

STATE OF MICHIGAN
COURT OF APPEALS

XHAFAER ELEZI,

Plaintiff/Counter-Defendant -
Appellee,

v

DAVID BRUCE WEISS,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
December 19, 2006

No. 264591
Oakland Circuit Court
LC No. 2003-054157-CK

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant appeals by right from a portion of the trial court's order granting summary disposition in favor of plaintiff, granting judgment in plaintiff's favor, awarding costs and mediation sanctions to plaintiff and dismissing defendant's counter-complaint. We reverse in part and remand for further proceedings consistent with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is a disbarred attorney¹ who is also apparently a certified public accountant and a licensed real estate broker. Plaintiff, who is a businessman with a number of real estate interests, was one of defendant's clients. According to plaintiff, defendant never revealed that he was unable to practice law, but instead indicated that he no longer actively practiced law. Defendant drafted various documents for plaintiff, including a promissory note for a loan made by plaintiff to defendant on November 22, 2000. Defendant received \$43,000 in cash in exchange for the note, which required defendant to pay plaintiff the principal sum of \$50,000 on or before March 15, 2001. When defendant failed to pay plaintiff according to the terms of the note, plaintiff filed suit for breach of contract and unjust enrichment.

Defendant filed a counter-complaint alleging that he assisted plaintiff with a number of real estate transactions with third parties and that plaintiff had not paid him the agreed-upon

¹ According to documents furnished by plaintiff, defendant has been unable to practice law since 1991.

commissions for those transactions. Defendant sought damages under theories of breach of contract, indemnification, and quantum meruit.

Defendant filed a motion for partial summary disposition, arguing that the note was usurious and that the trial court should strike any request by plaintiff seeking interest on the \$43,000 loan. Defendant also argued that he was entitled to attorney fees and costs of approximately \$5,500 in connection with having to defend against plaintiff's complaint.

During a hearing on defendant's motion, the trial court found that defendant's actions in drafting the note undermined his attempt to avoid the payment of interest. The trial court ordered defendant to pay plaintiff \$43,000 plus an "ordinary" rate of interest from the inception of the loan until the date the suit was filed. Plaintiff was to receive statutory interest from the date of filing of the complaint. When defendant noted that the trial court had yet to provide a pretrial date for defendant's counter-claims, the trial court sua sponte dismissed defendant's claims. The trial court's final order granted judgment for plaintiff, awarded plaintiff costs and fees and dismissed defendant's counter-complaint with prejudice.

We review de novo the trial court's ruling on a motion for summary disposition. *Johnson v Wayne Co*, 213 Mich App 143, 148-149; 540 NW2d 66 (1995).

Defendant does not challenge the judgment with respect to plaintiff's claim, but instead challenges the dismissal of his counter-complaint. He argues that it was error for the trial court to dismiss these claims without a request by plaintiff or briefing by the parties. Plaintiff counters that the trial court correctly determined that the real estate contracts that served as the basis for defendant's counter-claims were unenforceable because defendant had engaged in the unauthorized practice of law when he prepared them. Therefore, the trial court was justified in dismissing defendant's counter-complaint under MCR 2.116(I)(2). We agree with defendant's contention that the trial court's dismissal of defendant's counter-claims was premature.

A number of the trial court's comments appear to support plaintiff's argument that the trial court may have determined that the real estate contracts were unenforceable.² However, the trial court's actual ruling does not articulate this rationale. In addition, the trial court did not review whether defendant's activities in connection with the real estate transactions amounted to the unauthorized practice of law. See *Dressel v Ameribank*, 468 Mich 557, 566- 568; 664 NW2d 151 (2003). Likewise, the parties did not brief this issue below and the record is insufficient to establish whether the real estate agreements were of a type requiring "legal discretion and profound legal knowledge." See *id.* at 569. Under these circumstances, we find that it was improper for the trial court to sua sponte dismiss defendant's claims. See *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 88-90; 492 NW2d 460 (1992) (Corrigan, J., concurring). Accordingly, we reverse the trial court's dismissal of defendant's counter-complaint and remand

² We express no opinion on the merits of defendant's counter-claims.

this case for further proceedings consistent with this opinion.

Reversed in part and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly