

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

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DAVID K. BARNES,

Plaintiff/Counterdefendant-  
Appellee,

V

KWS REALTY SERVICES, INC., HENRY N.  
SANDWEISS, MONTE M. KORN, and  
COLONNADE ASSOCIATES LIMITED  
PARTNERSHIP,

Defendants/Counterplaintiffs-  
Appellants.

UNPUBLISHED

August 24, 2001

No. 224129

Washtenaw Circuit Court

LC No. 96-008073-CH

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KWS REALTY SERVICES, INC., HENRY N.  
SANDWEISS, MONTE M. KORN, and  
COLONNADE ASSOCIATES LIMITED  
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No. 224851

Washtenaw Circuit Court

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Before: Markey, P.J., and Talbot and Owens, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal several rulings of the trial court. In Docket No. 224129, defendants appeal as of right from the trial court's order of final judgment. Defendants challenge the trial court's grant of summary disposition of plaintiff's complaint and defendants' countercomplaint, and the trial court's award of damages against a security bond.

Defendants also appeal the trial court's denial of their motions for leave to amend their countercomplaint. In Docket No. 224851, defendants appeal on leave granted the trial court's award of costs and attorney fees to plaintiff. We affirm.

Plaintiff David K. Barnes is one of forty-seven limited partners of defendant Colonnade Associates Limited Partnership (hereinafter "CALP"). CALP owned and operated the Colonnade Shopping Center (hereinafter "the center") in Ann Arbor, Michigan. Barnes and other limited partners held bonds issued by CALP which were secured by a junior mortgage on the center. The junior mortgage was secondary to a mortgage held by Huntington Bank to secure loans made by Huntington Bank to CALP.

When CALP defaulted on its loans, Huntington Bank foreclosed on the property. CALP pursued efforts to redeem the mortgage within the statutory six-month redemption period. At the same time, Barnes engaged in negotiations with Huntington Bank to purchase the center in the event that CALP was unable to redeem. Approximately two weeks prior to the expiration of the redemption period, CALP notified all limited partners that in order to secure financing to redeem the property, it was necessary to discharge the junior mortgage securing the bonds.

Upon learning of CALP's intent to discharge the junior mortgage, Barnes filed a complaint in Washtenaw Circuit Court seeking judgment on the bonds and a declaratory judgment that the terms of the bond agreement do not allow CALP to discharge the junior mortgage and in effect extinguish his security interest without his consent. Barnes also filed a notice of lis pendens on the property. As a result of the filing of the lis pendens, CALP was unable to obtain title insurance in time to redeem the property.

In Oakland Circuit Court, CALP and its general partners, defendants KWS Realty Services, Inc. (hereinafter "KWS Realty"), Henry N. Sandweiss, and Monte M. Korn, (all defendants hereinafter collectively referred to as "CALP"), sought and obtained an emergency temporary restraining order (TRO) extending the redemption period. CALP posted a \$50,000 security bond for the restraining order. Ultimately, CALP was unable to redeem the mortgage on the Center and the TRO was dissolved.

The matter was transferred to Washtenaw Circuit Court. CALP filed a countercomplaint alleging breach of contract, breach of fiduciary duty, and fraud, and also seeking declaratory judgment regarding the propriety of the junior mortgage discharge. Barnes filed several dispositive motions, and ultimately all claims were dismissed. The trial court granted Barnes judgment in the amount of the CALP bonds. The court also awarded Barnes \$39,985 against the security bond for the TRO.

We first address CALP's fifth issue on appeal as it relates to the disposition of other issues CALP raises. CALP argues that the trial court erroneously granted summary disposition pursuant to MCR 2.116(C)(10) on CALP's declaratory judgment claim regarding the propriety of the junior mortgage discharge. CALP maintains that under the terms of the bond agreement, discharge of the junior mortgage is permissible based upon a vote of bondholders constituting a majority interest. We disagree.

"A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review." *Smith v Globe Life Ins Co*, 460 Mich 446, 454;

597 NW2d 28 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id.* “A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Smith, supra* at 454-455; MCR 2.116(C)(10). This Court also reviews de novo the trial court’s interpretation and application of a contract. *Cohen v Auto Club Ins Ass’n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

“[I]n the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are not ambiguous.” *D’Avanzo v Wise & Marsac*, PC, 223 Mich App 314, 319; 565 NW2d 915 (1997). A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. *D’Avanzo, supra* at 319. In an instance of contractual ambiguity, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate. *Id.*

The terms of the bond agreement are not ambiguous and do not permit the discharge of the junior mortgage without Barnes’s consent. The agreement provides in relevant part:

Actions to enforce the Collateral for the principal of this Bond shall be subject to approval and/or ratification by vote of the holders of a majority in principal amount of the Series outstanding. Without such a vote, which may establish a representative to take action on behalf of all Bondholders in the Series under specified fee and representational terms, individual Bondholders may take action to enforce the Bonds in the Series of which this is one, but not to enforce the Collateral securing their Bonds.

