STATE OF MICHIGAN

COURT OF APPEALS

ANTONIO D'ORAZIO and ELDA D'ORAZIO,

Plaintiffs/Cross-Defendants/Appellees,

v

JOSEPH P. DURSO, BONNIE L. DURSO, WINFIELD DEVELOPMENT INC., RE/MAX WEST INC, and RE/MAX INTERNATIONAL INC.,

Defendants,

and

DARIO TOMEI,

Defendant/Cross-Plaintiff/Appellant.

UNPUBLISHED
November 30, 2001

No. 222873
Wayne Circuit Court
LC No. 98-828212-CK

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Defendant Dario Tomei appeals the trial court's order granting summary disposition in favor of plaintiffs Antonio D'Orazio and Elda D'Orazio, declaring the D'Orazios' equitable claim to lot 11 of a subdivision known as the Pines of Winfield, to be superior to Tomei's quit claim interest and awarding a fee ownership interest in lot 11 to the D'Orazios. The trial court also awarded, in the alternative, $68,000 in money damages against codefendants, Joseph P. Durso, his spouse, Bonnie, and Durso's companies, ReMax West and Winfield Development Inc.[1] We affirm.

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[1] Because Joseph Durso took all pertinent actions, hereafter Durso will refer only to Joseph Durso. Neither the Dursos nor Durso's companies, which have ceased to exist, have appealed. Re/Max International Inc. was voluntarily dismissed from this case by the D'Orazios.

I. Basic Facts And Procedural History

Tomei asserts priority to a parcel of property with tax ID 034-010-002-004 (parcel 004) which he acquired by quit claim deed (in lieu of foreclosure) dated August 8, 1997, and recorded on September 25, 1997. The D'Orazios claim equitable title to lot 11, contained within parcel 004, through an option to purchase exercised on September 13, 1994. The D'Orazios recorded an affidavit of interest in parcel 004 on May 15, 1998, because the property had yet to be platted. Below, we briefly set out how these interests arose.

Durso borrowed money from Tomei to develop property at Seven Mile and Wayne Road in the city of Livonia into a subdivision to be known as the Pines of Winfield. When Durso ran into financial difficulty, he began making "deals with people such as the D'Orazios" to keep the project financially afloat. One such deal was a "Mutual Agreement" between Durso and the D'Orazios, which was originally an option to purchase lot 11. This option matured into a binding contract when the D'Orazios paid full consideration. Durso acknowledged that the D'Orazios had "paid in full" to purchase lot 11 of the proposed subdivision and admitted that they had no further obligations under the "Mutual Agreement."

As Durso's financial difficulty continued, Tomei sued to foreclose on the property. Durso testified that he gave Tomei a quit claim deed to parcel 004 in lieu of foreclosure. Durso testified that he had told Tomei about the D'Orazios and others who had provided money for lots in the proposed subdivision, even providing Tomei with a list of such people. Tomei denied this, but testified in his deposition as follows:

> *Q*. Did Mr. Durso talk to you about sales that he had for lots in the project?
>
> *A*. Yes.
>
> *Q*. Did he indicate to you that he had taken money from people for lots on this project?
>
> *A*. Yes.
>
> *Q*. Did he ever show you any documents with respect to sales of lots in the project?
>
> *A*. No.
>
> *Q*. Okay. This is again all prior to you taking the deed in July of 1997.
>
> *A*. Yes.

Defendant further testified:

> *Q*. Mr. Durso did disclose to you, though, that he had taken money on this project from other people?

A. He had received some deposits. To what amount I don't know. But he also told me they took liens against other properties of his.

Tomei also admitted he did not ask Durso for a list of people who had made deposits. Further, Tomei testified that he told Durso that "you take care of your moral obligations to whoever you took money from, and I will give you your house back for zero dollars." Tomei had also foreclosed on Durso's home and was still owed $100,000.

The trial court granted summary disposition because even though Tomei recorded his quit claim deed first, he had at least constructive knowledge of the D'Orazios' interest and therefore was not a good-faith purchaser under MCL 560.29. The trial court did not state on the record, nor does the order that was entered reference, which court rule the trial court relied upon in granting summary disposition. However, because the trial court considered evidence beyond the pleadings, the order must be based on MCR 2.116(C)(10).[2]

II. The Race-Notice Statute

A. Standard Of Review

Tomei argues that his quit claim deed, which was recorded first, prevails over the D'Orazios' claim of interest under Michigan's race-notice statute[3] provided that he was a good-faith purchaser. Tomei further contends that whether he had actual or constructive knowledge of the D'Orazios' claim – and thus was not a good-faith purchaser – was a disputed issue of material fact and summary disposition was therefore not appropriate. A motion for summary disposition based on MCR 2.116(C)(10) may be granted where, except as to damages, there is no genuine issue as to any material fact and the moving party is entitled to partial or full judgment as a matter of law.[4] A motion under MCR 2.116(C)(10) must be supported or opposed by affidavits or other documentary evidence.[5] The nonmoving party cannot simply rest on allegations or denials, but is required to present evidentiary proofs creating a genuine issue of material fact for trial.[6] When deciding a motion for summary disposition, a court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a

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[2] *Spiek v Dep't of Transportation,* 456 Mich 331, 337-338; 572 NW2d 201 (1998); *Gibbons v Caraway*, 455 Mich 314, 320, n 7; 565 NW2d 663 (1997).

[3] MCL 565.29.

[4] *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting from *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363; 547 NW2d 314 (1996).

[5] MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

[6] *Globe Life Ins Co, supra* at 455, n 2.

trial.[7] If the opposing party fails to present evidence to show a material factual dispute exists, summary disposition is properly granted.[8]

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo.[9] This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law.[10]

B. Statutory Provisions

MCL 565.29 provides:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

C. Good Faith Purchaser

Tomei correctly points out that under MCL 750.29, his interest, even though only a quit claim deed, may prevail over subsequently recorded interests. Tomei also correctly notes, however, that he must be a good-faith purchaser to prevail as a result of recording first.[11] "A good-faith purchaser is one who purchases without notice of a defect in the vendor's title."[12]

However, while Tomei disputes he had actual knowledge of the D'Orazios' interest, he need only have been placed on notice of possible defects in the vendor's title creating a duty of further inquiry. In *Royce v Duthler,*[13] this Court said:

> A person who has notice of a possible defect in a vendor's title and fails to make further inquiry into the possible rights of a third-party is not a good-faith purchaser and is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed. *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951). Notice of a defect has been defined by this Court as follows:

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[7] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

[8] *Globe Life Ins Co, supra* at 455, quoting from *Quinto v Cross Peters Co, supra*.

[9] *Spiek, supra* at 337.

[10] *Morales v Auto-Owners Ins,* 458 Mich 288, 294; 582 NW2d 776 (1998).

[11] *Michigan National Bank & Trust Co v Morren,* 194 Mich App 407; 487 NW2d 784 (1992).

[12] *Id*. at 410.

[13] *Royce v Duthler,* 209 Mich App 682, 690; 531 NW2d 817 (1995).

* * *

> "Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property."[14]

Here, the dispute over whether Tomei had actual knowledge of the D'Orazios' interest need not be resolved because he admitted in his deposition sufficient knowledge to be placed on notice of possible title defects that "would lead any honest man, using ordinary caution, to make further inquiries" into the possibility of rights and claims by persons who had paid money to Durso for lots in the proposed subdivision.[15] A reasonable inquiry would have produced a list of people who had potential claims to the property, including the D'Orazios. Thus, Tomei's argument fails because whether he had actual or only constructive knowledge of the D'Orazios' interest is not a material fact.[16]

Further, viewing the pleadings, depositions, admissions, and documentary evidence submitted to the trial court in the light most favorable to Tomei, the trial court correctly concluded that reasonable minds would not differ, and that at a minimum, Tomei had constructive knowledge of the D'Orazios' interest.[17] Thus, the trial court correctly determined that the D'Orazios' prior interest prevailed over Tomei's interest because Tomei was not a good faith purchaser[18] and, therefore, the D'Orazios were entitled to summary disposition as a matter of law.[19]

III. Subdivision Control Act

A. Standard Of Review

Tomei argues that the Durso-D'Orazio agreement was in violation on the Subdivision Control Act of 1967,[20] specifically in violation of MCL 560.264, and was void. Statutory

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[14] *Id.* quoting from *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535, 464 NW2d 713 (1990).

[15] *Royce*, *supra* at 690.

[16] *State Farm v Johnson*, 187 Mich App 264, 267-268; 466 NW2d 287 (1991).

[17] *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994); *Zurcher v Herveat*, 238 Mich App 267, 275; 605 NW2d 329 (1999).

[18] *Morren*, *supra* at 410; *Royce*, *supra* at 690.

[19] MCR 2.116(C)(10).

[20] 1967 PA 288, as amended, MCL 560.101 *et. seq*.

interpretation is a question of law which is considered de novo on appeal.[21] Review of equitable actions to quiet title is also de novo,[22] as is the trial court's decision on summary disposition.[23]

B. Options To Purchase

The statutory prohibition against selling property from a proposed plat before it is recorded does not extend to options to purchase lots from the proposed plat. MCL 560.264(1) provides, in pertinent part, "Agreement to sell under this section does not include an option to buy extended from the seller for a money consideration to the prospective buyer." Before July 28, 1997, the effective date of 1997 PA 87, the pertinent sentence read, "Provided, however, That agreement to sell does not include an option to buy extended from the seller for a money consideration to the prospective buyer."

Even if the Durso-D'Orazio agreement was in violation of MCL 560.264, it was not void, but voidable. MCL 560.267 provides,[24]

> Any sale of lands subdivided or otherwise partitioned or split in violation of this act is voidable at the option of the purchaser, and shall subject the seller to the forfeiture of all consideration received or pledged therefore, together with any damages sustained by the purchaser, recoverable in an action at law.

A contract that violates the act is subject to being voided, at the option of purchaser, up to the point that the defect is cured (the property is properly platted and the plat is recorded).[25] Here, the D'Orazios did not seek to void the contract; rather, they sought to enforce it. Thus, the trial court did not abuse its discretion by granting equitable relief to plaintiffs.[26]

IV. Conditions Precedent

A. Standard Of Review

Tomei argues that failure to fulfill two conditions precedent precludes the D'Orazios from enforcing the "Mutual Agreement." Review is again de novo.

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[21] *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

[22] *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998).

[23] *Id.*

[24] Before July 28, 1997, the effective date of 1997 PA 87, the statute read substantially the same.

[25] *Roose v Parklane Homes Corp*, 59 Mich App 542, 547; 229 NW2d 838 (1975).

[26] *Zurcher*, *supra* at 300, quoting from *Foshee v Krum*, 332 Mich 636, 643; 52 NW2d 358 (1952); *Giannetti v Cornillie (On Remand)*, 209 Mich App 96, 98; 530 NW2d 121 (1995).

B. Conditions In The Mutual Agreement

Tomei argues paragraphs four and five of the "Mutual Agreement" each contains an unfulfilled condition precedent. Those paragraphs provide:

> 4) At the time the final plat is recorded, a warranty deed will be given to Mr. & Mrs. Antonio D'Orazio an [sic] as mentioned below, the mortgage will be discharged.
>
> 5) Security to insure the lots will be delivered will be a mortgage for security purposes on the commercial property located at 15604 Farmington Rd. Livonia, Michigan with the understanding that should Joseph P. Durso build office building at this location, Mr. & Mrs. D'Orazio agree to subordinate their mortgage so that it will not interfere [sic] the construction.

Tomei's argument fails for several reasons. First, neither paragraph four or paragraph five of the "Mutual Agreement" are conditions that the D'Orazios were required to perform before the original option contract became a binding contract. The D'Orazios performed all conditions required of them under the contract by tendering the full purchase price for lot 11, as subsequently modified by Durso. Second, while the property may never be platted, Tomei as Durso's successor in interest, developed the property into a site condominium, in which lot 11 is an identifiable unit and subject to conveyance.[27] Third, although paragraph five provides the D'Orazios with a remedy in the event of breach, nothing in the "Mutual Agreement" provides that it is the sole remedy available to plaintiff.

The trial court has the discretion to grant specific performance of a real estate contract, and the trial court should generally grant such relief unless it would be inequitable to do so.[28] In the present case, it would be inequitable to force the D'Orazios to pursue a remedy the record indicates is worthless. We conclude that the trial court did not abuse its discretion in awarding a fee interest in lot 11 to the D'Orazios.[29]

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

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[27] MCL 559.104; MCL 559.164.

[28] *Zurcher, supra* at 300.

[29] *Id.*; *Giannetti, supra* at 98.