STATE OF MICHIGAN

COURT OF APPEALS

CHOAN, LTD.,

Plaintiff-Appellant,

v

KARL R. FRANKENA; CONLIN, MCKENNEY & PHILBRICK; and CONLIN, CONLIN, MCKENNEY & PHILBRICK,

Defendants-Appellees.

UNPUBLISHED
May 11, 2001

No. 219887
Washtenaw Circuit Court
LC No. 94-001767-NM

Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

Plaintiff Choan, Ltd., appeals as of right from a January 29, 1999, judgment of no cause of action. Plaintiff had sought damages from defendants alleging that each was negligent in handling the conversion of its property to condominiums. We affirm.

I. Facts and Procedural Background

This case concerns a dispute about the master deed drafted by defendant Karl Frankena for the Tower Plaza Building (building), located at 555 East Williams Street, in the city of Ann Arbor. In 1987, the building was to be sold by its owner, Williams Street Partners, to a company call Premark, Ltd., which planned to convert the building into condominiums. As part of the sales agreement, it was agreed that Williams Street Partners would retain ownership of the roof so that it could continue to lease space on the roof to house satellite antennas. Despite the agreement, Premark was unable to purchase the building from Williams Street Partners.

Following this sales attempt, Williams Street Partners quitclaimed the building – including exclusive ownership of the roof and mezzanine – to plaintiff, which, in turn, entered into a joint venture with Triad, called T-C Associates, to continue the condominium conversion process. In order to complete the conversion of the premises, defendant[1] was retained to prepare

[1] Unless otherwise noted, defendant refers to Karl Frankena.

the condominium master deed[2] and Fred White[3] was retained to revise the technical drawings that must be attached to the condominium master deed.[4] The technical drawings had initially been created by White during the previous sales attempt, however defendant did not take part in drafting the previous master deed. It is defendant's work on the master deed that gave rise to the instant action.

Plaintiff claims that, like Williams Street Partners before it, it intended to retain ownership of both the roof and mezzanine; however, the master deed prepared by defendant shifted ownership of the roof and the mezzanine to the condominium association by indicating that these areas were "common areas." At first, this ownership change went unnoticed. Eventually however, the condominium association noticed that, according to the master deed, it was the owner of the roof and mezzanine and filed a lawsuit against plaintiff in order to recover the revenues – generated from the lease of the roof for antennae space – paid to plaintiff during that time. During the lawsuit, plaintiff was unable to have the master deed corrected and settled with the association. As a result of this settlement, plaintiff initiated the instant lawsuit against defendant lawyers. Plaintiff's complaint alleged that it had specifically instructed defendant to ensure that the master deed reflected plaintiff's retained ownership in the roof and that defendant's failure in this regard constituted professional malpractice.

Prior to trial, defendants moved for summary disposition contending that the lawsuit was barred by the statute of limitations. This motion was eventually denied.[5] Following this motion, plaintiff moved to amend its complaint to add an allegation that, because of defendant's negligence, it was also deprived of the ownership interest it intended to retain in the mezzanine area as well. The trial court denied this motion, and plaintiff subsequently conceded that this claim, concerning the mezzanine, was time-barred.

Defendants then moved in limine to exclude the introduction of "any proofs, testimonial or otherwise, pertaining to any allegation that defendants committed professional negligence in relation to the mezzanine area," arguing that the mezzanine area of the master deed should be inadmissible under MRE 402, 403, and 404. The trial court provisionally granted defendant's motion without specifically articulating the basis for its ruling. During the trial, plaintiff renewed the motion and the trial court denied admission of evidence relating to the mezzanine area because of "the effect [sic] it will have on the jury's consideration on the evidence in this case." Plaintiff challenges this ruling on appeal.

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[2] Although there is a disagreement as to why defendant created a new master deed instead of amending the master deed from the Premark project, both plaintiff and defendant acknowledge that defendant created a new master deed.

[3] White was initially a party defendant to this suit, however, he is not a party to this appeal because a settlement was reached between him and plaintiff.

[4] The Michigan Condominium Act, MCL 559.101, *et seq*.; MSA 26.50(101), *et seq*. provides that the master deed, architectural plans and specifications must be recorded. MCL 559.173(1),(4); MSA 26.50(173)(1),(4).

[5] The motion was initially denied, then granted on defendants' motion for reconsideration, and then re-denied on plaintiff's motion for reconsideration.

II. Standard of Review

Generally, we review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). In civil cases, an abuse of discretion is found only in extreme cases where "the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

III. Analysis

Plaintiff contends that the trial court abused its discretion by granting defendants' motion to exclude evidence relating to the portion of the master deed dealing with the "mezzanine area." We disagree.

We note that plaintiff is correct in asserting that an ability to identify all of his client's property interests is required of an attorney preparing a master deed, and that the evidence relating to the mezzanine area was relevant as a matter of law. MRE 401, 402. Nevertheless, even relevant evidence may be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. The trial court suggested that the evidence was excluded because of the effect it would have on the jury, a rationale that implies that the trial court was basing its ruling on MRE 403. Plaintiff contends that the evidence would not have been prejudicial because it would not have improperly swayed the jury to reach a decision on emotional grounds. We disagree.

The concern with unfair prejudice is that the evidence will lead the jury to reach a conclusion on an improper basis or find the evidence to be more probative than it actually is. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); See also *Brenner v Kolk*, 226 Mich App 149, 164 n 11; 573 NW2d 65, 72 (1997). In the instant matter, the only issue to be litigated was whether defendant's preparation of the master deed deviated from the standard of care with respect to the roof area. Under these circumstances, presenting evidence of a second alleged mistake in the master deed may have swayed the jury to conclude that it was more likely that defendant must have committed at least one mistake worthy of reimbursement. This Court has ruled that "unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow such evidence." *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 404; 571 NW 2d 530 (1997). Thus, we are not persuaded that the trial court's decision was devoid of logic. Even without the mezzanine evidence, plaintiff was free to present all other evidence with respect to defendant's performance regarding the roof area. Accordingly, we cannot conclude that the trial court abused its discretion by granting defendants' motion to exclude the evidence.[6]

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[6] Plaintiff also contends that the trial court's ruling was based, in part, on MRE 404(b)(1) which states:

(continued…)

Plaintiff also asserted during oral argument before this Court that the evidence should have been admitted either to rebut or impeach defendant's testimony that he was directed by plaintiff to leave the master deed "as is" because, in plaintiff's view, the condominiums would be more marketable if prospective tenants believed the mezzanine was a common area. However, we find no record evidence that plaintiff raised this argument before the trial court, and consequently this issue has been waived. *Cox v D'addario*, 225 Mich App 113, 130; 570 NW2d 284 (1997); *Conagra, Inc*. v *Farmers State Bank,* 237 Mich App 109, 130; 602 NW2d 390, 400 (1999).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Harold Hood
/s/ Mark J. Cavanagh

(…continued)

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In determining whether MRE 404(b) applies, our Supreme Court has ruled that the following test determines the admissibility of "other acts" evidence under MRE 404(b): (i) the evidence must be offered for a proper purpose under 404(b) to "protect against the introduction of extrinsic act evidence when that evidence is offered solely to prove character"; (ii) the evidence must be relevant to an issue or fact of consequence at trial under MRE 402; and (iii) the evidence must not be substantially more prejudicial than probative based on MRE 403. *People v Pesquera*, 244 Mich App 305, 317-318; ___ NW2d ___ (2001), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Thus, since our inquiry leads us to believe that the mezzanine evidence was properly excluded under MRE 403, the evidence would also logically be inadmissible under the third prong of MRE 404(b). *Id*.