

STATE OF MICHIGAN
COURT OF APPEALS

JAMES MISSOURI,

Plaintiff/Counter-Defendant-
Appellant,

v

MWG PROPERTY CONSULTANTS, L.L.C.,
EDWARD LEE, NICOLE BLACK,
TRANSNATION TITLE INSURANCE
COMPANY, COUNTRYWIDE HOME LOANS,
INC., and R & C SERVICES, L.L.C., d/b/a
MORTGAGE POINTE OF MICHIGAN,

Defendants-Appellees,

and

AEGIS FUNDING CORPORATION,

Defendant/Counter-Plaintiff/Cross-
Plaintiff-Appellee,

and

DUKENS TALLANDIER,

Defendant/Cross-Defendant-
Appellee,

and

CHASE MANHATTAN MORTGAGE,

Defendant.

UNPUBLISHED

June 12, 2008

No. 273906

Wayne Circuit Court

LC No. 04-425782-CH

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying his post-trial motion for equitable relief in the nature of an order quieting title to real property or declaring the imposition of an equitable mortgage in addition to the jury's award of monetary damages. Plaintiff also appeals the trial court's order granting summary disposition to defendant Aegis Funding Corporation (Aegis) on his quiet title claim. Because the trial court neither erred in granting summary disposition to Aegis on plaintiff's quiet title claim nor in denying plaintiff's post-trial motion for equitable relief, we affirm.

I

This action arises from plaintiff's involvement in a real estate scheme in which plaintiff, who was unable to secure a mortgage on real property that he owned because of poor credit, agreed to convey the property to defendant Dukens Tallandier pursuant to an arrangement whereby he could immediately repurchase the property on a land contract. Plaintiff would then make payments on the land contract for a year, enabling him to establish credit, so that he could then obtain a mortgage to finance the purchase.

Tallandier obtained a purchase money mortgage loan from Aegis to finance his purchase of the property from plaintiff. He represented to Aegis that he intended to use the property as rental property. Aegis was not informed of the side agreement that would allow plaintiff to repurchase the property on a land contract. Aegis approved a mortgage loan of \$111,600, to be secured by a mortgage on the property, but plaintiff only received approximately \$46,000 of the loan proceeds. At the closing, defendant Edward Lee represented to Aegis and its closing agent, defendant Transnation Title Insurance Company (Transnation), that defendant MWG Property Consultants (MWG) held an unrecorded lien on the property in the amount of \$50,200 that was to be paid from Tallandier's loan proceeds. When Transnation questioned the lien, Lee produced a "dummy invoice" showing that MWG had provided plaintiff with building materials at a cost of \$50,200. Lee admitted in his deposition and at trial that he fabricated the invoice so that he and the other defendants could obtain "fee" payments. Relying on the "dummy invoice," Transnation disbursed the \$50,200 to MWG, but those funds were actually used to pay "fees" to defendants Lee, Tallandier, Nicole Black, and Michael Green, president of MWG.

One month after closing, plaintiff and Tallandier executed a land contract that required plaintiff to make monthly payments of more than \$900 and to pay the entire principal balance within two years. Black arranged to apply part of the loan proceeds toward the first year of payments under the land contract, so that plaintiff's out-of-pocket payment each month was only \$650 for the first year. Aegis was not informed of the land contract. After a year, plaintiff tried to obtain a mortgage loan to finance his repurchase of the property from Tallandier, but he still could not qualify for a loan.

Plaintiff subsequently brought this action against several defendants, asserting claims for fraud and misrepresentation, and other common-law and statutory claims. He also brought a claim to quiet title in his name, free and clear of any interests by Tallandier and Aegis. Aegis also filed a counter-complaint to quiet title against plaintiff, but plaintiff failed to answer the counter-complaint and a default was entered against him. Aegis subsequently moved for summary disposition on plaintiff's quiet title claim pursuant to MCR 2.116(C)(8) and (10). The trial court granted the motion and declared Tallandier's mortgage loan with Aegis a valid first lien on the property. The matter proceeded to trial against the remaining defendants. A jury

found that MWG, Lee, and Black, but not Transnation or Tallandier, were liable for fraud. It also found that Lee, Tallandier, Black, and Transnation were liable for negligence, and that Tallandier, Lee, and MWG, but not Transnation, had participated in a civil conspiracy. The jury further found that Lee, Black, Tallandier, and MWG violated the Michigan Consumer Protection Act, MCL 445.901 *et seq.* The jury assessed plaintiff's damages at \$66,350, but it also determined that plaintiff was ten percent comparatively negligent.

After trial, plaintiff filed a new motion to quiet title and requested that his conveyance to Tallandier be declared an equitable mortgage. The trial court denied the motion.

II

Plaintiff first argues that the trial court erred in granting Aegis's motion for summary disposition with respect to his claim to quiet title. We disagree.

We review *de novo* a trial court's decision on a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Id.* The motion may be granted only if the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion to determine if there is a genuine issue of material fact for trial. *Reed, supra* at 537.

Actions to quiet title are "equitable in nature." MCL 600.2932(5). Here, plaintiff seeks to quiet title by extinguishing Aegis's mortgage interest in the property as a remedy for fraud. A court sitting in equity has jurisdiction to quiet title as a remedy for a fraudulent conveyance. See *Hawkins v Dillman*, 268 Mich 483, 488; 256 NW 492 (1934).

To prove actionable fraud, a plaintiff must prove: (1) that the defendant made a material representation; (2) that the representation was false; (3) that the defendant knew that the representation was false or that he recklessly made a positive assertion without knowledge of its truth; (4) that the defendant made it with the intention that the plaintiff should act upon it; (5) that the plaintiff acted in reliance upon it; and (6) that the plaintiff suffered injury as a result of his reliance. *Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993). Generally, actionable fraud must be predicated on a statement relating to a past or existing fact. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). However, Michigan also recognizes fraud in the inducement, which occurs when a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. *Id.* Fraud in the inducement does not render a contract void, but merely voidable at the election of the defrauded party. *Id.* at 640.

Plaintiff seeks to void Aegis's mortgage interest on the basis of two instances of fraudulent conduct, the fictional payment to MWG and the false promises of reacquiring the property. With respect to the first, plaintiff alleged that Lee and other defendants fabricated

evidence that MWG held a lien on the property in order to divert a portion of the loan proceeds to themselves. Lee's deposition testimony that he produced a "dummy invoice" to obtain the \$50,200 "fee" provides factual support for this allegation of a misrepresentation of fact. However, there is no evidence that defendant Aegis was a party to this fraudulent conduct. Furthermore, this alleged conduct did not induce plaintiff to sell the property to Tallandier. The effect of the fraud was the wrongful diversion of funds, not the conveyance of the property. Plaintiff failed to establish that either his conveyance of the property or Aegis's acquisition of a mortgage interest in the property was induced by this fraudulent misrepresentation.

Plaintiff also alleges that the transaction was fraudulent because Black, Lee, and Tallandier represented that he would be able to repurchase the property after one year. This allegation is in the nature of fraud in the inducement, because it pertains to future conduct. *Id.* at 639.

Plaintiff alleged that defendants MWG, Mortgage Pointe of Michigan, Tallandier, and Lee "induced a sham 'repurchase,' by where the plaintiff's own property was sold back to him by Tallandier, via land contract," but these circumstances do not establish fraud in the inducement. Tallandier's alleged representation that he would sell the property back to plaintiff was conditioned on plaintiff's performance in satisfying the terms of the land contract for a year and qualifying for a purchase money loan. Plaintiff did not submit any documentary evidence showing that he satisfied these conditions.

More significantly, fraud in the inducement does not render a contract (or deed, or mortgage) void, but merely voidable at the election of the defrauded party. *Id.* at 640. If an interest conveyed by a deed passes to a bona fide purchaser for value, the interest is no longer voidable. See *Carpenter v Mumby*, 86 Mich App 739, 743; 273 NW2d 605 (1978). A mortgage of land is a conveyance within the meaning of the recording acts. MCL 565.35; *Stover v Bryant & Detwiler Improvement Corp*, 329 Mich 482, 484; 45 NW2d 364 (1951). Consequently, the holder of a mortgage may claim status as a bona fide purchaser. See *De Mey v Defer*, 103 Mich 239, 243-245; 61 NW 524 (1894).

Here, there was no evidence that Aegis had any knowledge of Tallandier's alleged intent to convey the property back to plaintiff through the land contract scheme. Accordingly, even if plaintiff's conveyance of the property to Tallandier was voidable on the grounds of fraud in the inducement, Aegis's status as a bona fide purchaser for value precluded the court from voiding its mortgage interest.

We reject plaintiff's argument that Aegis was not a bona fide purchaser for value because it should have known that the MWG lien was fabricated. Plaintiff maintains that Aegis's closing agent, Transnation, was negligent in failing to recognize this fraudulent lien, and that its negligence should be imputed to Aegis pursuant to agency principles. Although an agent's negligence can be imputed to its principal for purposes of imposing vicarious liability, *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 294; 731 NW2d 29 (2007), plaintiff does not cite any authority for his contention that a closing agent's negligence in failing to ascertain the validity of a lien can be imputed to a mortgagee for purposes of affecting the mortgagee's status as a bona fide purchaser for value. Regardless, any negligence by Transnation in failing to recognize the false MWG lien was not causally related to plaintiff's decision to enter into the transaction with Tallandier. The false lien affected only the distribution of funds, not plaintiff's

decision to agree to sell and then attempt to repurchase his property. Accordingly, the circumstances relating to the fraudulent lien do not affect Aegis's status as a bona fide purchaser for value.

Plaintiff also argued in his response to Aegis's summary disposition motion that the circumstances of the transaction required the trial court to set aside the warranty deed and reformulate the conveyance to Tallandier as an equitable mortgage. We disagree.

Michigan's equitable mortgage doctrine recognizes that a deed creates a presumption of transfer of ownership of real property that can be rebutted by clear and convincing evidence that the parties intended otherwise. *Ellis v Wayne Real Estate Co*, 357 Mich 115, 118; 97 NW2d 758 (1959); *Schultz v Schultz*, 117 Mich App 454, 458; 324 NW2d 48 (1982). Generally, an equitable lien arises from an agreement that identifies property and shows an intention that the property serve as security for an obligation. *In re Estate of Moukalled*, 269 Mich App 708, 719; 714 NW2d 400 (2006). "In the absence of a written contract, an equitable lien will be established only where, through the relations of the parties, there is a clear intent to use an identifiable piece of property as security for a debt." *Id.* (quotations omitted). "Under Michigan law, it is well settled that the adverse financial condition of the grantor, coupled with the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage." *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979), citing *Ellis*, *supra* at 115; *McLaughlen v Majestic Dev Corp*, 247 Mich 498; 226 NW 256 (1929).

In *Schultz*, *supra* at 458-459, this Court stated:

[A] review of Michigan case law reveals two instances in which it is proper to declare an equitable mortgage in order to circumvent the requirement for a writing. One such instance occurs when the deed is between parties where one party stands in a relationship of trust or guidance to the other party, such as attorney to client, guardian to ward, or parent to child, and the relationship has been abused. . . .

The other instance in which equitable mortgages may properly be declared occurs when a creditor abuses the "power of coercion" which he may have, by the force of circumstances, over the debtor. *Emerson* [*v Atwater*, 7 Mich 12, 24 (1859)], *Alpert Industries* [*v Oakland Metal Stamping Co*, 379 Mich 272, 278; 150 NW2d 765 (1967)], accord, *Koenig* [*supra*]. Courts sitting in equity interfere between the creditor and debtor to prevent oppression. *Emerson*, *supra*, 24, *Alpert Industries*, *supra*, 278. Otherwise, the statute of frauds would become "a shield for the protection of oppression and fraud". See *Emerson*, *supra*, 25, *Alpert Industries*, *supra*, 279. As has been observed, an oppressed debtor "will not hesitate to execute a deed or bill of sale, absolute upon the face of it, but intended to operate as a mortgage, to four times the value of the loan, without insisting upon a written deed of defeasance". *Fuller v Parrish*, 3 Mich 211, 218 (1854). Thus, an adverse financial condition of the grantor coupled with an inadequate purchase price for the property is sufficient to establish a deed absolute on its face to be an equitable mortgage. *Koenig*, *supra*, 106.

Neither of these two circumstances is present. Tallandier, Aegis, and the other defendants were not in a relationship of trust or guidance to plaintiff. Further, plaintiff was not an oppressed debtor to any of the parties. He had no prior relationship with any of them, and they had no connection with any of his financial difficulties. Furthermore, there was no evidence that plaintiff acted under duress brought on by distressing financial circumstances. Although plaintiff owed property taxes on the property and on his rental properties, there was no evidence that a tax sale was imminent.

Plaintiff argues that the parties intended the transaction to operate as a loan, not as a sale. He emphasizes that Tallandier regarded the transaction as a one-year scheme, and that Black and Lee assured him that he would reacquire title to the property after one year. However, these facts, even if true, do not establish an equitable mortgage. Rather, they establish that plaintiff understood that he was relinquishing title, although he did so with an expectation that the land contract scheme would enable him to repurchase the property. These circumstances do not rebut the presumption that the parties intended to transfer the property by warranty deed.

Furthermore, an equitable lien cannot be imposed if the proponent has an adequate remedy at law. *Yedinak v Yedinak*, 383 Mich 409, 415; 175 NW2d 706 (1970); *Estate of Moukalled*, *supra* at 719. If the MWG lien payoff was fraudulent, monetary damages in the amount of the wrongful payment provided an adequate legal remedy for plaintiff. Indeed, plaintiff successfully pursued this remedy at trial. Accordingly, we find no basis for reversing the trial court's order granting summary disposition to defendant Aegis.

III

Plaintiff next argues that the trial court erred in denying his post-trial motion to quiet title or to obtain an equitable mortgage based on the jury's verdict. An action to quiet title is equitable in nature and is subject to de novo review on appeal. *Richards v Tibaldi*, 272 Mich App 522, 528-529; 726 NW2d 770 (2006). We also review de novo a trial court's resolution of a claim for equitable mortgage. *Schultz*, *supra* at 457-458. However, we will not reverse a trial court's decision regarding a claim for an equitable mortgage unless it is clearly erroneous. *Id.*; *Grant v Van Reken*, 71 Mich App 121, 125; 246 NW2d 348 (1976).

Plaintiff argues that the jury's findings factually established his right to quiet title or to obtain an equitable mortgage. We disagree.

The jury did not issue any findings regarding Aegis, and its findings regarding the remaining defendants did not alter Aegis's status as a bona fide purchaser for value and its innocent acquisition of a valid mortgage interest in the property as set forth in section II.

With respect to Tallandier, plaintiff does not explain why the jury's findings required the trial court to set aside the deed and either quiet title in plaintiff's favor or declare the transaction an equitable mortgage. The jury determined that Tallandier violated the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, and was part of a civil conspiracy, and awarded plaintiff monetary damages. Plaintiff does not explain why the jury's findings require an equitable remedy in addition to monetary damages. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000).

Furthermore, Aegis's status as a bona fide purchaser for value precludes any equitable relief that would jeopardize its security interest in the property.

Accordingly, the trial court did not err in denying the equitable relief requested.

III

Plaintiff also argues that the trial court erred in failing to make findings of fact with respect to his post-trial motion for equitable relief. We find no error.

Plaintiff argues that the trial court should have used the jury as an advisory jury to make findings of fact regarding the equitable issues. The advisory jury procedure is set forth in MCR 2.509(D), which provides:

In appeals to circuit court from a municipal court and in actions involving issues not triable of right by a jury because of the basic nature of the issue, the court on motion or on its own initiative may

(1) try the issues with an advisory jury; or

(2) with the consent of all parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

MCR 2.517(A)(1) provides as follows:

In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.

MCR 2.517(A)(4) provides that “[f]indings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule.”

We find no support for plaintiff's argument that the trial court intended to utilize the advisory jury procedure when it declined to address the equitable mortgage issue before trial. Further, plaintiff did not object to the trial court's failure to include equitable matters in either the jury instructions or the special verdict form. Indeed, except for some matters not at issue here, plaintiff expressed approval of the court's instructions. Accordingly, plaintiff waived any error regarding the trial court's failure to use the jury as an advisory jury on equitable issues or its failure to resolve the equitable issues at the conclusion of the trial. *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002).

Plaintiff opted to pursue these matters in a post-trial motion, but the trial court was not required to make findings of fact in a decision on the motion.¹ MCR 2.517(A)(4).

¹ Plaintiff also asserts that, procedurally, an equitable mortgage is a remedy that is encompassed
(continued...)

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette

(...continued)

within a claim to quiet title and, therefore, his complaint was sufficient to state a claim for an equitable mortgage. Regardless of the merits of this assertion, we conclude that the trial court did not err in declining to impose an equitable mortgage under the facts of this case.