STATE OF MICHIGAN

COURT OF APPEALS

LINDEN INVESTMENT COMPANY, a Michigan Co-Partnership, JAMES J. KLAIN and MARCIA M. KLAIN,

Plaintiffs-Appellees,

v

FRANK MINCA, ERNESTINE MINCA, JOSEPH A. KEPHART, RICHARD F. KINKLE, ESTATE OF LOUISE NETTLOW, KARL MICHAEL, JR., and ROSEMARY MICHAEL,

Defendants,

and

JOHN R. FRENS and THELMA A. FRENS,

Defendants-Appellants.

UNPUBLISHED
October 5, 1999

No. 202059
Genesee Circuit Court
LC No. 95-038761 CH

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Defendants John and Thelma Frens (the Frens) appeal by leave granted from an order quieting title to certain property located in Genesee County in plaintiffs, and assessing mediation sanctions against defendants. We affirm.

Plaintiffs were the fee simple owners of just under 197 acres of vacant land. In September 1991, plaintiffs sold the land to Spring Green 196, Inc. (Spring Green) by land contract. The total purchase price was $250,000 with an annual interest rate of ten percent. Spring Green was to make a down payment of $50,000, followed by quarterly payments of $8,000 for a period of four years. At the end of this term, Spring Green was to make a balloon payment satisfying the balance of the purchase price plus accrued interest. In November 1991, unbeknownst to plaintiffs, Spring Green granted twelve

mortgages on the subject property, in various amounts, totaling $559,859. Among these mortgages was one granted to the Frens, purporting to be in the amount of $120,000. The Frens' mortgage, like the others, contained the following language: "This mortgage is subject to the interest of the deed holder of the subject property to whom the mortgagor is making payments on a land contract . . . ." On that same day, Spring Green entered into a land contract, as vendor of the subject property, with United Capital Corporation and/or Synco, Inc. (United Capital), as vendee.

Plaintiffs apparently received the December 1991 quarterly payment of $8,000 from Spring Green, but the March 1992 payment was not received, nor were any payments made on the land contract thereafter. Additionally, Spring Green had not paid the property taxes as required by the land contract. After payment was more than forty-five days in arrears, plaintiffs filed a foreclosure action, naming both Spring Green and United Capital as defendants. A title search performed at this time revealed no liens on the property. The action was voluntarily dismissed when Spring Green and United Capital tendered quitclaim deeds to plaintiffs in lieu of foreclosure, and plaintiffs granted Spring Green and United Capital a six month option to purchase the property, which represented their statutory period of redemption after foreclosure.

In December 1994, plaintiffs found a new buyer for the property, but a title search associated with this transaction revealed the twelve mortgages that Spring Green had granted, including the mortgage granted to the Frens. Plaintiffs' counsel wrote to the holders of the twelve mortgages, requesting that they each voluntarily tender a discharge of their mortgage or claim of interest. Some of the twelve deed holders executed voluntary discharges of their mortgages, while others did not. Despite the fact that plaintiffs were already nominally in possession of the vacant land, plaintiffs commenced summary proceedings to recover possession of the premises upon the land contract default, in an attempt to clear the clouds on the title due to the undischarged mortgages. The district court concluded that the interests of these mortgagees had already been extinguished and, therefore, it had no basis on which to grant plaintiffs any additional relief. Plaintiffs then commenced the instant quiet title action in the circuit court, along with an action for slander of title.[1] The case was mediated in March 1996, and the evaluation awarded a judgment of foreclosure in favor of plaintiffs against defendants interests, with no money damages to any party. Plaintiffs accepted the mediation evaluation, but all remaining defendants rejected the evaluation. The parties agreed to submit the case to the trial court for decision on a stipulated set of facts. Relying on language in the land contract, as well as language in the mortgages themselves, the trial court found that upon Spring Green's default, defendants' interests were extinguished, regardless of the method by which plaintiffs took back their property. The court quieted title in plaintiffs against defendants' mortgages, but did not award damages for slander of title. Plaintiffs moved to recover mediation sanctions, but settled with defendants Michael before the hearing on that motion, and settled with defendant Kephart afterwards. Although the Frens filed a written response opposing mediation sanctions, neither they, nor their counsel, appeared at the hearing on plaintiffs' motion, where the court imposed mediation sanctions against the Frens.

On appeal, the Frens first argue that the trial court erred in quieting title in plaintiffs against their mortgage. Specifically, they argue that: (1) their mortgage interest could not be involuntarily terminated in any way other than foreclosure or forfeiture; (2) that the court's action deprived them of a property

interest without due process of law and amounted to an unconstitutional taking without just compensation; and (3) that because plaintiffs accepted a quitclaim deed from Spring Green, the principle of "merger" caused their mortgage to become attached to plaintiffs' entire interest in the property. We disagree. "Actions to quiet title are equitable in nature and are reviewed de novo by this Court." *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998).

Plaintiffs were the fee simple owners of the subject property. Under the doctrine of equitable conversion, upon execution of the land contract, "equitable title" passed to the vendee (Spring Green) while legal title remained with the vendor (plaintiffs) as security for payment of the purchase price. *Hooper v Van Husan*, 105 Mich 592, 597; 63 NW 522 (1895); *Pittsfield Twp v Saline*, 103 Mich App 99, 103; 302 NW2d 608 (1981). Upon payment in full of the purchase price, the vendee has the right to have a conveyance of the legal title. *Id.* Equitable conversion is rooted in the principle that "equity regards and treats as done what, in good conscience, ought to be done." *Pittsfield Twp, supra* at 103. Consequently, a land contract vendee's estate in real property is subject to defeasance, and ceases to exist when the vendee no longer has any right, under either the terms of the contract or by virtue of redemptive rights, to compel conveyance of legal title by specific performance.[2] Here, because Spring Green defaulted on the land contract, its interest in the property was extinguished.

> [A] land contract seller need not invoke a judicial or statutorily created remedy to foreclose the rights of the purchaser as must a mortgagee if he wishes to foreclose the mortgagor's equity of redemption. Typically, the seller will find it necessary to institute summary proceedings or an action for ejectment or an equitable action to foreclose the purchaser's interest so that he can obtain peaceable possession. But where the purchaser is not in physical possession of the land or possession can be recovered peaceably, as is frequently true where the property is vacant, the purchaser's rights may be declared forfeited by the seller without proceedings in court if notice of forfeiture is duly given. [*Day v Lacchia*, 175 Mich App 363, 372-373; 437 NW2d 400 (1989); *Rothenberg v Follman*, 19 Mich App 383, 388; 172 NW2d 845 (1969) (footnotes omitted).]

Although this was vacant property, under the terms of the contract, Spring Green was nominally in possession until default. While possession may have been returned to plaintiffs sometime earlier, there can be no doubt that when plaintiffs and Spring Green (along with United Capital) agreed that plaintiffs would accept quitclaim deeds in lieu of foreclosure, nominal possession had been peaceably surrendered to plaintiffs. Because equitable redemption is not a property right of land contract vendees (but only a potential avenue for relief), *Day, supra,* it is clear that the quitclaim deeds given by Spring Green and United Capital transferred nothing to plaintiffs because the default, coupled with the peaceable repossession, extinguished any equitable interest previously held by either Spring Green or United Capital. The Frens cite no authority for the proposition that plaintiffs were obligated to provide them with notice before accepting the surrender of the property. While the Frens complain that the trial court "canceled" their mortgage on the vendee's interest in the subject property, the court did nothing more to that mortgage than to recognize that the estate to which it had been attached ceased to exist.

It is well settled that a land contract vendee's interest is considered real property, and therefore, it may be mortgaged or conveyed, subject to the vendor's interest, except to the extent that the land contract itself places valid restrictions on such transfers. See *Darr v First Federal S & L*, 426 Mich 11, 19-20; 393 NW2d 152 (1986); *Bowen v Lansing*, 129 Mich 117, 118-119; 88 NW 384 (1901). See, also, *National Lumber Co v Goodman*, 371 Mich 54, 59; 123 NW2d 147 (1963) (legitimate restrictions on manner of assignments or conveyances). In this case, what the Frens received was not a mortgage on the legal estate in fee, but a mortgage only on the vendee's interest in the property, which was subject to the pre-existing interest of plaintiffs. This is so because "a mortgage will give the mortgagee no greater rights or interests than the mortgagor's. Whatever defeats a mortgagor's title also defeats the lien of the mortgagee." 16 Michigan Law & Practice, Mortgages, § 56, p 348, citing *Sloan v Holcomb*, 29 Mich 153 (1874), *Joy v Jackson & M Plank Road Co*, 11 Mich 155 (1863). As the United States Court of Appeals for the Sixth Circuit noted, when interpreting Michigan law in a similar case: "a creditor of the vendee can assert a claim against this 'equity.' But in the absence of the vendee having built up a sizable equity as the result of substantial payments on the contract, that remedy holds little promise for the creditor, since his claim would be subject to the vendor's legal title." *Vereyken v Annie's Place, Inc*, 964 F2d 593, 594 (CA 6, 1992). Here, defendants had notice that their mortgages were subordinate to plaintiffs' interest. Defendants gambled that Spring Green would not default on the land contract. However, because defendants had no greater interest than Spring Green, when Spring Green's interest in the property was extinguished, so were the interests of defendants.

Furthermore, we do not agree with the arguments raised by the Frens. First, contrary to the Frens' argument, it is apparent that a mortgagee's interest may be involuntarily terminated in a way other than foreclosure or forfeiture. See *Day, supra* at 374. That is, when a mortgagee's interest is attached to an interest in real property that can cease to exist in some manner other than foreclosure or forfeiture, a mortgagee can involuntarily lose his interest in the same way. Here, Spring Green's/United Capital's interest was lost through the default on the land contract, and defendants interests were similarly extinguished.

Next, the Frens ask whether a court can "cancel a mortgagee's interest and redemptive rights without violating the constitution." In this regard, the Frens assert both a violation of procedural due process and an unconstitutional taking. The Frens argue, primarily, that their redemptive rights were canceled without any process or notice. However, the Frens have not shown that they, as mortgagees of a land contract purchaser, have any rights against the land contract seller. Assuming that the Frens could, without foreclosure, assert the rights of their mortgagor, as noted earlier, their mortgagor had no equitable right of redemption, *Day, supra* at 372, although they could have appealed, but did not, to a court of equity to be allowed to redeem. "The estate of a land contract purchaser does not (in contrast with a mortgage) include as one of its incidents an equity of redemption." *Day, supra* at 372. Here, Spring Green and United Capital were given a six month option to purchase the property after they tendered the quitclaim deeds to plaintiffs, but the option was not exercised.

Moreover, neither Spring Green's default on the land contract, nor the failure of Spring Green or the Frens to seek to redeem, was "state action," and consequently, the extinguishment of the Frens interest in the property by these events cannot support a claim for the denial of procedural due process.

See *Cheff v Edwards*, 203 Mich App 557, 561; 513 NW2d 439 (1994). Although the trial court's recognition of the fact that the Frens' mortgage was extinguished was obviously state action, the court's decision occurred at the conclusion of a quiet title action where the Frens participated and were represented by counsel. As for the Frens' "takings" claim, they have failed to establish that they lost any property through interference by the government, or that they are being forced to bear a burden, that in fairness, should be borne by the public. See *Bevan v Brandon Twp*, 438 Mich 385, 389-391; 475 NW2d 37 (1991).

Finally, the Frens argue that the conveyance of the quitclaim deeds in lieu of foreclosure caused the vendee's interest to be merged into the fee. However, unlike a layman's understanding of the term, in the law, merger is a doctrine by which interests, or contract terms, or claims are destroyed, not a doctrine by which two components combine. Black's Law Dictionary provides the following definitions of merger:

> Contract law. The extinguishment of one contract by its absorption into another, and is largely a matter of intention of the parties.
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> Property interests. It is a general rule of law that where a greater estate and a lesser estate coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be merged; that is, sunk or drowned in the latter. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist anymore. Similarly, a lesser interest in real estate merges into a greater interest when lessee purchases leased property.
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> Rights. This term, as applied to rights, . . . indicates that where the qualities of debtor or creditor become united in the same individual, there arises a confusion of rights which extinguishes both qualities; whence, also, merger is often called "extinguishment." [*Black's Law Dictionary* (5th ed).]

Furthermore, this Court has explained that, "whenever a greater and lesser estate or a legal and equitable estate coincide in the same person, the lesser or equitable estate is destroyed by merger." *Board of Trustees of the General Retirement Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club,* 145 Mich App 318, 325; 377 NW2d 432 (1985). In the instant case, merger does not support the Frens' position. Actually, merger provides another basis for determining that the interest to which the Frens' mortgage had been attached was extinguished. Therefore, we conclude that the trial court properly quieted title in plaintiffs.

Next, the Frens contend that the court erred in awarding mediation sanctions against them pursuant to MCR 2.403(O). We disagree. A trial court's decision to award mediation sanctions is reviewed de novo. *Braun v York Properties, Inc,* 230 Mich App 138, 149; 583 NW2d 503 (1998).

The purpose of the mediation sanction rule, MCR 2.403(O), is to encourage settlement by placing the burden of litigation costs on the party who insists upon trial by rejecting the proposed mediation award. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 78-79; 577 NW2d 150 (1998). A case is appropriate for mediation if it is a civil case where the relief sought is primarily money damages or division of property. MCR 2.403(A)(1); *Forest City, supra* at 79. A mediation panel can determine an equitable claim when determining the amount of damages, but it is not proper for a mediation panel to make a separate award for equitable relief. MCR 2.403(K)(3); *Forest City, supra*. However, where the court's verdict includes equitable relief, costs may be awarded pursuant to MCR 2.403(O) if the court determines that 1) taking into account both the monetary and the equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and 2) it is fair to award costs under all of the circumstances. MCR 2.403(O)(5); *Forest City, supra* at 79.

Here, plaintiffs' complaint included an equitable claim requesting that the court quiet title to the property, and a legal claim for money damages for slander of title. While the case may not have been "primarily" for money damages, the Frens could have objected to the submission of the equitable claim to mediation, but failed to do so. MCR 2.403(C). The mediation evaluation in this case stated: "Plaintiff receives judgment of foreclosure[3] without award of money damages to either party/parties." Thus, while it was not improper for the mediation panel to determine an equitable issue when determining whether plaintiffs were entitled to damages on the legal claim, the mediation panel erred in making a separate award for equitable relief. MCR 2.403(K)(3); *Forest City, supra* at 79. Nevertheless, noting the Frens' failure to object to the submission of the equitable claim to mediation, we do not believe the trial court erred in awarding mediation sanctions in the instant case.

Here, the proper portion of the evaluation was zero. The verdict awarded plaintiffs zero damages with respect to the slander of title claim. Pursuant to MCR 2.403(O)(3): "If the evaluation was zero, a verdict finding that the defendant is not liable to the plaintiff shall be deemed more favorable to the defendant." While the portion of the verdict awarding no damages to plaintiffs with respect to their slander of title claim was more favorable to defendants, when the equitable relief awarded by the verdict is considered along with the legal relief, MCR 2.403(O)(5), it cannot be said that the entire verdict was more favorable to defendants than the mediation evaluation. Furthermore, we believe that it was "fair to award costs under all of the circumstances." MCR 2.403(O)(5)(b). We therefore conclude that the trial court did not err in awarding mediation sanctions against the Frens.

However, we agree that the case must be remanded for an evidentiary hearing regarding the reasonableness of the fees awarded. Actual costs that may be awarded as mediation sanctions include those costs taxable in any civil action and a reasonable attorney fee for services necessitated by the rejection of the mediation evaluation. MCR 2.403(O)(6). Where, as here, the party opposing the taxation of costs challenges the reasonableness of the fee requested, the trial court must hold an evidentiary hearing to determine a reasonable attorney fee. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). While the trial court need not make findings of fact with respect to each factor it considers in determining reasonableness, it is required to make findings of fact with respect to the attorney fee issue. *Id.* at 479-480. Here, the trial court did not hold an evidentiary hearing regarding the attorney fee issue. While the Frens' counsel did not appear at the hearing on plaintiffs'

motion for mediation sanctions, that motion dealt with the propriety of mediation sanctions, not the amount of such sanctions, and the Frens challenged the reasonableness of the fees requested in a written response to plaintiffs' request for mediation sanctions. Therefore, this case must be remanded to the trial court for an evidentiary hearing regarding the amount of mediation sanctions awarded.

The trial court's order quieting title is affirmed. The case is remanded for an evidentiary hearing regarding the amount of mediation sanctions awarded. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

[1] Defendants Frank Minca, Ernestine Minca, and Richard Kinkle failed to respond to plaintiffs' complaint. A default judgment was entered against them extinguishing their rights to the subject property.

[2] As currently codified by 1998 PA 106 (effective June 3, 1998, adding MCL 565.356-.361; MSA 26.676-.681 and repealing MCL 565.355; MSA 26.675),

> When the vendor named in the land contract has ceased in law to be bound by the provisions of the contract, and is entitled to a release from the contract, the vendee named in the contract, or his or her heirs, successors, or assigns, including, without limitation, any land contract mortgagees or other parties claiming a lien or security interest upon or in the vendee's interests in the contract, shall, when requested by the vendor, execute a discharge of the contract in the same manner as now provided by law for the discharge of mortgages. [MCL 565.361(5); MSA 26.681(5).]

Although the trial court properly quieted title before this act's effective date, this statute recognizes the principle that when a vendor is no longer bound in law by the provisions of the contract, the vendee's interest no longer exists.

[3] A foreclosure action is equitable in nature. MCL 600.3180; MSA 27A.3180; *Mitchell v Dahlberg*, 215 Mich App 718, 726-727; 547 NW2d 74 (1996).