The bond agreement provides only for the enforcement of the collateral upon a vote of the holders of a majority in principal. It does not permit the discharge of the junior mortgage securing the bonds.

CALP characterizes its attempt to discharge the mortgage as an enforcement of the collateral, and argues that discharge of the mortgage is a part of any enforcement of the collateral. We reject CALP’s argument that the use of the term “enforce” contemplates and incorporates the concept of “discharge” of the mortgage, or that the terms are synonymous in this context.

The enforcement of the collateral underlying the junior mortgage implies payment to the bondholders.<sup>1</sup> Pursuant to the terms of the bond agreement, bondholders representing a majority

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<sup>1</sup> Black’s Law Dictionary defines “enforce” as follows:

To put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to.

of principal may agree to enforce the collateral by foreclosing on the junior mortgage. Conversely, a discharge of the junior mortgage implies just the opposite under these circumstances. Discharge of the junior mortgage would extinguish the security interest underlying the bonds.<sup>2</sup> Although discharge may be a product of enforcement, which presupposes payment, discharge is not permissible in lieu of enforcement. The trial court correctly observed this distinction. Further, discharge of the junior mortgage cannot be deemed payment in this case because CALP intended to give the bondholders an equity interest in exchange for the discharge of the junior mortgage. Such an arrangement is contrary to the express terms of the bond agreement which provides that the bond is “payable in lawful money of the United States.”

The trial court correctly determined that pursuant to the terms of the bond agreement, the general partners lacked the authority to discharge the junior mortgage that secured Barnes’ CALP bonds without the consent of all the bondholders. Accordingly, the trial court properly granted summary disposition in favor of Barnes on this question.

CALP also argues that the trial court erred in granting judgment on the TRO bond in the amount of \$39,985. CALP maintains that Barnes would not have been able to close on the sale of the center on December 30, 1996 irrespective of the TRO because the purchasing entity, BCV-Col LP, had not yet been formed and other necessary documentation was not available. Additionally, CALP argues that even if Barnes could have closed on December 30, 1996, he failed to show that the increased costs in closing on May 8, 1997 were attributable to the TRO, which was dissolved on January 13, 1997.

The trial court’s application of the court rules in determining whether Barnes was entitled to judgment on the bond is a question of law which this Court reviews de novo. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 396-397; 554 NW2d 345 (1996); *In re Prichard Estate (On Remand)*, 169 Mich App 140, 147; 425 NW2d 744 (1988). The trial court’s factual findings in this regard are reviewed for clear error. MCR 2.613(C).

“In Michigan, statutes or court rules permit a trial court to issue an injunction conditioned on the party requesting the injunction giving security for damages caused by ‘wrongful’ enjoinder.” *Prichard, supra* at 149. The object of a damage award is “to compensate a party for costs and damages sustained as a result of an injunction, which, based on the determination made on the merits of the underlying controversy between the parties, should not have been issued at all.” *Prichard, supra* at 151. “[J]udgment may be entered against a bond or security if the moving party demonstrates that the conditions of the bond or security have been triggered.” *Bruwer, supra* at 397. “The pertinent inquiry is whether the damages proximately resulted from the injunction.” *Prichard, supra* at 153.

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<sup>2</sup> Black’s defines “discharge” as:

To release; liberate; annul; unburden; disincumber; dismiss. To extinguish an obligation.

The TRO bond provided that CALP would be liable for Barnes' "legal costs, including reasonable attorney fees and such other damages or costs as the court deems appropriate as they sustain by reason of said temporary restraining order as described in the December 30, 1996 order." At an evidentiary hearing, Barnes testified that the purchase price of the center increased by \$53,585 due to the delay in closing. Barnes also testified that he incurred increased closing costs. Due to the pending litigation between the parties by May 8, 1997, Barnes was required to obtain a \$400,000 letter of credit, the fee for which was \$4,050. Third, Barnes claimed that he incurred an increase in mortgage interest, which over the five-year mortgage period totaled \$92,967. Finally, he stated that the delay in closing resulted in Barnes paying \$20,009.49 more in interest on back taxes. Barnes testified that all of these added costs, totaling \$161,999 were attributable to the TRO. It was undisputed that Barnes' recovery was limited to the amount of the security bond. The trial court awarded Barnes \$39,985.<sup>3</sup>

We cannot conclude that the trial court's findings were clearly erroneous. Barnes' testimony regarding his damages and the causal relationship between the TRO and the damages was supported by the deposition testimony of Timothy Hampton, who stated that but for the TRO and the extension of the redemption period, Michigan National Bank was prepared to close on December 30, 1996. The trial court observed that Sandweiss testified without personal knowledge of the transaction between Barnes and Huntington Bank, and his opinion regarding whether the parties would have closed on December 30, 1996 was speculative. In light of the evidence presented and deferring to the trial court's superior ability to assess the credibility of the witnesses, we conclude that the trial court did not clearly err in finding that Barnes sustained damages in the amount of \$39,985 caused by the TRO. See *Prichard, supra* at 154-155.

CALP next argues that the trial court erroneously granted summary disposition<sup>4</sup> of CALP's counterclaims of breach of fiduciary duty and fraud. We disagree. Michigan has not addressed whether a limited partner owes a fiduciary duty to the limited partnership and to the general partners. In light of the unique facts before us, we need not do so here.

Barnes had a dual-status relationship to CALP. He was both a limited partner in CALP, and also a bondholder/creditor. CALP claims that Barnes breached his fiduciary duty as a limited partner by filing the lis pendens. CALP argues that Barnes was acting as a limited partner to frustrate CALP's efforts to redeem the mortgage on the center. Barnes maintains that he filed the lis pendens in his capacity as a bondholder and creditor of CALP in an attempt to prevent the discharge of the junior mortgage securing the bonds. Barnes claims it was only after CALP informed the limited partners of the plan to discharge the junior mortgage to obtain the necessary financing that Barnes initiated proceedings and filed the lis pendens.

We have determined that under the terms of the bond agreement, CALP did not have the authority to discharge the junior mortgage without Barnes' consent. Therefore, we agree with

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<sup>3</sup> The trial court's award of \$39,985 represents the \$50,000 bond less \$10,015 in costs and fees already paid by CALP.

<sup>4</sup> Barnes brought his motion for summary disposition pursuant to both MCR 2.116(C)(8) and MCR 2.116(C)(10). Because the court considered documentary evidence presented, we treat the motion as having been granted pursuant to MCR 2.116(C)(10).

the trial court that Barnes was entitled to file the lis pendens to prevent the discharge and protect his security interest in the bonds. Although the lis pendens had the effect of hampering CALP's redemption efforts, Barnes' status as a bondholder justified his actions. Irrespective of Barnes' motives, because he was a bondholder/creditor of CALP, and because CALP's attempted discharge of the junior mortgage was not permitted by the terms of the bond agreement, Barnes' filing of the lis pendens was proper. Accordingly, CALP's claim of breach of fiduciary duty on the basis of the filing of the lis pendens must fail and the trial court properly granted summary disposition of CALP's claim alleging breach of fiduciary duty. Based upon the same rationale, the trial court properly granted summary disposition of CALP's fraud claim which was also premised on the filing of the lis pendens.

CALP next claims that the trial court abused its discretion in denying CALP's motions for leave to amend its countercomplaint to add claims of intentional interference with contract, slander of title, and a claim for exemplary damages. This Court will reverse a trial court's decision on a motion to amend a complaint only where the trial court abused its discretion. *Dampier v Wayne Co*, 233 Mich App 714, 721; 592 NW2d 809 (1999).

MCR 2.118(A)(2) provides: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party." See *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). A motion to amend ordinarily should be granted, and denied only for particularized reasons such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment. *Dampier, supra* at 733-734.

We find no abuse of discretion. The trial court's denials of CALP's motions for leave to amend the countercomplaint were based upon its prior ruling that Barnes had a right to file the lis pendens. The trial court properly determined that the proposed amendments to CALP's countercomplaint would be futile because Barnes was entitled to file the lis pendens. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998). CALP was attempting to advance the same arguments that had been previously decided by the court. Although CALP argued different theories of recovery, they were premised upon the alleged impropriety of Barnes' filing the lis pendens. Accordingly, the trial court did not abuse its discretion in denying CALP's motions for leave to amend its countercomplaint.<sup>5</sup>

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<sup>5</sup> We reject CALP's reliance upon *Patten Corp v Canadian Lakes Development Corp*, 788 F Supp 975 (WD Mich 1991). In *Patten*, the court denied summary judgment, determining that a lis pendens was improperly filed and therefore constituted a false statement which could form the basis for a slander of title action. *Id.* at 979. The court's basis for finding the lis pendens improper was that the lis pendens was unrelated to the cause of action. *Id.* at 978. In the case at bar, Barnes' action was not taken solely to collect on the bonds as CALP contends. Rather, the lis pendens was filed in conjunction with the complaint seeking declaratory judgment that CALP lacked authority to discharge the junior mortgage securing the bonds. The filing of the lis

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CALP next argues that the trial court erroneously granted summary disposition of Barnes' claim for judgment in the amount of the CALP bonds. CALP contends that Barnes was not entitled to prevail on his breach of contract claim because Barnes himself breached the bond agreement by filing the lis pendens. In so doing, CALP argues, Barnes interfered with CALP's redemption efforts and thus caused CALP's inability to pay the bonds. We disagree.

It was undisputed that the bonds were in default. We reject CALP's argument that the lis pendens constituted an action to *enforce* the collateral, which cannot be done without the consent of bondholders representing a majority interest. CALP's position is contrary to the language of the bond agreement and mischaracterizes Barnes' cause of action. Barnes sought a money judgment to collect on the bonds which had been in default since at least 1994. Barnes' action did not seek enforcement of the collateral by foreclosing on the junior mortgage. Rather, Barnes sought to preserve his rights in the junior mortgage and to collect on the bond. The plain wording of the bond agreement does not prohibit Barnes from filing an action individually and without the consent of the other bondholders to enforce the bond.

Further, there was no genuine issue of fact regarding the merit of CALP's affirmative defenses. CALP's theories of defense were predicated on the filing of the lis pendens, which the trial court correctly determined was proper based upon CALP's impermissible attempt to discharge the junior mortgage. The trial court correctly granted summary disposition for Barnes on Count II of his complaint and awarded him a judgment on the bonds.

In Docket No. 224851, CALP appeals the trial court's award of costs and attorney fees incurred to collect on the bonds. CALP contends that because the bond agreement only provides for recovery of costs and attorney fees in actions to enforce the bond and rights in the collateral, Barnes is not entitled to costs because this is not an action to enforce rights in the collateral. CALP also argues that Barnes forfeited any right to costs due to his delay in filing his motion for costs. Finally, CALP maintains that the trial court's determination regarding the amount of fees and costs incurred by Barnes is excessive and unsupported by specific findings.

The award of attorney fees and costs is a matter of discretion for the trial court. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 330; 602 NW2d 633 (1999). To the extent that resolution of this issue involves the interpretation of the bond agreement, review is de novo. *Cohen, supra* at 528.

As an initial matter, CALP argues that Barnes forfeited any claim to attorney fees because he did not timely pursue the matter. We disagree. The trial court's April 9, 1998 order granting summary disposition provided for costs and attorney fees associated with Barnes' enforcement of this rights under the bonds. However, a final order resolving all issues relative to Barnes's rights under the bonds was not entered until December 1, 1999. Barnes filed his motion for costs and attorney fees on November 23, 1999. Accordingly, we reject CALP's claim that

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pendens was related to Barnes' cause of action as it concerned his security interest underlying the bonds.

Barnes' motion for costs and attorney fees was untimely. Because the proceedings involving Barnes' rights under the bond agreement were not finally resolved until December 1999, Barnes did not waive his right to recover costs and attorney fees.

CALP next claims that the terms of the bond agreement do not allow for costs and attorney fees. CALP maintains that costs and fees are recoverable only to the extent that Barnes sought judgment on the bonds, but not as to issues involving the junior mortgage. The bond agreement provides:

Reasonable legal fees and court costs to enforce the Bond and rights in the collateral . . . shall be paid by CALP.

CALP argues that because Barnes did not seek to enforce his rights in the collateral by foreclosing on the junior mortgage, he may not collect attorney fees and costs expended relative to the junior mortgage.

We disagree with CALP's interpretation of the bond agreement. Although enforcement of the collateral by foreclosing on the junior mortgage requires a vote of a majority of the bondholders, this is not what Barnes sought to do. Barnes sought a declaratory judgment that CALP lacked the authority to discharge the junior mortgage which secured his interest in the bonds. We construe the provision allowing costs and attorney fees to include Barnes' action to prevent CALP from discharging the junior mortgage without his consent as an action to enforce his rights in the collateral. The bond agreement requires CALP to pay legal fees and court costs to enforce rights in the collateral.

CALP further argues that the trial court failed to make findings of fact regarding Barnes' attorney fees and costs, and that the \$51,447.20 award was excessive and unsupported. We disagree in both respects.

Barnes offered testimonial and documentary evidence in support of his claim for costs and attorney fees. The transcript of the evidentiary hearing on this question indicates that the trial court conducted a lengthy proceeding and made adequate findings. The trial court recognized that Barnes did not seek payment of all of his legal fees and costs, but rather only for those expenditures specifically attributed to enforcing his rights in the bonds. The trial court also recognized that Barnes' expenses incurred with respect to adjudicating his rights under the junior mortgage were related to and necessary for his enforcement of the bonds themselves. The trial court commented at length on the unique nature of this case and the expenses involved. The court also observed that CALP had notice of its liability for costs and attorney fees as provided in the bond agreement and as ordered by the court on April 9, 1998. Notably, the court's award of attorney fees and costs was less than the amount sought by Barnes. The court's findings in this regard further demonstrate the trial court's deliberation and attention to this matter, and lend



support to its award. We conclude that the trial court's findings were sufficient and were not clearly erroneous.

Affirmed.

/s/ Jane E. Markey  
/s/ Michael J. Talbot  
/s/ Donald S. Owens