

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COMERICA BANK, Successor to COMERICA  
BANK - JACKSON, N.A.,

UNPUBLISHED  
April 25, 2000

Plaintiff/Counter-defendant/Appellee,

v

No. 213988  
Jackson Circuit Court  
LC No. 94-070653-CK

TDJ, INC., a/k/a GREENWOOD CENTRE, INC.,

Defendant,

and

BICKERSON'S, INC.,

Defendant/Counter-plaintiff/Appellant.

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Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant Bickerson's, Inc. [defendant] appeals as of right the circuit court order of summary disposition dismissing defendant's countercomplaint with prejudice.<sup>1</sup> We affirm.

This case began in 1994. Plaintiff held a mortgage on commercial mall property owned by TDJ, Inc., known later as Greenwood Centre, Inc.<sup>2</sup> TDJ, Inc., which was wholly owned by Tom D. Johnson, filed for Chapter 7 bankruptcy in February 1994 and abandoned the property. Defendant Bickerson's, Inc., also wholly owned by Johnson, leased space from Greenwood Centre, Inc. and owned and operated a restaurant on the property. Plaintiff filed this action, a receiver was appointed, and plaintiff was ultimately granted summary disposition of its claims. This Court, in an unpublished per curiam opinion, reversed the trial court's grant of summary disposition and remanded for further proceedings. *Comerica Bank v Bickerson's, Inc.*, Docket No. 184917, issued October 29, 1996. Following remand, the trial court's previous orders were confirmed, plaintiff was again granted summary disposition, and defendant's counter-complaint was dismissed with prejudice.

Defendant argues on appeal that the trial court, on remand, disregarded this Court's order. Defendant contends that, rather than conducting a trial and evaluating the facts as instructed by this Court, the trial court entered an order which simply "embodied by implication the findings on liability of the [previous summary disposition] order which was reversed' on appeal. There is no merit to this claim.

Although defendant argues that the trial court did not conduct a trial and evaluate the facts, it did hold an extensive "evidentiary hearing" on May 22, 1997. At the hearing, both plaintiff and defendant presented opening and closing arguments, both plaintiff and defendant presented testimony from witnesses, and each side had an opportunity to cross-examine the witnesses. There was no dispute that defendant owed rental monies. At the onset of the hearing, plaintiff offered to accept the terms of the 1994 lease, which would have resulted in approximately \$27,000 overdue rent, but defendant did not agree with plaintiff's calculations and the parties proceeded to their proofs. The trial court evaluated the evidence, concluded that the 1994 lease was an attempted modification of the 1990 lease, resolved challenges regarding the designation of rental space, determined that defendant was liable, and provided defendant an abatement for certain expenses, resulting in a final judgment of \$71,230. The trial court did not disregard this Court's order.

Defendant also argues that the trial court erred by ordering the receiver to conduct a sale of the property. Defendant contends that the sale of defendant's assets should be declared void because the sale was made without notice to defendant of a hearing regarding the sale, without a factual finding of liability, and without a valid judgment establishing liability. We disagree.

The sale of a party's assets after a money judgment has been rendered is authorized pursuant to MCL 600.6104; MSA 27A.6104. Defendant was given notice of the March 10, 1995, motion hearing regarding the sale of defendant's assets, and the May 22, 1997, evidentiary hearing. Defendant attended both hearings. Defendant seems to overlook the fact that, except as to the dollar amount judgment, all remaining orders set forth in the trial court's March 24, 1995, judgment were "confirmed in every respect" by the trial court after remand. Following the proceedings ordered by this Court, the trial court ordered that both the judicial lien and the receivership were to remain in full force and effect. Liability was established at the March 10, 1995, motion hearing and reconfirmed after remand at the May 22, 1997, evidentiary hearing. We find no error.

Defendant also argues that both the entry of the order for the sale of the property and the sale itself were effectuated through bad faith and overreaching by plaintiff and by improper conduct by the receiver. This claim is without merit.

The collateral mortgage agreement at issue in this case specifically provided that in the event of default, the "Mortgagor consents to the appointment of a Receiver for the mortgaged premises and any foreclosure proceeding." The receiver was ordered by the trial court to attempt the collection of rent payments, to pay overdue real estate taxes, to liquidate assets and to seek offers for purchase of the real property. The receiver submitted detailed accountings to the trial court on a monthly basis. Defendant's assertion of bad faith and overreaching by plaintiff is without merit. Plaintiff did nothing more than enforce the terms and conditions of its collateral mortgage agreement by court order.

Nor is there any merit to defendant's claim that the receiver operated under a conflict of interest and achieved an "impermissible result" by improperly acting in concert with plaintiff and its counsel. Once a receiver is appointed, the property is within constructive possession of the receiver and its administration is within the jurisdiction of the trial court. *In re Kennison Sales & Engineering Co.*, 363 Mich 612, 623; 110 NW2d 579 (1961). The receiver acted only according to the instructions of the trial court. Both the entry of the order for the sale of the property and the sale itself were effectuated properly pursuant to court order.

Next, defendant argues that the trial court erred in finding defendant liable under the 1990 lease, which required lease payments of \$6,000 per month, rather than the 1994 lease, which required lease payments of \$2,000 per month. We do not agree. Evidence presented at the evidentiary hearing that the 1990 lease contained a provision that

if the tenant shall remain in possession of all or any part of the lease premises after the expiration of the term of this lease or any renewal thereof, then the tenant shall be deemed a tenant of the leased premises from a month to month at the same rental and subject to all the terms and provisions thereof except only as to the term of this lease.

It is apparent from the record that defendant remained in possession of the leasehold for some months after the expiration date of the 1990 lease. Assignment of rents is binding upon the occupiers of the premises or the tenant from the date a notice of default is filed. MCL 554.231; MSA 26.1137(1), MCL 554.232; MSA 26.1137(2). In addition, while the additional mortgage security remains in force no modifications of the rental covenants may be made without written consent of the holder of the mortgage. MCL 554.233; MSA 26.1137(3). Plaintiff, the holder of the mortgage, did not give written consent to the space and rental amount changes that were made in the 1994 lease, and the trial court properly held that the 1990 lease prevailed under MCL 554.233; MSA 26.1137(3).

Finally, defendant argues that the trial court erred in granting summary disposition in favor of plaintiff on defendant's counter-complaint because there were claims for which relief could be granted and because genuine issues of material fact were raised. We disagree. This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

On March 10, 1997, defendant filed a countercomplaint against plaintiff for (1) constructive eviction, (2) tortious breach of contract, (3) gross negligence or conspiracy to take property, and (4) inducement of breach of fiduciary duty. Defendant alleges that disputed material facts were raised in both the counter complaint and in the answer with regard to whether plaintiff constructively evicted defendant, and therefore, summary disposition was inappropriate. There is no merit to this claim.

An action to regain possession of premises after a constructive eviction must be commenced within ninety days from the time the cause of action arose or became known to the tenant. An action for damages for constructive eviction under must be commenced within one year from the time the cause of action arose or became known to the tenant. MCL 600.2918(6); MSA 27A.2918(6). In this case, because plaintiff stopped paying rent in April 1994 and vacated the premises in December 1994, this

cause of action was commenced long after the one year period and is, therefore, barred by the statute of limitations. The trial court properly held that there was no genuine issue of material fact and no basis in law for this complaint.

Defendant's complaint also alleged that plaintiff committed tortious breach of contract. Although defendant argues that plaintiff "interfered to the detriment" of defendant, defendant fails to allege that plaintiff acted improperly. Each of the allegations in this count of defendant's complaint begin, "[plaintiff] directly or indirectly through the Receiver. . ." As noted previously, the actions of the receiver in this case on behalf of plaintiff, the mortgage holder, were authorized by law and ordered by the trial court. Summary disposition on this count was appropriate.

Next defendant alleged gross negligence and conspiracy to take property because plaintiff used the receiver to reach its own objective, i.e. the sale of the commercial building without foreclosure. Again, it was the trial court, not plaintiff and not the receiver, that ordered sale of the commercial building for approximately \$500,000. Therefore, because it was the trial court, rather than plaintiff or the receiver, that ordered the sale and approved the amount of the sale, dismissal of this claim was proper.

Finally, defendant alleged inducement of breach of fiduciary duty against plaintiff. Although defendant suggests that this is a valid cause of action in other jurisdictions, defendant has not cited any cases or statutes in which Michigan has recognized this cause of action. The trial court did not err in granting summary disposition.

Affirmed.

/s/ Harold Hood

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

<sup>1</sup> Although defendant purports to appeal orders dating back to 1996, the order granting summary disposition is the final order in this matter. See MCR 7.204(A)(1).

<sup>2</sup> There was testimony that TDJ, Inc. later changed its corporate name to Bickerson's, Inc.