STATE OF MICHIGAN

COURT OF APPEALS

CAMRON JON KENNEY,

Plaintiff-Appellee,

v

DAVID JAMES KENNEY,

Defendant-Appellant,

and

ROBERT SCHAFFER and GRACE SCHAFFER,

Intervening Defendants-Appellants.

UNPUBLISHED
January 13, 2009

No. 278142
Eaton Circuit Court
LC No. 03-001473-DO

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant David Kenney ("defendant") and intervening defendants Robert and Grace Schaffer ("the Schaffers," or collectively with defendant Kenny, "defendants") appeal by leave granted the November 1, 2006 judgment of divorce. We affirm.

Plaintiff and defendant were married on August 14, 1999. In 2001, defendant was sentenced to serve 30 years in federal prison following his conviction on federal drug charges. Plaintiff filed the instant action for divorce on October 31, 2003. The parties have no children. The most significant asset at issue in the divorce was the marital home, a 1973 Baron mobile home sitting on five acres of land ("the property"). Defendant entered into a land contract to buy the property, from Robert and Edna Teachout in 1993, before the parties were married. During their marriage, plaintiff and defendant spent more than $16,000 on improvements to the property, including an addition to the mobile home, a deck and a paved driveway. Plaintiff continued to reside in the marital home on the property after defendant was sentenced. Eventually, she began living there with another man. Plaintiff commenced these divorce proceedings in October 2003.

According to plaintiff, sometime in 2000 or 2001, after defendant was arrested on the federal drug charges upon which he would be convicted, he showed her an agreement between himself and the Schaffers, telling her that it would "take care of [them] not losing the house." The agreement, which plaintiff did not read at that time, purported to transfer title to the property to the Schaffers in exchange for $16,500. The agreement further provided that defendant would

retain possession of the property as a lessee, that he would maintain the property "with ownership care," that he would complete payment of his land contract with the Teachouts, that he would pay any taxes, and that, once the land contract was paid in full, the Schaffers would receive the deed to the property and defendant would then pay rent to the Schaffers. Robert Schaffer ("Robert") testified that in 1996, defendant asked him to loan defendant money to pay an attorney relating to a previous drug offense, that he loaned defendant $16,500 and that he and defendant agreed that if defendant "didn't meet the aspects of [their] agreement," defendant would transfer the property to the Schaffers. Robert further testified that, he, Grace, and defendant signed the agreement on June 12, 1996, and that the agreement was not notarized until "early [19]97." Plaintiff testified that defendant told her that the agreement had been "back dated" in order to avoid forfeiture of the property in connection with defendant's federal drug charges. Plaintiff also testified that during the marriage, defendant told her that the property was his and that she "would be taken care of." The Schaffers first demanded that plaintiff make payments relating to the property in November 2003, and they began eviction proceedings against plaintiff thereafter.

In her complaint for divorce, plaintiff claimed a marital interest in the property, alleging that defendant owned the property at the time of his arrest and that he transferred it to the Schaffers thereafter, without plaintiff's knowledge or consent, for one dollar, in order to avoid having it forfeited to the United States Government.[1] The Schaffers intervened as holders of record title to the property, having received a warranty deed to the property from the Teachouts in April 2002. Defendant and the Schaffers argued that plaintiff lacked standing to challenge the validity of their agreement because she was not a party to that agreement. The trial court found that plaintiff had standing to challenge the Schaffers' title to the marital real property. Further, the trial court awarded the property to plaintiff, finding that it was part of the marital estate and that the agreement between defendant and the Schaffers was not executed prior to the marriage, but rather, was an attempt by defendant and the Schaffers to defeat plaintiff's claims to the property by fraudulent means. The trial court ordered the Schaffers "to convey unencumbered legal title to the real estate by warranty deed to [p]laintiff," and also awarded plaintiff her costs and attorney's fees.

On appeal, defendants first argue that the trial court erred by concluding that plaintiff had standing to challenge the validity of the agreement between defendant and the Schaffers transferring the property to the Schaffers. We disagree.

Whether a party has standing is a question of law that this Court reviews de novo. *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 291; 737 NW2d 447 (2007). This Court reviews findings of fact by the trial court pertinent to the determination of standing for clear error, giving due deference to the trial court's superior ability to assess the credibility of the witnesses appearing before it. MCR 2.613(C); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508

[1] Plaintiff asserted, and defendant did not deny, that the mobile home was not transferred to the Schaffers, but rather remained titled in plaintiff's name.

(2004). A finding is clearly erroneous if the appellate court, on all of the evidence, is left with a definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

Generally, a party has standing if, "in an individual or representative capacity [he or she has] some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992), quoting 59 AmJur2d, Parties, § 30, p 414. That is, the concept of standing in the context of a legal proceeding means that: (1) a party must have suffered an actual or imminent, concrete and particularized impairment of a legally protected interest, (2) there is a causal connection between the injury and the challenged conduct of the defendant(s); and (3) a favorable decision by a court could likely redress that impairment. *Michigan Citizens for Water Conservation*, *supra* at 294-295; *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

The trial court found that plaintiff had standing to challenge the validity of the agreement because the agreement was an attempt to "deceive" her out of her marital interest in the property. The trial court found that the agreement was entered into after the parties were married, and not before. The trial court noted particularly that plaintiff and defendant spent more than $16,000 on improvements to the property during the marriage, and concluded that "[a] reasonable person would not allow a $16,500 loan to go into default if he had the money to repay it," especially where the result is the loss of property which is valued well in excess of the owed amount. The trial court also noted plaintiff's testimony that during the marriage defendant told plaintiff that the property was his and that she would be taken care of, as well as that defendant specifically told her that his agreement with the Schaffers had been back dated. The determination regarding the date of execution of the agreement rested in large part on a determination of the credibility of the testimony offered by plaintiff and by Robert Schaffer;[2] the trial court found plaintiff's testimony to be credible. On the record before us, and according due deference to the trial court's credibility determination, the trial court did not clearly err in concluding that the agreement was entered into after the parties were married. Thus, because that agreement constituted an actual, concrete impairment to plaintiff's legal interest in marital property, caused by defendants' conduct and redressable by a favorable decision, the trial court properly concluded that plaintiff had standing to challenge the validity and effect of the agreement. *Bowie*, *supra*; *Lee*, *supra*.

Further, plaintiff certainly had standing to assert her claim to the property *in this divorce action*, including alleging that the purported transfer of the property without her consent was fraudulent and/or impaired her rights in the marital property. In *Berg v Berg*, 336 Mich 284, 288; 57 NW2d 889 (1953), our Supreme Court held that although

> as a general rule . . . , the husband and wife are the only parties to be recognized in a divorce case[, t]here are exceptions. . . . Third persons may be made

[2] Defendant did not testify at trial.

> defendants in an action for divorce where it is charged that such persons have conspired with the husband with intent to defraud the wife out of her interest in property.

It follows that plaintiff, as a party to a divorce action, has standing to challenge a purported contract where, as here, she has alleged that the parties to the contract have conspired with defendant to defraud her out of her interest in the marital property. Because the marital property was the subject of the agreement between defendant and the Schaffers, and because the purpose of the agreement was to eliminate plaintiff's marital interest in the property, plaintiff had standing to pursue her claim to the property as part of this divorce action. *Berg*, *supra*.

Defendants also argue that the trial court erred by awarding the property to plaintiff as part of the marital estate, because defendant transferred the property to the Schaffers before he was married or engaged to plaintiff and without any intent to defraud plaintiff of her prospective marital rights in the property. We disagree.

This Court reviews the trial court's findings of fact in a property distribution for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). As noted above, a finding is clearly erroneous if the appellate court, on all of the evidence, is left with a definite and firm conviction that a mistake has been made. *Beason*, *supra* at 805. When reviewing the trial court's findings of fact, this Court gives due deference to the trial court's superior ability to assess the credibility of the witnesses appearing before it. MCR 2.613(C); *Glen Lake-Crystal River Watershed Riparians*, *supra* at 531. If the trial court's findings of fact are upheld, its decision should be affirmed "unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks*, *supra* at 152.

As noted above, considering the record presented and the trial court's superior ability to assess the credibility of the witnesses before it, we are not left with a firm and definite conviction that the trial court's factual finding that the agreement was drafted and signed during plaintiff's and defendant's marriage was mistaken. The trial court's determination that a reasonable person would not have defaulted on a $16,500 loan at the risk of losing property worth more than $80,000, while spending over $16,000 in improvements to that same property, and while spending substantial additional amounts to purchase and build a custom motorcycle worth more than $40,000, was not clearly erroneous. *Beason*, *supra*. Additionally, as noted by the trial court, the agreement provided that the Schaffers were entitled to collect rent from defendant upon completion of defendant's obligations under the land contract. However, they allowed a period of at least two years to pass before first demanding rent from plaintiff for no ostensible purpose, resulting in a loss of over $5000 in income. That reasonable persons would not have neglected their monetary interest in the property for more than two years, if indeed they could claim such an interest, further supports the trial court's finding that the agreement was executed to assist defendant in hiding assets to avoid forfeiture and to deprive plaintiff of any marital interest in the property.

Defendants' claim that plaintiff failed to plead fraud with particularity is likewise without merit. MCR 2.112(B)(1) requires that in pleadings alleging fraud, "the circumstances constituting fraud . . . must be stated with particularity." In order to demonstrate fraud, a plaintiff must show: "(1) defendants made a material representation; (2) it was false; (3) when defendants made it, defendants knew that it was false or made recklessly without knowledge of

its truth or falsity; (4) defendants made it with the intent that plaintiff[] would act upon it; (5) plaintiff[] acted in reliance upon it; and (6) plaintiff[] suffered damage." *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996) (citation omitted). "The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose." *Clement-Rowe v Michigan Healthcare Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). The circumstances of an alleged fraud are pled with sufficient particularity where they "apprise the opposite party of the nature of the case he must prepare to defend." *Kassab v Michigan Basic Prop Ins Assoc*, 185 Mich App 206, 213; 460 NW2d 300 (1990), aff'd in part and rev'd in part on other grounds 441 Mich 433; 491 NW2d 545 (1992), quoting 1 Martin, Dean & Webster, Michigan Court Rules Practice (3rd ed), p 242.

In her complaint, plaintiff alleged that defendant transferred the marital property to the Schaffers only after he had been arrested on federal drug charges and "knew that the Federal Government would be seizing all of his assets." Plaintiff further alleged that defendant transferred the property without her knowledge or consent, and that she had not relinquished her interest in the property, as well as that he concealed certain other items of personal property. These allegations set forth plaintiff's fraud claim with sufficient particularity to apprise defendants of "the nature of the case [they] must prepare to defend." *Kassab*, *supra* at 213.

Similarly, the trial court's finding that plaintiff proved fraud at trial also was not clearly erroneous. Plaintiff offered testimony that, if believed, supported all of the elements of the alleged fraud. The trial court determined that plaintiff's testimony was credible, and as discussed above, that determination is supported by other circumstances and evidence.

In addition, defendants' claim that plaintiff was barred from asserting fraud in the first instance, because she did not come to the court with "clean hands," is not compelling. In support of their claim, defendants cite plaintiff's admissions on cross-examination that, at defendant's urging, she lied to federal investigators and to a presentence investigation reporter assigned to defendant's case regarding defendant's whereabouts and regarding various issues concerning the marital property. However, in *McFerren v B & B Investment Group*, 253 Mich App 517, 524; 655 NW2d 779 (2002), this Court, quoting *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 671; 5 NW2d 524 (1942), observed that "[t]he misconduct which will move a court of equity to deny relief must bear a more or less direct relation to the transaction concerning which complaint is made. Relief is not denied merely because of the general morals, character or conduct of the party seeking relief." (Internal quotation marks omitted). As the trial court correctly observed, plaintiff's misconduct in lying to federal authorities at defendant's behest in connection with his drug offense is a separate matter from her claim to the property, which, having not been seized in connection with defendant's drug conviction remained part of the marital estate, in this divorce action. Notably, none of the parties in the instant case were victimized by plaintiff's misrepresentations to the federal government. And, while one could reasonably argue that plaintiff did benefit from her misrepresentations to the federal authorities (by avoiding seizure of the property), her claims in the divorce action are not "inextricably tied" to her misconduct, so as to warrant application of the unclean hands doctrine to bar those claims. *McFerren*, *supra* at 524.

Further, although perhaps plaintiff came before the court with unclean hands, having lied to the federal government in connection with defendant's criminal case, the Schaffers also had unclean hands, as did defendant, and thus could not equitably claim that plaintiff was barred

from bringing this action. Furthermore, defendants' misconduct was directed against plaintiff, whereas plaintiff's conduct was not directed against defendants. Our Supreme Court has held that, where both parties come before the court with unclean hands, the court may still grant relief to one of the parties. See *Rutland Twp v City of Hastings*, 413 Mich 560, 564-566; 321 NW2d 647 (1982) (holding that the plaintiff's improper conduct did not bar the Court from granting it relief from the defendant's improper acts).

Considering the record before us and the trial court's superior ability to assess witness credibility, and finding no error in the trial court's legal rulings, we are not left with a firm conviction that the trial court's property distribution was inequitable. *Sparks*, *supra* at 152. We find no basis on which to conclude that a mistake has been made in the court's decision to grant relief to plaintiff as set forth in the November 1, 2006 judgment of divorce.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio