

STATE OF MICHIGAN
COURT OF APPEALS

OLIVER/HATCHER CONSTRUCTION AND
DEVELOPMENT, INC.,

Plaintiff-Appellee,

v

SHAIN PARK ASSOCIATES,

Defendant-Appellant.

UNPUBLISHED
May 22, 2008

No. 275500
Oakland Circuit Court
LC No. 06-077442-CZ

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant Shain Park Associates, LLC, (“Shain Park”) appeals by leave granted the December 20, 2006, opinion and order denying its motion for summary disposition that was brought under MCR 2.116(C)(7), (C)(8), and (C)(10). We reverse and remand.

This case concerns a non-assignment clause in a construction contract. On May 21, 2001, plaintiff Oliver/Hatcher Construction and Development, Inc. [“Oliver/Hatcher”] and 250 Martin Investments LLC [“250 Martin”], the developer of a condominium project in Birmingham, executed AIA contract A201 whereby plaintiff agreed to be the principal contractor on the project.¹ The provision here at issue, Article 13.2.1 of the contract states:

Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the contract.²

¹ An AIA contract is standard construction contract devised by the American Institute of Architects.

² Subparagraph 13.2.2 permits 250 Martin to assign the contract to “an institutional lender providing construction financing for the Project” without Oliver/Hatcher’s consent. No such assignment is involved here.

Sterling Bank and Trust, FSB, who was financing the project, brought a foreclosure action after 250 Martin allegedly failed to make contractually required payments to Oliver/Hatcher as well as payments to the bank. Oliver/Hatcher filed a lien for \$363,549.91. After the bank foreclosed, Shain Park acquired the project from the bank on December 29, 2004, through a “Covenant Deed and Assignment of Leases, General Intangibles and Contract Rights.” Section 1(i) of that document stated that the bank assigned all of its “right, title and interest in and to all assignable contracts, contracts rights” related to the property here at issue. Section 1(ii) stated that the bank assigned “all contracts and rights under contracts for service to or maintenance of the Property.”

On February 4, 2005, Shain Park and 250 Martin executed a bill of sale whereby 250 Martin assigned its rights under the project to Shain Park. Similar to the assignment between Shain Park and the bank, section 1(iii) of this assignment stated that 250 Martin assigned “all contracts and rights under contracts for the construction, service or maintenance of the property.”

On September 7, 2005, the parties entered into a written agreement, paragraph 2 of which stated that Shain Park agreed to pay \$153,818 as consideration for full satisfaction of Oliver/Hatcher’s lien claim and of a counterclaim and cross-claim that Oliver/Hatcher had filed in a suit brought by the architect on the project for unpaid services. It also stated that the consideration was for

A full and complete settlement and release of any and all claims against the Property, [], and Shain [] that Oliver has arising out of or relating to the Property, the Residential Units and/or the Contract.”

Paragraph 12 stated, “Nothing in this Settlement Agreement is intended to or shall release, settle, waive or discharge any latent, unknown claim or cause of action.” The agreement also stated that Oliver/Hatcher assigned its “rights with respect to subcontracts” with Robovitsky Incorporated (the masonry subcontractor) and Couturier Iron Craft to Shain Park. Oliver/Hatcher also gave up certain rights to attorney fees.

Shain Park sent correspondence to Oliver/Hatcher on August 9, 2006, and September 7, 2006, detailing what it considered to be latent defects in the project, and asserting that there were more than \$2 million in damages mostly related to water penetration as a result of poor masonry work. The September letter stated that Shain Park had claims of breach of contract, negligence, unjust enrichment, and fraudulent misrepresentation based on Oliver/Hatcher’s concealment of defects.

Oliver/Hatcher then filed the present declaratory judgment claim, in apparent anticipation of Shain Park’s actually filing an action asserting those claims. Oliver/Hatcher alleged that it never consented to the two assignments, so the assignments were void, and that it did not receive notice of them until after it had entered into the settlement agreement. It also asserted that Shain Park had no legal relationship with Oliver/Hatcher that would support any cause of action against

Oliver/Hatcher under any theory.³ Oliver/Hatcher asked the court for two things: (1) to declare the assignments invalid, and (2) to declare that Shain Park lacked a cause of action for negligence, unjust enrichment, or fraudulent misrepresentation.

In lieu of answering the complaint, Shain Park moved for summary disposition, arguing that Oliver/Hatcher's declaratory action should be dismissed on the ground that in the settlement agreement it had waived or released its right to bring any claims against Shain Park arising out of the contract. Shain Park also argued that the assignments were valid because the contract only barred assignment of the contract "as whole," but because there were no duties left to complete under the contract, only rights to causes of action were assigned. Shain Park further argued that a right of action in a contract may be assigned even if the contract itself is not assignable; e.g., even if a contract for personal services is not assignable, a cause of action for breach of the contract is. And it argued that even if the assignments violated the AIA contract, Oliver/Hatcher's remedy is not the voiding of the assignments; it is the remedy provided by the contract, which by its terms is 250 Martin's having responsibility for the obligations under the contract.

Oliver/Hatcher presented the affidavit of Paul Oliver, chairman and secretary of Oliver/Hatcher, who averred that Oliver/Hatcher never consented to the assignments by 250 Martin and the bank. He also averred that Oliver/Hatcher was not informed of the assignments until September 6, 2005. And he averred that had he known of the assignments, he would not have entered into the settlement agreement. Oliver/Hatcher reiterated that the assignors were in breach of the contract and so had no causes of action to assign, and further argued that Shain Park's failure to give Oliver/Hatcher notice of the assignments estopped it from relying on them, or at least presented a question of fact.

The court addressed the arguments in its written opinion and order. It recognized the policy favoring the alienability of certain contract rights, but said that policy does not override express statements forbidding assignment. It said that despite the contractual language forbidding assignment without consent unless the assignment is from the owner to the institutional lender, 250 Martin and the Bank assigned the contract to Shain Park. In light of the language in the attempted assignments stating the assignments were of "all contracts and rights under the contracts" and "all rights, contract rights," the court rejected Shain Park's argument that there was no assignment of the contract as a whole. The court said that the attempted assignments failed because Oliver/Hatcher had accepted a known risk in contracting with 250 Martin, and that changing beneficiaries changed Oliver/Hatcher's duty under the contract. The court further said that the assignments failed because 250 Martin and the bank were both in breach of the AIA contract when the assignments were made and so had no causes of action to assign. The court said that even if the assignments were valid, Oliver/Hatcher presented sufficient evidence in support of an estoppel defense. The court said that Shain Park's failure to

³ To the extent that Oliver/Hatcher argues that Shain Park has no causes of action because it has no legal relationship to Oliver/Hatcher, that argument is based on the validity of the assignments. That is, if the assignments are invalid, the contracts were not assigned to Shain Park and so Shain Park has no relationship to Oliver/Hatcher which would impose a duty on Oliver/Hatcher.

notify Oliver/Hatcher of the assignments before plaintiff signed the settlement agreement estopped Shain Park from relying on the assignments, or at least, presented a question of fact. On those grounds, the court denied the motion.

I

Shain Park first argues that the circuit court erroneously concluded that under the contract an assignment without consent of the other party results in an invalidation of the assignment because that conclusion is contrary to the plain language of the contract and to the modern trend in interpreting contractual prohibitions on assignments. Issues of contract interpretation present questions of law that are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

Subparagraph 13.2.1 of the AIA contract states:

Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the contract.

If contractual language is clear, a court must ascertain the parties' intent from the contract. *Forge v Smith*, 458 Mich 198; 580 NW2d 876 (1998). The language is clear in stating that when one party to the contract attempts an assignment (except to a lender under subparagraph 13.2.2) without the consent of the other, that party is still responsible for all obligations under the contract. The language thus does not preclude an assignment; indeed, it contemplates the possibility. Under that plain language, an assignment without consent does not fail, as the trial court concluded, but rather merely prevents the assignor from escaping its contractual obligations.

Shain Park points to the following comment from Sweet on Construction Industry Contracts: Major AIA Documents, § 23.19, p 485 (4th ed 2000), regarding the particular contract and provision involved in the present case:

The AIA made the classic mistake in A201-1997, subparagraph 13.2.1, of not precluding assignability, but simply stating that neither party 'shall assign.' This language is a promise not to assign. Breach of the promise would expose the assignor to a claim for breach, even though damages are almost impossible to show, but any assignment would still be valid.

Sweet has been referenced in case law as a respected commentator on construction industry contracts. See, e.g., *Robert W Carlstrom Co, Inc v German Evangelical*, 662 NW2d 168, 173 (Minn App, 2003), and *College of Notre Dame of Maryland, Inc v Morabito*, 132 Md App 158; 752 A2d 265 (2000).⁴ Sweet's Treatise is consistent with the plain language of the contractual

⁴ Although Sweet's treatise is in neither our hard copy library nor our available Westlaw (continued...)

provision and provides supports a finding that the trial court erred in declaring that the assignments fail. Furthermore, it is consistent with Restatement Contracts, 2d, § 317, which states:

(2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, . . . (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.

The cases cited by the parties are not directly applicable to the present issue. For instance, Shain Park cites to *Wonsey v Life Insurance Co of North America*, 32 F Supp 2d 939 (ED Mich, 1998). However, the question in that case was not the effect of a non-assignment clause, but instead was “whether a court may set aside an anti-assignment provision in a structured settlement agreement”, *id.* at 942; i.e., the issue was the enforceability of such clauses generally, a matter not at issue here. In support of its position that the assignments were void because they were made without its consent, Oliver/Hatcher cites to two cases. But they deal with contractual provisions that differ from those in the present case in that they specifically said either that assignments without consent were void or that assignments without consent voided the insurance policy contract containing the non-assignment provision. See *Hy King Assoc, Inc v Verstatech Manufacturing Industries, Inc*, 826 F Supp 231, (E Dist Mich, 1993): (“Any attempt at assignment without such written consent shall be deemed null and void and of no effect.”). And see *Employers Mut Liability Ins Co of Wisconsin v Michigan Mut Auto Ins Co*, 101 Mich App 697, 701-702; 300 NW2d 682 (1981): (“This insurance shall be void in case this Policy or the interest insured thereby shall be sole, assigned, transferred or pledged without the previous consent in writing of the Company.”).

In light of the comments in the Sweet treatise and the Restatement, and the application of the basic statutory construction rule requiring that effect be given to the plain language of the contract, we conclude that the trial court erred in ruling that the assignments were void on the ground that they were made without Oliver/Hatcher’s consent.

II

Shain Park argues that Oliver/Hatcher’s declaratory action is precluded by the doctrine of *res judicata* because of Oliver/Hatcher’s failure to object when Shain Park was substituted for the bank in the lien foreclosure action. However, that issue was not raised in either Shain Park’s summary disposition motion or its brief of supplemental authority in support of its motion for summary disposition, and the trial court did not address that argument. This Court does not generally review issues not raised, addressed, and decided by the trial court. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

(...continued)

databases, our extern was able to retrieve the document using his educational Westlaw account, which is permitted by his externship contract. A copy of the pertinent portion of the treatise is attached as Attachment 1.

III

Shain Park argues that the settlement agreement between the parties precludes Oliver/Hatcher from bringing any claims against Shain Park. However, Oliver/Hatcher did not bring any “claims” – it merely asked for declarations. Thus, this argument is misplaced.

IV

Shain Park asserts that the trial court erred in finding that Oliver/Hatcher presented sufficient evidence to support an estoppel defense. An estoppel arises when: (1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 218; 731 NW2d 472 (2007).

The trial court ruled that even if the assignments were valid, Shain Park’s failure to notify Oliver/Hatcher of the assignments before Oliver/Hatcher signed the settlement agreement estopped Shain Park from relying on the assignments, or at least, presented a question of fact. The court’s ruling was based on Paul Oliver’s averment in his affidavit that had he known of the assignments beforehand (i.e., had Shain Park not been silent about them), he would not have signed the settlement agreement. Oliver/Hatcher contends that the trial court’s ruling was correct because Shain Park did not give notice of the assignments to Oliver/Hatcher until September 6, 2006, 20 months after the assignments were made on February 4, 2005 [and a year after the agreement was signed on September 7, 2005]. However, Oliver’s affidavit states that he did not know of the assignments until September 6, 2005. The affidavit does not identify the event whereby Oliver/Hatcher received notice, so, it is unclear what the basis is for Oliver/Hatcher’s assertion that it did not get notice until 2006 when the affidavit clearly says 2005 in two separate places. Based on the averments in the affidavit, Oliver received notice the day before the settlement agreement was executed. At the very least, as the trial court said, there is an unresolved fact question on that point.

V

Shain Park argues that the trial court impermissibly engaged in fact finding and decided issues irrelevant to its motion for summary disposition. In a brief argument without thorough analysis, Shain Park declares that the trial court impermissibly found that Shain Park did not inform Oliver/Hatcher of, or seek Oliver/Hatcher’s consent to the assignments, that 250 Martin and the banks were in breach of the AIA contract, that the banks had a duty to assume and complete 250 Martin’s duties under the AIA contract, and that the assignments materially changed Oliver Hatcher’s duties under the AIA contract. With respect to the notice argument, this argument is of little consequence in light of the unresolved factual question as to when Oliver/Hatcher received notice. With regard to the remainder of the arguments, it appears that the trial court’s findings were indeed irrelevant. Oliver/Hatcher sought a declaration that the assignments were invalid for lack of consent. Shain Park then brought a motion for summary disposition, asserting that the assignments were valid because the contract did not require consent for assignments. That was the sole issue presented by the complaint for declaratory judgment with respect to the assignment. However, the trial court went beyond the issue presented in the complaint for declaratory relief when it addressed Oliver/Hatcher’s alternative

arguments presented in its reply brief as to why the assignments were invalid – i.e., that 250 Martin and the banks were in breach of the AIA contract, that the banks had a duty to assume and complete 250 Martin’s duties under the AIA contract, and that the assignments materially changed Oliver Hatcher’s duties under the AIA contract. The trial court erred by ruling on issues that were not relevant to the issues presented.

VI

In granting the application for leave to appeal, this Court directed the parties to “also address the question of whether Oliver/Hatcher’s request that the trial court declare that Shain Park has no causes of action is a proper subject of a declaratory action.”

To the extent that Oliver/Hatcher asked the court to declare that Shain Park, as a general proposition, has no causes of action against it, this is not a proper matter for a declaratory action because a declaratory action requires an actual controversy. MCR 2.605(A)(1); *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 54-55; 620 NW2d 546 (2000). Actual controversy is defined as one in which there is “a genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations.” *Allstate Insurance Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993). If the injury sought to be prevented is speculative or hypothetical, an actual controversy does not exist. *Citizens for Common Sense, supra*.

Here, Oliver/Hatcher asked the court to declare that Shain Park had no causes of action before Shain Park had actually asserted them. That is, although Shain Park indicated in correspondence that it believed it had causes of action for breach of contract, negligence, unjust enrichment, and fraudulent misrepresentation, there is no indication that it has actually filed a complaint asserting those claims. Consequently, Oliver/Hatcher asked the court to rule on a hypothetical situation. Moreover, “[a declaratory judgment is ‘[a] binding adjudication of the rights and status of litigants . . . [which] is conclusive in a subsequent action between the parties as to the matters declared . . .’” *Associated Builders and Contractors v Department of Consumer & Industry Services Director*, 472 Mich 117, 124; 693 NW2d 374 (2005), quoting Black’s Law Dictionary (6th ed), p 409. By asking the court to declare that Shain Park has no causes of action against Oliver/Hatcher, Oliver/Hatcher has put Shain Park in the rather unusual position of having to prove causes of action it has not actually asserted, and then being bound by what the court declared. Accordingly, we conclude that Oliver Hatcher’s request that the trial court declare that Shain Park has no causes of action is not a proper subject of a declaratory action.

CONCLUSION

We reverse the order granting summary disposition in favor of Oliver/Hatcher because the trial court erred in finding that the assignment was invalid for lack of consent, and by deciding issues that were not relevant to the issue presented in the motion for summary disposition that was brought in response to the narrow issue presented in the complaint for declaratory judgment: whether the assignments were void for lack of consent. We also conclude that Oliver Hatcher’s request that the trial court declare that Shain Park has no causes of action is not a proper subject of a declaratory action.

Reversed and remanded. Jurisdiction is not retained.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey