaintiff. To be a real party in interest and, hence, to have standing to prosecute a suit, the party need only be vested with the right of action on the claim; the beneficial interest may be with another. *Michigan National Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). Under the circumstances of this case, plaintiff had standing to prosecute the breach of contract claim despite the assignment, plaintiff being vested with the right of action on the claim pursuant to MCR 2.202(B). *Id*. See also 2 Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), p 7.

We are not persuaded by defendant's argument that the trial court's decision to dismiss the suit was correct, albeit for an incorrect reason. Defendant's claim fails for lack of factual support in the record. Before dismissing plaintiff's action, the court did not find that Leigh individually, rather than defendant, was obligated to pay the consultant fee to plaintiff. Rather, the court found that plaintiff and defendant had a "valid contractual obligation. . .with respect to the fifty thousand dollar consulting fee."

Accordingly, we vacate the order of dismissal and remand to the trial court for entry of judgment in favor of plaintiff on his breach of contract claim. We do not remand to a different judge, however, because we find no evidence that the trial court demonstrated animus against plaintiff or his attorney. MCR 2.003(B)(1); *People v Lobsinger*, 64 Mich App 284, 290-291; 235 NW2d 761 (1975).

Additionally, on remand, the trial court shall address the merits of plaintiff's claims for lost use of the $50,000 consultant fee and for costs and attorney fees. The trial court shall not consider, however, the set-off of the consultant fee against any indebtedness of plaintiff to Leigh as a consequence of their mutual involvement in a business transaction referred to as the ACU/CAM venture. Set-off is unavailable to defendant on the facts of this case.

Regardless of whether the set-off sought is legal or equitable in nature, as a general rule, in order for set-off to apply, the claims sought to be set off must be mutual and reciprocal such that the debtor on one side is the creditor on the other side, either as the nominal or the real party in interest. *Reichert v Farmers State Savings Bank*, 263 Mich 305, 307; 248 NW 630 (1933); *Hapke v Davidson*, 180 Mich 138, 149-150; 146 NW 624 (1914); *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997). Accordingly, for defendant to be able to set-off its debt to plaintiff in this case, defendant must be a creditor of plaintiff as a result of the ACU/CAM venture. The record establishes that defendant is not a creditor of plaintiff in the ACU/CAM venture.

Any debt owed by plaintiff as a result of the ACU/CAM venture arises under the terms of a document referred to as the ACU/CAM Loan Participation Agreement and several related promissory notes. The agreement was signed by plaintiff, Leigh and a third party identified as Mitch Jaworski in their individual capacities, and required the signatories to share in equal portions all losses sustained as a result of ACU/CAM's failure to honor its loan obligations. Likewise, the promissory notes were signed by plaintiff, Leigh and Jaworski in their individual capacities. The agreement and the notes contain no mention of defendant. Leigh did not sign the agreement or the notes in his capacity as a director, officer or shareholder of defendant. No other evidence was presented establishing that defendant was a party to the loan participation agreement or the promissory notes. In fact, at the time of trial in this case, a suit was pending before the trial court in which Leigh, in his individual capacity, was suing plaintiff to recover money he believed he was owed by plaintiff under the loan participation agreement and notes.

On this record, neither party presented evidence establishing that defendant was a party to the ACU/CAM Loan Participation Agreement or the promissory notes. Although the agreement and notes were signed by Leigh, the fact that Leigh was the sole shareholder and director of defendant does not alter the fact that defendant corporation is a separate and distinct legal entity from Leigh for purposes of set-off. *Hapke, supra* at 149-150. Accordingly, no mutuality exists on the record facts.

Further, although equity permits set-off where the law otherwise would not where the parties to the action have agreed to the set-off, we find no such agreement here. The documentation supplied by plaintiff establishes that there was no agreement to set-off the consulting fee against any debt arising from the ACU/CAM venture. Instead, the evidence establishes that Leigh made an offer to set-off the debts. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). Plaintiff did not accept the offer, but instead agreed to consider the offer, evaluate its merits in light of supporting documentation supplied by Leigh, and respond to the offer once he had the opportunity to review the supporting documentation. Absent an acceptance by plaintiff, no agreement existed. *Id.* Because the record fails to establish that the parties agreed to any set-off, equity will not impose a set-off. See 20 Michigan Law & Practice, Set-off & Recoupment, § 12, p 272.

Reversed and remanded for proceedings consistent with this opinion. Plaintiff's request for sanctions and attorney fees is also denied. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder